The Sheriff's Constitution

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The county sheriff is unique among our nation's law enforcers, with an ancient pedigree, elected status, and special protections as a state constitutional officer. But these factors combine to cause a recurrent problem—elected sheriffs often assert for themselves the power to refuse to enforce criminal laws of their choosing. Today's constitutional sheriffs—a group of sheriffs who view themselves as the highest authority in their county, answerable only to their electorate—are the latest manifestation of this ethos, declaring opposition to gun control measures, pandemic restrictions, environmental protections, and more. Lest one think these nonenforcement decisions are entirely one-sided, other sheriffs have declared opposition to immigration and abortion restrictions.

This challenge to the rule of law has flourished in part because our modern criminal system embraces enforcement discretion, offering only the thinnest of constitutional backstops. In lieu of legal limits, even blanket nonenforcement of certain crimes is managed primarily through political checks, such as elections or intervention by other levels of government. But these constraints have serious shortcomings.

This Article proposes reviving judicially-enforceable limits on nonenforcement discretion modeled on a now-forgotten understanding of the sheriff's duties to investigate and enforce. For much of our history, state courts played an important role in supervising nonenforcement discretion. Routinely called upon to determine when a sheriff's failure to enforce the law amounted to neglect of duty, courts across the country developed a relatively nuanced understanding regarding the permissibility of nonenforcement. This precedent rebuked sheriff nullification but did not naively demand perfect enforcement, thus limiting lawlessness while preserving some flexibility. Over time, however, this approach largely fell by the wayside, replaced with broad pronouncements of enforcement discretion.

Rediscovering the authority of courts to check enforcement discretion presents an opportunity to rethink much of our modern canon—such as the false choice between full enforcement of all criminal laws and unfettered discretion, and the unassailability of law enforcement's case-by-case discretion. To be sure, this approach imposes costs, but there are

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legislative strategies to mitigate these consequences, including limiting arrestable offenses and the use of pretrial detention. And without limits on nonenforcement discretion, we risk an unchecked arbitrariness that poses the greatest risk to the most vulnerable in our society.

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INTRODUCTION

On the surface, the office of the sheriff of Klickitat County, Washington—a rural county along the Oregon border[1]—operates like many others across the country. The state constitution mandates an election for the office.[2] The sheriff's department is the largest policing agency in the county.[3] Most of the department's budget is dedicated to its patrol division.[4] The office's arrests primarily are for low-level offenses.[5] While other county departments have seen their budgets stagnate over the last few years, the sheriff's budget has had a number of increases.[6]

Although much of this is humdrum, the man occupying the office is anything but, at least when it comes to his view of a sheriff's enforcement authority. Three-term sheriff of Klickitat County, Bob Songer, is an open adherent to the "constitutional sheriffs" ideology[7]—one that views the sheriff as the highest law enforcement authority in the county and answerable only to their electorate.[8] As a consequence, Sheriff Songer has opposed both federal and state authorities operating in his county and has declared he will not enforce various state laws—including gun laws,[9] social-distancing mandates,[10] and protections for gray wolves.[11]

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1. Charles Bethea, *A Coronavirus Turf War in Klickitat County*, New Yorker (May 17, 2020), https://www.newyorker.com/news/us-journal/a-coronavirus-turf-war-in-klickitat-county.

2. WASH. CONST. art. XI, § 5.

3. *Compare Klickitat County Sheriff's Department*, POLICE SCORECARD [hereinafter *Klickitat Police Scorecard*], https://policescorecard.org/wa/sheriff/klickitat-county [https://perma.cc/2DNT-NV64] (last visited Mar. 25, 2025), *with Goldendale Police Department*, POLICE SCORECARD, https://policescorecard.org/wa/police-department/goldendale [https://perma.cc/7V7H-BEWB] (last visited Mar. 25, 2025).

4. JENNIFER NEIL, CORRECTIONS | JAIL REPORT 8 (2024), https://www.klickitatcounty.org/1543/Corrections-Jail-Report. The department also has K-9, Marine, and Posse units. *Id*. at 7–8.

5. *Klickitat Police Scorecard*, *supra* note 3.

6. *See* NEIL, *supra* note 4, at 6–7.

7. Paul Kiefer, *'Constitutional Sheriff' Raises Controversial Posses in Klickitat County*, SPOKESMAN-REV. (Oct. 11, 2024, 10:11 PM), https://www.spokesman.com/stories/2024/oct/11/constitutional-sheriff-raises-controversial-posses [https://perma.cc/9ZBR-4REZ].

8. Maurice Chammah, Opinion, *The Law Enforcement Officers with Surprising Power*, N.Y. TIMES (Oct. 15, 2024), https://www.nytimes.com/2024/10/15/opinion/sheriff-power-trump.html ("The group argues that sheriffs have more authority within their counties than the state or federal government."); Kiefer, *supra* note 7.

9. Kiefer, *supra* note 7.

10. Jacob Bertram, *Songer Calls COVID-19 Restrictions 'Illegal,'* COLUM. GORGE NEWS (Nov. 25, 2020), www.columbiagorgenews.com/free_news/songer-calls-covid-19-restrictions-illegal/article_99ce1f66-2e8d-11eb-a012-9f52a9a23f3e.html [https://perma.cc/KWA7-FFRG].

The notion that the county sheriff can nullify criminal statutes—that is, refuse to enforce applicable criminal law "because of moral or ideological opposition to that law"[12]—has reared its head in a variety of contexts. In recent years, a substantial number of sheriffs have purported to exercise their authority along the lines of Sheriff Songer—opposing firearms laws and public health regulations.[13] Others oppose immigration-related laws, abortion restrictions, or camping bans targeting homeless individuals.[14] Some fail to protect victims of domestic violence or decline to pursue confirmed voter-fraud plots.[15] And the movement has spread beyond sheriffs, fueling broader assertions about the authority of "constitutional counties" to oppose state and federal policies.[16]

In some ways, this embrace of the sheriff's nonenforcement authority parallels prosecutorial practices. Prosecutors long have claimed the authority to choose which cases to pursue.[17] More controversially, modern reform prosecutors openly decline to enforce certain low-level offenses in order to serve broader justice-oriented goals, including decarceration.[18] Their policies have generated a range of acclaim and criticism.[19]

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11. Cole Goodwin, *Klickitat County Sheriff Bob Songer Says He Will Not Enforce Protections for Gray Wolves*, COLUM. CMTY. CONNECTION NEWS (Nov. 3, 2023), columbiacommunityconnection.com/the-dalles/klickitat-county-sheriff-bob-songer-will-not-enforce-endangered-species-act [https://perma.cc/H8ST-XT4V].

12. I borrow this definition from W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 181 (2021). *Accord* Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1252 (2011).

13. *See infra* notes 88–94 and accompanying text.

14. *See infra* notes 83, 96–97, and accompanying text.

15. *See, e.g.*, sources cited *infra* note 124; Molly Beck & Corrinne Hess, *After Residents Commit Voter Fraud to Make a Point, Racine Sheriff Seeks to End Online Ballot Requests Instead of an Investigation*, MILWAUKEE J. SENTINEL (July 29, 2022, 2:07 PM), www.jsonline.com/story/news/politics/elections/2022/07/28/racine-sheriff-blames-elections-website-after-absentee-ballot-plot-donald-trump-robin-vos/10178217002 [https://perma.cc/V2NG-XH6V].

Regarding the sheriff's impact on voting generally, see Khaya Himmelman, *Constitutional Sheriffs Group Plans to Insert Itself into More Aspects of the Voting Process in 2024*, TALKING POINTS MEMO (Apr. 18, 2024, 2:28 PM), talkingpointsmemo.com/news/constitutional-sheriffs-group-plans-to-insert-itself-into-more-aspects-of-the-voting-process-in-2024 [https://perma.cc/2DUC-ZR7Q], and Kira Lerner, *Sheriffs Have a Lot of Power over Whether Hundreds of Thousands of People Can Vote*, APPEAL (Aug. 10, 2020), https://theappeal.org/politicalreport/sheriffs-and-voting-rights-in-jail [https://perma.cc/9B59-98NP].

16. TJ L'Heureux, Albert Serna Jr., Anisa Shabir, Adrienne Washington, Isaac Stone Simonelli & Brendon Derr, *In the Sheriff We Trust*, ARIZ. CTR. FOR INVESTIGATIVE REPORTING (Aug. 21, 2023), https://azcir.org/cspoa [https://perma.cc/P5KA-NQL5] ("[A]t least a dozen U.S. counties influenced by the sheriffs group have considered 'constitutional county' resolutions over the past two years.").

17. *See* Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 5 (1940) (discussing the general principle that the prosecutor "must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints").

18. *See* Benjamin Levin, Essay, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1444–45 (2021). The term "progressive prosecutor" glosses over important distinctions among such prosecutors. *See id.* at 1417–18 (offering a typology of progressive prosecutors).

This literature on reform-oriented prosecutors is impossible to summarize here, but for important defenses of their practice, see generally, for example, EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019); Carissa Byrne Hessick, *Pitfalls of Progressive Prosecution*, 50 FORDHAM URB. L.J. 973 (2023); Murray, *supra* note 12;

Yet, in sharp contrast to that of reform prosecutors, sheriff nonenforcement has been relatively ignored by the legal academy.[20] A few scholars have begun to examine the politicized nature of the sheriff's office,[21] while others focus on the white supremacist ideologies underlying the constitutional sheriffs movement.[22] But legal scholars have not yet engaged deeply with the fundamental tenet of the movement[23]—whether sheriffs have the authority, on moral or ideological

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Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707 (2020); Jeffrey Bellin, *Defending Progressive Prosecution: A Review of* Charged *by Emily Bazelon*, 39 YALE L. & POL'Y REV. 218 (2020); Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1 (2019); and David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 UC DAVIS L. REV. ONLINE 25 (2017).

19. For positive takes, see sources cited *supra* note 18. For more critical assessments, see generally, for example, Paul H. Robinson & Jeffrey Seaman, *Decriminalizing Condemnable Conduct: A Miscalculation of Societal Costs and Benefits* (U. Pa. Carey L. Sch., Research Paper No. 24-10, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4732861.

Some scholars question the extent to which prosecutors can achieve mass decarceration. *See, e.g.*, Seema Tahir Saifee, *Decarceration's Inside Partners*, 91 FORDHAM L. REV. 53, 56 (2022); Paul Butler, *Progressive Prosecutors Are Not Trying to Dismantle the Master's House, and the Master Wouldn't Let Them Anyway*, 90 FORDHAM L. REV. 1983, 1984 (2022); Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 168–69, 171 (2022).

20. Although not specific to this issue of nonenforcement discretion, legal academics have done more of late to include sheriffs in their analysis of U.S. law enforcement. *See, e.g.*, Anthony O'Rourke, Rick Su & Guyora Binder, Essay, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1327, 1371 (2021) ("This section outlines the legal structure and historical development of sheriffs' offices. While police and sheriffs serve similar law enforcement roles today, and are both equally resistant to structural reforms, the sheriff and the police arrived at this point from dramatically different directions.").

21. *See generally, e.g.*, EMILY M. FARRIS & MIRYA R. HOLMAN, THE POWER OF THE BADGE: SHERIFFS AND INEQUALITY IN THE UNITED STATES (2024); James Tomberlin, Note, *"Don't Elect Me": Sheriffs and the Need for Reform in County Law Enforcement*, 104 VA. L. REV. 113 (2018). Professors Farris and Holman, along with Jessica Pishko, *see infra* note 22, have led the modern scholarly examination of key political aspects of the office of the sheriff.

22. The authoritative treatment of this issue is in JESSICA PISHKO, THE HIGHEST LAW IN THE LAND: HOW THE UNCHECKED POWERS OF SHERIFFS THREATENS DEMOCRACY (2024). *See also* Chuck Tanner & Devin Burghart, *CSPOA Leader Divulges White Nationalist Ties*, INST. FOR RSCH. & EDUC. ON HUM. RTS. (Oct. 19, 2023), https://irehr.org/2023/10/19/cspoa-leader-divulges-white-nationalist-ties [https://perma.cc/LE34-758U]. "The 'constititional sheriffs' movement contends that '[t]he law enforcement powers held by the sheriff supersede those of any agent, officer, elected official or employee from any level of government when in the jurisdiction of the county.'" STATES UNITED DEMOCRACY CTR. & INST. FOR CONST. ADVOC. (ICAP) AT GEO. UNIV. L. CTR., FACT SHEET: "CONSTITUTIONAL SHERIFFS" AND ELECTIONS (2024) [hereinafter FACT SHEET] (alteration in original) (quoting *About*, CSPOA, https://cspoa.org/about [https://perma.cc/76A3-YFLC] (last visited Mar. 26, 2025)), https://statesunited.org/wp-content/uploads/2022/10/Fact-Sheet-22Constitutional-Sheriffs22-and-Elections-31-Oct-2024-1.pdf [https://perma.cc/P7PU-MPSH].

23. Much of the commentary that exists is fairly perfunctory and largely focused on other aspects of the constitutional sheriffs movement. *See, e.g.*, Tim Dickinson, *He Parties with Neo-Confederates, Trashes MLK, and Leads the 'Constitutional Sheriffs,'* ROLLING STONE (Oct. 17, 2023), www.rollingstone.com/politics/politics-features/constitutional-sheriffs-ceo-sam-bushman-ties-white-supremacists-1234855624 ("The theory is legal hokum, but difficult to rein in because sheriffs have broad latitude in enforcement and are generally answerable only to voters who elect them."); *Confronting Violent White Supremacy (Part V): Examining the Rise of Militia Extremism: Hearing Before the Subcomm. on C.R. & C.L. of the H. Comm. on Oversight & Reform*, 117th Cong. 29 (2021) (statement of Mary McCord, Executive Director, Institute for Constitutional Advocacy and Protection (ICAP), Georgetown Law) ("[T]he constitutional sheriffs movement is a dangerous movement. It has no really [*sic*] authority under law. It's a

grounds, to decline to enforce otherwise applicable criminal laws.[24]

One reason for this lack of attention might be that these sheriffs seem to have a point. Sheriff nullification is a natural extension of expansive modern conceptions of law enforcement discretion.[25] Broad statements of enforcement discretion are widespread.[26] The Supreme Court embraces such discretion, even when faced with seemingly mandatory statutes.[27] Scholars of the presidency and of prosecutorial authority differ on whether enforcement discretion permits categorical nonenforcement[28]—that is, declining to enforce entire classes of

made-up thing, but it has a real impact."); *cf.* Va. Op. Att'y Gen. No. 19-059 at 3 (2019), www.oag.state.va.us/files/Opinions/2019/19-059-Jones-issued.pdf [https://perma.cc/PPU3-WNZQ] ("[A]ll localities, local constitutional officers, and other local officials are obligated to follow duly enacted state laws.").

24. *See* Robert L. Tsai, *The Troubling Sheriffs' Movement That Joe Arpaio Supports*, POLITICO MAG. (Sept. 1, 2017), www.politico.com/magazine/story/2017/09/01/joe-arpaio-pardon-sheriffs-movement-215566 [https://perma.cc/K5SY-CPMT].

25. *See* Laura McFarland, *Constitutional Officers Address Logistics of Second Amendment Sanctuary Designation*, RICHMOND TIMES-DISPATCH (Jan. 6, 2020), www.richmond.com/news/local/central-virginia/powhatan/powhatan-todaytoday/constitutional-officers-address-logistics-of-second-amendment-sanctuary-designation/article_bfedeb2a-30a7-11ea-bfde-3b66878ad625.html (interviewing Sheriff Brad Nunnally, who said, "If the attorney (general's) office or the governor's office thinks they are going to remove discretion from my job, it is a mistake. This is how the system works"); Joshua Hersh, *This Washington Sheriff Is Refusing to Enforce His State's New Gun Control Law*, VICE (Mar. 22, 2019, 10:18 AM), www.vice.com/en/article/gyaew4/this-washington-sheriff-is-refusing-to-enforce-his-states-new-gun-control-law [https://perma.cc/J6X8-AC5Z] ("'Even if it was a legal law, you have discretionary power,' [Sheriff Bob] Songer told VICE News. 'There is no other law enforcement official in the entire United States except a sheriff that's elected to office by the people.'").

26. *See, e.g.*, Peter Margulies, *Immigration Law's Boundary Problem: Determining the Scope of Executive Discretion*, 74 HASTINGS L.J. 679, 726 (2023) ("In criminal law, the discretion of law enforcement is part of settled practice."); Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 11 (2019) (reciting the saying that law enforcement is "shot through with discretion" (quoting David D. Cole, *Formalism, Realism, and the War on Drugs*, 35 SUFFOLK U. L. REV. 241, 245 (2001))).

27. *See* Town of Castle Rock v. Gonzales, 545 U.S. 748, 761, 764–65, 767 n.13 (2005); *see also* United States v. Texas, 599 U.S. 670, 682 & n.4 (2023) (citing *Castle Rock*, 545 U.S. 748, and explaining that "by infringing on the Executive's enforcement discretion, [statutes mandating arrest] could also raise Article II issues"); Heckler v. Chaney, 470 U.S. 821, 835 (1985) (interpreting the term "shall" in enforcement provision to preserve discretion because such language is "commonly found in the criminal provisions of Title 18 of the United States Code").

28. Debates regarding presidential nonenforcement authority have been particularly robust over the last decades, sparked in part by immigration-enforcement debates. ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 3 (2020). For some commentators taking a robust view of presidential nonenforcement authority, see, for example, *id.* at 192–93 and Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 516 (2017). For a dimmer view of presidential nonenforcement, see, for example, Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784–85 (2013). For a middle position that focuses on when categorical nonenforcement becomes inappropriate, see, for example, Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753, 1757 (2016), and Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 675 (2014).

Also generating controversy is federal nonenforcement in the context of marijuana laws. *See generally* Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633 (2011).

On the prosecutor front, the notion of discretion in the individual case is well-established. *See* Bordenkircher v. Hayes, 434 U.S. 357, 364–65 (1978). The debate today focuses on categorical

offenses[29]—but none challenge enforcement discretion on a case-by-case basis. This Article, however, challenges this embrace of enforcement discretion.

To find the legal limits of sheriff nonenforcement discretion, this Article examines the long history of sheriff nullification.[30] This approach yields two insights:

First, sheriff nullification has a long pedigree, suggesting it may be a consequence of the structure of the sheriff's office—an elected law enforcement official with weak political constraints.[31] In recent times, there has been widespread nonenforcement of public health mandates related to masking and social distancing.[32] A century ago, it was alcohol prohibition laws.[33] Modern nonenforcement of regulatory mandates often involves gun control laws.[34] A century earlier, it was gambling and prostitution.[35] This pattern suggests it is a mistake to think that today's constitutional sheriffs solely are a byproduct of our current political climate.[36]

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nonenforcement. For the view that prosecutors generally do not have this authority, see, for example, CHARLES D. STIMSON & ZACK SMITH, HERITAGE FOUND., "PROGRESSIVE" PROSECUTORS SABOTAGE THE RULE OF LAW, RAISE CRIME RATES, AND IGNORE VICTIMS 29 (2020); Fairfax, *supra* note 12, at 1274–75; Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1684–85, 1685 n.137 (2010); Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 875 (2004). For a contrary view, see, for example, Milan Markovic, *Charging Abortion*, 92 FORDHAM L. REV. 1519, 1525–26, 1542–43 (2024); Murray, *supra* note 12, at 200, 255; Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603, 608–10 (2020); and Ronald Wright, *Prosecutors and Their State and Local Polities*, 110 J. CRIM. L. & CRIMINOLOGY 823, 828, 857 (2020).

29. *See* Zachary S. Price, *Faithful Execution in the Fifty States*, 57 GA. L. REV. 651, 667 (2023).

30. *See infra* Section I.B. Justin Murray makes the point, in the context of prosecutors, that even absent direct enforcement, criminal laws can still have a residual impact, either through enforcement by other actors or by otherwise structuring social relationships. *See generally* Justin Murray, *Prosecutorial Nonenforcement and Residual Criminalization*, 19 OHIO ST. J. CRIM. L. 391 (2022).

31. *See infra* Part II.

32. *See infra* notes 93–94 and accompanying text.

33. *See infra* notes 99–100 and accompanying text.

34. *See infra* notes 88–92 and accompanying text.

35. *See infra* notes 102–03 and accompanying text; Freas v. State *ex rel.* Freeling, 235 P. 227, 228 (Okla. 1925) (although not requiring a jury instruction on the matter, noting that the sheriff was permitted to present evidence regarding "palliation or extenuation of his alleged failure to enforce the gambling and prohibitory laws"); State v. Lombardi, 99 N.W.2d 829, 840 (1959) ("The evidence of the prostitutes shows that although when [Sheriff] Lombardi knew indisputably the nature and activities of Club 166 he found no reason to interfere with its operations but on the contrary protected it against interference by others. Other evidence . . . is competent to show that the sheriff intended not to disturb the Club's operations though his knowledge of them was complete, that is, he wilfully refused or neglected to perform the duties of his office."); Ferguson v. Superior Ct., 147 P. 603, 605–06 (Cal. Dist. Ct. App. 1915) ("The accusation at length is as follows: . . . 'That the defendant [constable] . . . has seen women and girls living and reisiding in houses of prostitution, . . . but he has at all times failed, refused, and neglected, and still fails, refuses and neglects, to cause the prosecution or the arrest of any of the persons letting said cribs for the purpose of prostitution, or any of the persons residing therein.'").

36. This conflict has flavors of the "new preemption," by which a state government preempts local government actions. *See* Maria Ponomarenko, *Some Realism About Criminal Justice Localism*, 173 U. PA. L. REV. (forthcoming 2025) (manuscript at 13–16) (on file with author). *See generally* Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995 (2018). Whereas municipalities generally are unprotected against state preemption, *see* Nixon v. Mo. Mun. League, 541 U.S. 125, 140 (2004) (describing municipalities as "convenient agencies for exercising such of the governmental

Second, examining past instances of sheriff nonenforcement reveals a forgotten history of the role state courts played in curbing arbitrary nonenforcement. As the office of the sheriff evolved in early America, courts were called upon to flesh out when a sheriff's failure to arrest amounted to neglect of duty—a removable offense.[37] In doing so, courts developed a robust understanding regarding the permissibility of nonenforcement. Their decisions rebuked sheriff nullification but also preserved an important degree of flexibility and leniency in the law.[38] This Article is the first to excavate this history and to delineate this jurisprudence.

Based on these insights, this Article critiques the way in which our system eschews legal checks on nonenforcement and instead relegates abuse of nonenforcement authority to the world of politics. Drawing on the long-forgotten ways in which state courts enforced the sheriff's obligations to investigate allegations of crime and enforce criminal statutes, this Article suggests we revisit the possibility that nonenforcement would be subject to judicial review. By reviewing nonenforcement through a neglect-of-duty framework, one can begin to create a legal regime that provides some meaningful check on the sheriff's nonenforcement discretion, even when that discretion is exercised on a case-by-case basis.

This Article proceeds in four parts. Part I outlines the stakes of neglecting sheriff nonenforcement. It begins by describing a sheriff's authority and impact, making clear that where they operate, sheriffs tend to be the primary law enforcement official.[39] This Part then details current and historical instances of sheriff nullification, including modern constitutional sheriffs. Part I concludes by making the case for why we should be wary of unfettered nonenforcement discretion.

Given the authority of the sheriff and the potential harms of nonenforcement, Part II turns to existing checks on a sheriff's authority. Those checks, primarily political in nature, ultimately fail to meaningfully curb nonenforcement discretion, thus permitting movements like the constitutional sheriffs' to propagate.

Part III asks whether the law can do more to constrain nonenforcement. It does so by looking to earlier eras to understand the legal controls on the sheriff. This Part provides an original account of a body of state law that, over the course of decades, defined what was required of a sheriff when it comes to investigating and enforcing criminal statutes—and when a sheriff's inaction amounted to neglect of duty. Collectively, this body of law offers a framework for legal

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powers of the State as may be entrusted to them in its *absolute discretion*" (emphasis added) (quoting Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 607–08 (1991))), the office of the county sheriff is established by most state constitutions, thus imbuing the office with certain responsibilities and authorities that are guaranteed against state infringement absent constitutional amendment. *See infra* note 267.

This Article does not explore the permissible boundaries of state preemption in this arena, but rather focuses on the sheriff's enforcement (and nonenforcement) obligations as a matter of historical practice and common law. These obligations serve as the authority for judicial action constraining the sheriff.

37. *See infra* Part III.

38. *See infra* Section III.C; *see also infra* Part IV (discussing reforms that would mitigate the harms of arrest—such as those imposed by pretrial detention—as well as alternative actors whose decisions could avoid unduly harsh convictions and sentences).

39. *See infra* Section I.A (detailing sheriffs' law enforcement impact).

controls over nonenforcement, including in individual cases—a path that appears long abandoned, but that this Article contends we should reconsider.

Part IV considers potential counterarguments and negative consequences of reviving legal controls on nonenforcement. This Part challenges the modern assumption that courts are incapable of reviewing nonenforcement decisions in particular cases. This Part also rejects the notion that curbing nonenforcement discretion mandates "full enforcement" of criminal laws.[40] Yet, wary of the human toll that accompanies every arrest, this Part also proposes a series of legislative reforms to reduce our reliance on pretrial detention and restore leniency elsewhere in the system.[41]

Before proceeding, one caveat is in order. Although from time to time this Article notes variations among the states, in general it discusses "sheriffs" as one broad category. But in reality, a sheriff's powers and duties vary from state to state.[42] Rather than provide an authoritative treatment of any one state or catalogue all the possible variations, this Article focuses on the most powerful (and the most common) version of the U.S. sheriff—one established by the state constitution with full enforcement authority. Doing so addresses the sheriff's strongest claims, which can be adapted to particular states to draw more specific conclusions.[43]

I. SHERIFFS AS KINGS

This Part provides the context needed to evaluate the political and legal checks on the sheriff's nonenforcement authority. Section I.A explains the role of the sheriff as a law enforcer and criminal policymaker. Section I.B outlines the rise of the constitutional sheriffs movement while also drawing parallels to earlier

40. *See infra* Section IV.A.

41. *See infra* Sections IV.D–E.

42. *See* McMillian v. Monroe County, 520 U.S. 781, 795 (1997) ("[I]t is entirely natural that both the role of sheriffs and the importance of counties vary from State to State . . . ."); James A. Conser, Rebecca Paynich & Terry E. Gingerich, LAW ENFORCEMENT IN THE UNITED STATES 82–84 (3d ed. 2013) (explaining that the duties of sheriffs vary from county to county).

For example, although most sheriffs are established as elected officials in their state constitution, *see infra* note 182, Alaska and Connecticut do not have sheriffs at all. Daniel M. Thompson, *How Partisan Is Local Law Enforcement? Evidence from Sheriff Cooperation with Immigration Authorities*, 114 AM. POL. SCI. REV. 222, 224 n.5 (2020). In Alabama, sheriffs are statutorily obligated to "ferret out crime." ALA. CODE § 36-22-3(a)(4). In Tennessee, they are obligated "to patrol the roads of the county." TENN. CODE ANN. § 38-3-102(b).

Sheriffs' enforcement authority also varies. In Delaware, for example, where the state constitution defines sheriffs as "conservators of the peace," the legislature was permitted, without constitutional amendment, to strip the sheriff of arrest powers. Christopher v. Sussex County, 77 A.3d 951, 952, 962 (Del. 2013). But in Pennsylvania, the state supreme court found implied authority for sheriffs to make arrests for breaches of the peace committed in their presence. Commonwealth v. Leet, 641 A.2d 299, 303 (Pa. 1994).

43. *See* Price, *supra* note 29, at 694–736 (examining prosecutorial power based on each state's specific constitutional structure); Wright, *supra* note 28, at 840 ("A uniform theory of declinations . . . does not work well for all the varied state and local prosecutor offices in the United States.").

examples of sheriff nullification. Section I.C then focuses specifically on the risks posed by unchecked nonenforcement discretion.

A. THE LONG ARM OF THE SHERIFF

Although largely an afterthought to policing scholars, sheriffs are key cogs in the U.S. criminal apparatus.[44] There are nearly 3,000 sheriffs' offices across the country,[45] with a combined budget of about $44 billion.[46] Although more than half of sheriffs' offices employ fewer than twenty-five full-time officers,[47] in the aggregate, sheriffs (and their deputies) constitute 25% of the full-time sworn law enforcement officers employed in the country.[48] Both elected sheriffs and their deputies are overwhelmingly white and male.[49] Sheriffs' offices also employ 55% of full-time nonsworn law enforcement personnel.[50] Approximately 130 million Americans live in a jurisdiction for which the sheriff is the sole local law enforcement entity.[51] Even in larger cities with their own municipal police departments, sheriffs retain jurisdiction to enforce the law within the city limits.[52]

Sheriffs' wide jurisdiction and substantial personnel numbers translate into a significant enforcement footprint. Based on 2016 data, for example, Aaron Littman has calculated that sheriffs' offices made about 20% of the reported arrests for possession of marijuana nationwide; that figure rises to more than 33%

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44. Although this Article focuses on criminal enforcement, the sheriff's role as a process server involves sheriffs in a variety of civil proceedings. Examples include writs of possession (evictions), writs of execution (to satisfy court judgments), and orders of protection. *See* TENN. CODE ANN. § 29-15-114 (writ of possession); MINN. STAT. § 550.135 (writ of execution); NEB. REV. STAT. ANN. § 28-311.09 (9)(a) (order of protection); *see also* Linehan v. Rockingham Cnty. Comm'rs, 855 A.2d 1271, 1275 (N.H. 2004) ("Generally, the sheriff's common law powers included conserving public peace, preserving public order, preventing and detecting crime, enforcing criminal laws by, among other things, raising a posse and arresting persons who commit crimes in their presence, providing security for courts, serving criminal warrants and other writs and summonses, and transporting prisoners.").

45. CONNOR BROOKS, OFF. OF JUST. PROGRAMS, U.S. DOJ, NCJ 305200, SHERIFFS' OFFICES PERSONNEL, 2020, at 2 tbl.2 (2022), bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/sop20.pdf [https://perma.cc/7SG7-QBAR].

46. *Id.* at 13 tbl.14.

47. *Id.* at 3 tbl.3.

48. *Id.* at 1.

49. *See id.* at 4 ("The percentage of full-time sworn officers who were female decreased from 1997 (16%) to 2020 (14%)." (citation omitted)); George Bulman, *Law Enforcement Leaders and the Racial Composition of Arrests*, 57 ECON. INQUIRY 1842, 1843 (2019) ("[O]nly 4% of counties had a Black sheriff . . . between 1991 and 2015.").

50. BROOKS, *supra* note 45, at 1. The number of nonsworn personnel more than doubled from 1997 to 2020, while the number of sworn officers held steady. *See id.* at 2 tbl.1.

51. *See* O'Rourke et al., *supra* note 20, at 1371.

52. *See, e.g.*, Sheriff's Duty to Patrol Within City Limits, Tenn. Op. Att'y Gen. No. 08-134 at 1 (2008), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2008/op08-134.pdf [https://perma.cc/KX7D-PRVB] ("[I]f the sheriff has reason to believe that [a municipal] police force is neglecting its duty, his or her duty to prevent and suppress offenses in that community is the same as it is in unincorporated parts of the county."); Sheriff's Authority in Municipalities, Miss. Op. Att'y Gen. No. 2008-00596 at 1 (2008) ("[T]he sheriff's authority extends to all portions of the county including all municipalities situated therein, [while] the municipal police department is limited to the confines of the corporate limits of the municipality . . . ."); Wash. Op. Att'y Gen., AGO 61-62 No. 25 (1961), https://www.atg.wa.gov/ago-opinions/offices-and-officers-county-sheriff-authority-investigate-felony-cases-third-and-fourth [https://perma.cc/E72A-4N3P] ("[T]he sheriff, [is] the chief law enforcement officer in the county, with jurisdiction coextensive with the county, including municipalities and townships . . . .").

in Louisiana and South Carolina.[53] Pretrial incarceration rates in rural areas (where sheriffs dominate)[54] have accelerated over the last few decades and now outpace urban areas with substantially higher crime rates.[55] Sheriffs deploy a wide range of force techniques[56] and kill a disproportionate number of Americans each year.[57] Sheriffs' offices deploy aerial drones, license plate readers, predictive policing, and other controversial data and surveillance techniques[58] often associated with large urban police forces. Almost all sheriffs' offices have K-9 units, handling more than 5,500 police dogs, primarily for drug detection purposes.[59] Sheriffs' deputies routinely check the immigration status of people in their custody.[60]

Sheriffs also play a key role in operating and filling jails.[61] The vast majority of jails are operated at the county level, administered by an elected sheriff.[62] Through a variety of policy choices—proposing and securing support for new jail construction, using jail space for non-criminal detention (e.g., immigration detention), and determining when a jail will cite rather than incarcerate—the sheriff plays a key role in determining the volume of jail incarceration.[63]

Jail incarceration has boomed of late. Even after a 25% decline during the pandemic, at midyear 2022, local jails (not prisons) still held 663,100 people in

53. Aaron Littman, *Jails, Sheriffs, and Carceral Policymaking*, 74 VAND. L. REV. 861, 904 & n.186, app. 1 (2021).

54. Jessica Pishko, *How Sheriffs' Power and Autonomy Make Them Central Players for Policing Reform*, BOLTS (Sept. 26, 2019), https://boltsmag.org/sheriffs-and-policing-practices-the-badge [https://perma.cc/UMG7-95AS] ("Sheriffs are typically the only policing force in rural and unincorporated areas. Law enforcement in cities and towns tends to be the province of police departments formed by municipal authorities . . . ."); Michele Bisaccia Meitl, Ashley Wellman & Patrick Kinkaid, *Texas Sheriffs' Perceptions on Firearm Regulations and Mass Shootings*, 23 INT'L J. POLICE SCI. & MGMT. 222, 222 (2021) ("There are nearly 3,000 sheriffs' offices around the United States and they often serve as the only law enforcement body in rural areas.").

55. JACOB KANG-BROWN & RAM SUBRAMANIAN, VERA INST. OF JUST., OUT OF SIGHT: THE GROWTH OF JAILS IN RURAL AMERICA 7 (2017), https://www.vera.org/downloads/publications/out-of-sight-growth-of-jails-rural-america.pdf [https://perma.cc/2UBA-2RPJ].

56. CONNOR BROOKS, OFF. OF JUST. PROGRAMS, U.S. DOJ, NCJ 307234, SHERIFFS' OFFICES, PROCEDURES, POLICIES, AND TECHNOLOGY, 2020 – STATISTICAL TABLES 7 tbl.2 (2023), bjs.ojp.gov/document/soppt20st.pdf [https://perma.cc/EW8T-L4HP].

57. E.D. Cauchi & Scott Pham, *County Sheriffs Wield Lethal Power, Face Little Accountability: "A Failure of Democracy,"* CBS NEWS (May 20, 2024, 6:00 AM), www.cbsnews.com/news/county-sheriffs-deaths-accountability [https://perma.cc/KM7Y-CS6H] ("County sheriff's officers are three times more lethal than city police . . . .").

58. BROOKS, *supra* note 56, at 9 tbl.4, 21 tbl.13, 23 tbl.14. About one in eight offices, covering about 38% of officers, deploy predictive policing. *Id.* at 21 tbl.13. About one in five offices, covering about 60% of officers, regularly use license plate readers. *Id.* at 23 tbl.14.

59. *Id.* at 11 tbl.5.

60. *Id.* at 15 ("Sixty percent of sheriffs' offices had deputies regularly check immigration status during selected circumstances, such as traffic stops or arrests, in 2020." (citation omitted)).

61. *See* Littman, *supra* note 53, at 869, 876, 920.

62. *Id.* at 870 & n.28, 876 & n.55 (explaining that sheriffs operate almost all county jails, which house 88% of jail detainees across 2,750 jail systems).

63. *See id.* at 902–03, 908–09, 913–14.

custody.[64] Only 30% of these individuals were serving a sentence or awaiting sentencing post-conviction—most were being held pretrial.[65] Between July 2021 and June 2022, approximately 7.3 million people were processed through jails, with an average stay of about one month.[66] That time period is sufficient to impose the well-documented harms of the arrest process and often to induce a guilty plea.[67] The massive growth of the jail population over the last few decades has occurred almost entirely in county jails.[68] That growth continues today, even as the country closes more jails and prisons than it opens.[69]

In short, the sheriff plays a key role in our law enforcement landscape. As both chief law enforcement officers and jail administrators, sheriffs exercise their discretion in ways that have a profound impact on who is incarcerated. And unlike municipal police, who are subject to removal by the mayor, the sheriff is a constitutional officer—an elected official whose office is mandated by their state constitution and thus largely insulated from other county officials.[70] For broad swaths of the country, the sheriff *is* the law. This authority extends to which crimes to prioritize, and which not to pursue.

B. THE RECURRENCE OF SHERIFF NONENFORCEMENT

This Section provides a brief overview of the nation's recurring experience with sheriff nonenforcement, making the point that although the laws sheriffs ignore have shifted over time, nonenforcement has remained a common thread.

Many analyses of the U.S. sheriff begin by noting the office's English history.[71] Although there is no disputing that the office of the sheriff has an ancient

64. ZHEN ZENG, OFF. OF JUST. PROGRAMS, U.S. DOJ, NCJ 307086, JAIL INMATES IN 2022 – STATISTICAL TABLES 1 (2023), https://bjs.ojp.gov/document/ji22st.pdf [https://perma.cc/FUP8-PYJZ].

65. *Id.* at 3.

66. *Id.* at 1.

67. Regarding arrest costs, see Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 313–20 (2016) (discussing the range of harms associated with an arrest). Regarding guilty pleas for low-level offenses, see Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 663, 669–70 (2014) (quoting a public defender who says that for clients going through the plea process, "[t]he main thing is to get out of jail"), and Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1347 (2012) ("For those with children, jobs, or other obligations, the deprivations inflicted by a month in jail can be worse punishment than they would face if they were convicted at trial.").

68. Littman, *supra* note 53, at 871.

69. KANG-BROWN & SUBRAMANIAN, *supra* note 55, at 6; Elizabeth Allen, *How to Redevelop Former Jails and Prisons for the Collective Good*, VERA INST. JUST. (Apr. 30, 2024), https://www.vera.org/news/how-to-redevelop-former-jails-and-prisons-for-the-collective-good [https://perma.cc/H9ZH-D84B].

70. *See infra* Section II.B (describing limits on the ability of county commissioners to control the county sheriff).

71. For examples of legal scholars grounding their analyses of the sheriff in the office's history, see O'Rourke et al., *supra* note 20, at 1371, 1376–80; Tomberlin, *supra* note 21, at 116–22; and David B. Kopel, *The* Posse Comitatus *and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. CRIM. L. & CRIMINOLOGY 761, 765–87 (2015).

For a particularly thorough treatment of sheriff history, see Soraya K. Kawucha, Sheriffs – The *Other* Police (Dec. 2014) (Ph.D. dissertation, Sam Houston State University) (ProQuest). For an in-depth treatment of the sheriff's history as it relates to the modern sheriff and the constitutional sheriffs movement, see PISHKO, *supra* note 22, at 44–72.

pedigree, one must be careful not to overrely on a history that long predates the rise of our modern criminal enforcement system.[72] Still, to understand the claims of some sheriffs today, one must start with the fact that the sheriff originally served as the representative of the English Crown's enforcement authority in the county.[73] As American colonies and states imported the office, empowering their own sheriffs, some English traditions found their way into U.S. law. In particular, leading treatises and various courts described the sheriff as a law enforcement officer with "no superior in his county."[74]

Today's constitutional sheriffs take this understanding of a sheriff's authority to an extreme.[75] In their view, "[t]he sheriff's constitutional authority means that they can choose which state and federal laws to enforce."[76] This is nullification by another name. The constitutional sheriffs movement found its footing in the

72. The sheriff's *posse comitatus*, for example, long predates the rise of modern professional police forces. PISHKO, *supra* note 22, at 45.

73. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *343 ("As keeper of the king's peace, both by common law and special commission, [the sheriff] is the first man in the county, and superior in rank to any nobleman therein, during his office."); *see also* Wis. Pro. Police Ass'n v. County of Dane, 316 N.W.2d 656, 658 (Wis. 1982) ("The office of sheriff is one of the most ancient and important in Anglo-American Jurisprudence."); Annala v. McLeod, 206 P.2d 811, 812 (Mont. 1949) ("The office of sheriff is one of great antiquity. As 'reeve of the shire' or 'shire reeve,' he was, during his term of office, supreme in rank to any nobleman within the limits of his county. He was a representative of the king, 'the first man in the county.'" (quoting BLACKSTONE, *supra*, at *339, *343)).

74. 1 WALTER H. ANDERSON, CLYDE BOWEN & GUS CARR ANDERSON, A TREATISE ON THE LAW OF SHERIFFS, CORONERS, AND CONSTABLES WITH FORMS § 6, at 5 (1941) ("In the exercise of executive and administrative functions, in conserving the public peace, in vindicating the law, and in preserving the rights of the government, he (the sheriff) represents the sovereignty of the State and he has no superior in his county.").

State courts have echoed this sentiment. *See, e.g.*, Dunn County v. Wis. Emp. Rels. Comm'n, 718 N.W.2d 138, 144 (Wis. Ct. App. 2006); State v. McCarty, 179 P. 309, 311 (Kan. 1919); *see also* Sheriffs, Prosecuting Attorneys –Duties and Powers, Wash. Op. Att'y Gen., AGO 51-53 No. 322 (1952), https://www.atg.wa.gov/ago-opinions/sheriffs-prosecuting-attorneys-duties-and-powers [https://perma.cc/Y766-6WLH].

75. Tsai, *supra* note 24 ("[The constitutional sheriff movement's] animating idea is that a sheriff holds ultimate law-enforcement authority in his county—outranking even the federal government within its borders.").

The constitutional sheriffs movement manifests in other ways as well, including opposition to attempts to impose term limits for the sheriff's position, civilian oversight, and budget cuts. *See* Jack Leonard, *Baca Wins His Battle Against Term Limits*, L.A. TIMES (Nov. 11, 2004, 12:00 AM), https://www.latimes.com/archives/la-xpm-2004-nov-11-me-limits11-story.html [https://perma.cc/K8NB-SN9N]; Andrew Graham & Marisa Endicott, *Sonoma County Sheriff Sees Whistleblower Investigation Subpoenas as Threat to Constitutional Autonomy*, PRESS DEMOCRAT (July 19, 2024), https://www.pressdemocrat.com/article/news/sonoma-county-sheriff-oversight-whistleblower-subpoena-fight-iolero [https://perma.cc/376B-JAXV]. Although this Article focuses primarily on nonenforcement discretion, I touch on these issues in the budgetary context in Section II.B.

76. Josh Numainville, *Q&A: Why Are 'Constitutional Sheriffs' Refusing to Enforce Gun Control Laws?*, WESTLAW TODAY (Feb. 22, 2023), https://today.westlaw.com/Document/Ib150302cb38811ed8636e1a02dc72ff6/View/FullText.html?transitionType=Default&contextData=(sc.Default)&firstPage=true [https://perma.cc/B4VC-77MM] (quoting researchers Emily Farris (TCU) and Mirya Holman (Tulane)).

aftermath of the 2012 Sandy Hook school shooting.[77] In response to the shooting, the Obama Administration announced a detailed plan involving numerous executive and congressional actions to reduce gun violence.[78] Sheriffs across the country responded in strong opposition—vowing not to enforce any new gun laws and even to prevent federal officials from doing so.[79] In the years since, the movement has continued to show strength—for example, over a five-year period, a leading constitutional sheriff association hosted events in at least thirty states and conducted formal trainings for law enforcement officers in at least thirteen states.[80] Overall, a recent survey found nearly 45% of sheriffs agree that their authority in their county supersedes that of federal or state governments.[81]

Sheriff opposition to federal law and priorities is not an isolated or novel phenomenon. Today's constitutional sheriffs focus on opposition to federal gun legislation.[82] But other sheriffs have announced publicly their intent not to cooperate with federal immigration enforcement efforts.[83] Although there are differences between immigration sanctuary policies and "Second Amendment sanctuaries,"[84] these sheriffs are united in their opposition to certain federal laws

77. James Barron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, N.Y. TIMES (Dec. 14, 2012), https://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html.

78. *See* THE WHITE HOUSE, NOW IS THE TIME: THE PRESIDENT'S PLAN TO PROTECT OUR CHILDREN AND OUR COMMUNITIES BY REDUCING GUN VIOLENCE 2 (2013), https://perma.cc/Y82H-YBV2.

79. Jonathan Thompson, *The Rise of the Sagebrush Sheriffs: How Rural "Constitutional" Peace Officers Are Joining the War Against the Feds*, HIGH COUNTRY NEWS (Feb. 2, 2016), www.hcn.org/issues/48-2/the-rise-of-the-sagebrush-sheriffs/; Letter from Utah Sheriffs' Ass'n to President Barack Obama (Jan. 17, 2013) [hereinafter Letter from Utah Sheriffs' Ass'n], www.scribd.com/doc/121298169/Utah-Sheriffs-Association-s-letter-to-President-Barack-Obama [https://perma.cc/M5DZ-26G9] ("No federal official will be permitted to descend upon our constituents and take from them what the Bill of Rights—in particular Amendment II—has given them.").

80. *See* L'Heureux et al., *supra* note 16 (discussing actions of the Constitutional Sheriffs and Peace Officers Association up to August 2023).

81. Numainville, *supra* note 76.

82. In 2013, Maricopa County Sheriff Joe Arpaio and nearly 500 other sheriffs "vowed not to obey any federal law that required them to confiscate guns." Tsai, *supra* note 24. That same year, in Utah, twenty-eight sheriffs warned: "No federal official will be permitted to descend upon our constituents and take from them what the Bill of Rights—in particular Amendment II—has given them." Letter from Utah Sheriffs' Ass'n, *supra* note 79.

83. *See, e.g.*, Nick Ochsner, *After Calls for Collaboration, Sheriff McFadden Ignores Calls, Emails from ICE*, WBTV (Oct. 25, 2019, 9:43 AM), www.wbtv.com/2019/10/25/after-calls-collaboration-sheriff-mcfadden-ignores-calls-emails-ice [https://perma.cc/5YCY-T5K6] (reporting on a Mecklenburg County, North Carolina, sheriff refusing to honor ICE detainers or notify ICE officials when undocumented persons are being released); Hayley Fixler, *Durham County Sheriff Speaks Out Against Bill that Forces Offices to Work with ICE*, CBS17.COM (Mar. 29, 2023, 5:46 PM), www.cbs17.com/news/local-news/durham-county-sheriff-speaks-out-against-bill-that-forces-offices-to-work-with-ice ("'As the sheriff in Durham County, I should not be enforcing federal immigration law. I will not enforce federal immigration law,' [Sheriff Clarence] Birkhead said.").

84. Immigration laws are not directly enforced by local law enforcement; they are federal laws that benefit from local cooperation. *See* Arizona v. United States, 567 U.S. 387, 395–97 (2012) (discussing federal law enforcement of immigration laws); *id.* at 411 ("Consultation between federal and state officials is an important feature of the immigration system."). But firearms regulations often are state laws, which apply to sheriffs directly. *See* Shawn E. Fields, *Second Amendment Sanctuaries*, 115 NW. U. L. REV. 437, 463, 466 (2020).

or practices. And the further back one goes, more examples abound. In 2014, several sheriffs in Utah defied Bureau of Land Management efforts to protect cultural resources by forcibly opening closed roads.[85] Sheriffs played a role in the "Sagebrush Rebellion" and its opposition to federal ownership of land in Western states.[86] Southern sheriffs long opposed federal civil rights efforts, from the aftermath of Reconstruction through Jim Crow.[87]

Like sheriff opposition to federal laws, sheriffs also oppose a range of state criminal statutes. Today's constitutional sheriffs again focus their opposition on gun-control efforts. In 2023, about 80% of Illinois's sheriffs announced they would refuse to enforce a provision of a new gun-control law that required owners of assault weapons to register them with the state.[88] In 2019, sheriffs in at least thirteen counties in Washington announced they would not enforce a gun-control law that involved raising the age of purchase for assault weapons to twenty-one, a mandatory waiting period, and more thorough background checks.[89] That same year, in Colorado, Weld County Sheriff Steve Reams announced he would not enforce the state's pending red flag law—a law that permitted a court to temporarily remove firearms from a person in crisis.[90] Sheriffs raised similar opposition in Oregon

85. *See* Thompson, *supra* note 79.

86. *See id.*; Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 118–19 (2001) ("A tenuous relationship has always existed between the local representatives of federal agencies and local landowners, but recent incidences such as the Sagebrush Rebellion and the more recent County Supremacy movement have made federal land management personnel scared for their lives and safety."). *See generally* R. MCGREGGOR CAWLEY, FEDERAL LAND, WESTERN ANGER: THE SAGEBRUSH REBELLION AND ENVIRONMENTAL POLITICS (1993) (discussing the "Sagebrush Rebellion" of the 1980s and opposition to federal control over public lands).

87. On post-Reconstruction violence and lynching, see *infra* note 175 and accompanying text. On Jim Crow-era opposition to integration efforts, see, for example, Louis Menand, *The Color of Law*, NEW YORKER (July 1, 2013), https://www.newyorker.com/magazine/2013/07/08/the-color-of-law; Margalit Fox, *Jim Clark, Sheriff Who Enforced Segregation, Dies at 84*, N.Y. TIMES (June 7, 2007), https://www.nytimes.com/2007/06/07/us/07clark.html.

88. *See* Mirya Holman & Emily Farris, *Constitutional Sheriffs Refuse to Follow or Enforce Illinois' New Assault Weapons Ban*, TALKING POINTS MEMO (Feb. 3, 2023, 9:00 AM), talkingpointsmemo.com/cafe/constitutional-sheriffs-refuse-to-follow-or-enforce-illinois-new-assault-weapons-ban [https://perma.cc/RVP7-KEL9]; Cesar Sanchez & Hannah Meisel, *Sheriff's Offices in Illinois Defy New Assault Weapons Ban: 'We Are the Keeper of Our Jails,'* WQAD8 (Jan. 12, 2023, 5:35 PM), www.wqad.com/article/news/politics/illinois-politics/illinois-sheriffs-against-assault-weapons-ban/526-368230a6-e4b7-45ec-916a-935d95f81cfe [https://perma.cc/E6S7-BJKC]; *see also* Eunice Alpasan, *Sheriffs Across Illinois Say They Won't Enforce New Assault Weapons Ban*, WTTW (Jan. 17, 2023, 8:58 PM), news.wttw.com/2023/01/17/sheriffs-across-illinois-say-they-won-t-enforce-new-assault-weapons-ban [https://perma.cc/BW4W-6SRR] (In the context of new state firearms restrictions, Jefferson County Sheriff Jeff Bullard said, "[i]t's my duty to stop civil rights violations from happening in my county, so it goes way beyond just not enforcing.").

89. Owen Daugherty, *At Least 13 County Sheriffs in Washington Refuse to Enforce New Gun Law*, THE HILL (Feb. 11, 2019, 3:08 PM), thehill.com/homenews/state-watch/429460-at-least-13-county-sheriffs-in-washington-refusing-to-enforce-states-new/; *see also* Hersh, *supra* note 25.

90. Scott McLean & Sara Weisfeldt, *This Colorado Sheriff Is Willing to Go to Jail Rather Than Enforce a Proposed Gun Law*, CNN (Mar. 31, 2019, 2:11 AM), https://www.cnn.com/2019/03/31/us/colorado-red-flag-gun-law/index.html [https://perma.cc/M7EK-4NBJ].

in 2022[91] and in California in 2024.[92]

Sheriff opposition to state laws is hardly limited to gun mandates. Sheriffs have opposed pandemic-era stay-at-home mandates,[93] masking requirements,[94] and wildlife-protection laws.[95] Lest one think that sheriff opposition always comes from the political right, a Washington state sheriff recently declared his opposition to enforcing a ban on sleeping on public lands (which is often used to

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For additional examples, see Tim Skubick, *Nessel, Sheriff, Clash over Enforcement of Red Flag Law*, WLNS (Apr. 21, 2023, 8:19 PM), www.wlns.com/news/local-news/nessel-sheriff-clash-over-enforcement-of-red-flag-law (Livingston County, Michigan); Leah Anaya, *NM Sheriffs Force Lawmakers to Abandon Red Flag Bill: We Refuse to Enforce Unconstitutional Laws*, LAW ENF'T TODAY (Jan. 19, 2020), https://www.lawenforcementtoday.com/nm-sheriffs-force-lawmakers-to-abandon-red-flag-bill-we-refuse-to-enforce-unconstitutional-laws [https://perma.cc/E99R-EA3T] (Lincoln County, New Mexico); Sara Knuth, *Weld County Votes to Become Second Amendment Sanctuary County*, GREELEY TRIB. (May 13, 2020, 2:45 AM), https://www.greeleytribune.com/2019/03/06/weld-county-votes-to-become-second-amendment-sanctuary-county (Weld County, Colorado); and Jesse Paul, *Colorado's Attorney General Says Sheriffs Who Won't Carry Out a Red Flag Bill Court Order "Should Resign,"* COLO. SUN (Mar. 20, 2019, 5:07 AM), coloradosun.com/2019/03/20/colorado-second-amendment-sanctuary-counties-court [https://perma.cc/8J48-JXT7] ("County commissions that have made their counties 'sanctuaries' say they don't want their elected sheriffs enforcing a law they don't think is legally sound. But what's not totally clear is if that means refusing to use the tools provided under the measure, or defying a court order to seize weapons.").

91. Jonathan Levinson, *Some Oregon Sheriffs Refuse to Enforce Gun Laws*, JEFFERSON PUB. RADIO (Nov. 21, 2022, 4:55 PM), https://www.ijpr.org/politics-government/2022-11-21/some-oregon-sheriffs-refuse-to-enforce-gun-laws [https://perma.cc/FKG8-5X2S].

92. AWR Hawkins, *California Sheriff Not Enforcing New State Bans on Concealed Carry*, RIGHT EDITION, https://rightedition.com/2024/01/04/california-sheriff-not-enforcing-new-state-bans-on-concealed-carry [https://perma.cc/C5HS-DP4S] (last visited Mar. 26, 2025); Cam Edwards, *Growing Number of California Law Enforcement Say They Won't Enforce New Carry Restrictions*, BEARING ARMS (Jan. 5, 2024, 1:01 PM), bearingarms.com/camedwards/2024/01/05/growing-number-of-california-law-enforcement-say-they-wont-enforce-new-carry-restrictions-n79059 [https://perma.cc/V652-6KJM].

93. *See, e.g.*, Joseph Choi, *At Least Four New York Sheriffs Say They Won't Enforce Cuomo's Limits on Thanksgiving Gatherings*, THE HILL (Nov. 17, 2020, 2:52 PM), thehill.com/homenews/state-watch/526367-at-least-four-new-york-sheriffs-say-they-wont-enforce-cuomos-limits-on (New York); *2 Arizona Sheriffs Refuse to Enforce a Stay-at-Home Order*, ASSOCIATED PRESS (May 3, 2020, 12:21 PM), apnews.com/general-news-a7c04cfd3b0e243b8beb28140cadccfb [https://perma.cc/R7DH-GAAE] (Arizona); Jim Owczarski & Sophie Carson, *Racine County Sheriff Will Not Enforce Stay-at-Home Order, Says It Will Have 'Dire Lifetime Consequences,'* MILWAUKEE J. SENTINEL (Apr. 17, 2020, 8:58 PM), https://www.jsonline.com/story/news/local/2020/04/17/coronavirus-wisconsin-racine-county-sheriff-schmaling-says-evers-order-overreaching-dire-consequence/5157229002 [https://perma.cc/G58R-58K7] (Wisconsin).

94. *See, e.g.*, Minyvonne Burke, *'Not Backed by Science': L.A. County Sheriff Will Not Enforce Mask Mandate*, NBC NEWS (July 17, 2021, 11:53 AM), https://www.nbcnews.com/news/us-news/not-backed-science-l-county-sheriff-will-not-enforce-mask-n1274274 [https://perma.cc/4WGS-4HNN]; Austin Jenkins, *'Don't Be a Sheep': A SW Washington Sheriff's Response to Governor's Mask Order*, OPB (June 25, 2020, 9:30 AM), www.opb.org/news/article/washington-state-mask-order-county-sheriff-response [https://perma.cc/EA55-KXPG] (discussing Sheriff Robert Snaza of Lewis County, Washington, who encouraged listeners not to be "sheep" and not to abide by the governor's mask mandate); *Law Enforcement Agencies Across the State Clarify Their Stance on the Statewide Mask Mandate*, KX NEWS (Nov. 16, 2020, 4:59 PM), www.kxnet.com/news/local-news/law-enforcement-agencies-across-the-state-clarify-their-stance-on-the-statewide-mask-mandate (discussing McKenzie County, North Dakota, Sheriff Matthew Johansen's announcement that he would not enforce the governor's mask mandate).

95. *See, e.g.*, Goodwin, *supra* note 11 (discussing intent of the sheriff of Klickitat County, Washington, not to enforce protections for gray wolves under Washington law or the federal Endangered Species Act).

target homeless individuals).[96] Another in Louisiana declared she would not enforce a state ban on abortions.[97] A Texas sheriff refused to make arrests for certain instances of low-level drug possession.[98]

Again, like sheriff opposition to federal laws, sheriff nullification of state laws has a long history. A century ago, sheriffs widely refused to enforce alcohol prohibitions.[99] One particularly transparent example was Sheriff Charles Barbee of Prince William County, Virginia, who freely admitted he was "exceedingly inactive" in enforcing alcohol prohibitions.[100] Neglect of Sunday Blue Laws[101] and anti-gambling laws[102] was commonplace as well.

It is not difficult to explain this breadth and history of sheriff nullification. As elected officials, sheriffs appeal to the preferences of their constituencies—

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96. Lauren Girgis, *Burien Seeks New Police Chief After Sheriff Refuses to Enforce Camping Ban*, SEATTLE TIMES (Apr. 11, 2024, 7:48 PM), www.seattletimes.com/seattle-news/homeless/burien-seeks-new-police-chief-after-sheriff-refuses-to-enforce-camping-ban/.

For an additional example, see Alex Zielinski, *Multnomah County Sheriff Says She Won't Use Jails to Criminalize Homelessness Under Portland Camping Policy*, OPB (July 30, 2024, 8:11 PM), https://www.opb.org/article/2024/07/30/multnomah-county-sheriff-nicole-morrisey-odonnell-says-wont-jail-homelessness [https://perma.cc/Q4RR-7UJ7].

97. Victor Skinner, *Louisiana Sheriff Says She'll Defy State Abortion Law*, CTR. SQUARE (July 8, 2022), https://www.thecentersquare.com/louisiana/louisiana-sheriff-says-shell-defy-state-abortion-law/article_184a04f6-fef1-11ec-abb3-a32e17c568a9.html [https://perma.cc/99FU-8UR5].

98. Tomas Hoppough, *Texas Sheriff Refuses to Arrest Drug Carriers at Border Patrol Checkpoint*, KFOX14 (Oct. 1, 2015, 7:07 PM), https://kfoxtv.com/archive/gallery/texas-sheriff-refuses-to-arrest-drug-carriers-at-border-patrol-checkpoint-01-20-2016 [https://perma.cc/W2YG-MN7R].

99. *See, e.g.*, *Guard of State Closed the Bars*, MANKATO FREE PRESS, July 5, 1918, at 2, https://chroniclingamerica.loc.gov/lccn/sn83016589/1918-07-05/ed-1/seq-3 [https://perma.cc/344C-PNML] (reporting how sheriff of Steele County, Minnesota, refused to close saloons during prohibition); Freas v. State *ex rel.* Freeling, 235 P. 227, 227 (Okla. 1925) (action to remove sheriff for failure to enforce violations of the prohibitory liquor law and violations of the gambling laws); State v. Teeters, 209 P. 818, 818 (Kan. 1922) (petition alleging sheriff failed to enforce liquor laws); State *ex rel.* McDonald v. Dyson, 183 N.W. 298, 299–300 (Neb. 1921) (removing sheriff for failing to enforce the laws involving the transfer of intoxicating liquors).

100. Barbee v. Murphy, 141 S.E. 237, 240 (Va. 1928).

101. *See, e.g.*, *Marion Party Disappointed*, MARION DAILY MIRROR, June 27, 1907, at 8 (discussing refusal of Sheriff E. Drown of Marion County, Ohio, to enforce "state law against Sunday saloons and baseball in the territory outside the city of Marion").

102. *See, e.g.*, *In re* Sulzmann, 29 Ohio N.P. (n.s.) 92, 103 (Ohio Ct. C.P. 1931) ("The respondent [sheriff], knowing that betting and gambling was going on, constituted himself in effect the self-appointed race-gambling commissioner of Cuyahoga county, issuing and refusing permits as he saw fit, knowingly permitted open gambling and wagering at the meetings he graciously allowed to operate, and when appeals were made to step in and stop the gambling he wholly neglected not only to stop it but never made a move to investigate the matter."), *aff'd*, 183 N.E. 531 (Ohio 1932); Mays v. Robertson, 288 S.W. 382, 383 (Ark. 1926) (alleging sheriff "knowing that certain persons (naming them) were guilty of the crime of exhibiting certain gambling devices . . . did unlawfully, knowingly, and willfully, fail, neglect, and refuse to arrest said persons and take them before some magistrate or court"); *Freas*, 235 P. at 227 (alleging sheriff's failure to enforce violations of the prohibitory liquor law and violations of the gambling laws); Coffey v. Superior Court, 82 P. 75, 75 (Cal. 1905) (alleging police chief permitted gambling); *Sheriff Defies Governor*, OMAHA SUNDAY BEE, June 25, 1905, at 1 (Sheriff John Herpel of St. Louis County, Missouri, defying governor's orders to enforce anti-betting law); *Sheriff Defies Folk*, CITIZEN-REPUBLICAN, June 29, 1905, https://chroniclingamerica.loc.gov/lccn/sn99062010/1905-06-29/ed-1/seq-3 [https://perma.cc/2SJQ-T2W4] (sheriff threatening to arrest state officials sent to enforce gambling laws that sheriff refused to enforce).

preferences for alcohol during Prohibition or preferences for their firearms in the face of gun-control laws. As the sheriff of Broward County, Florida, put it about seventy-five years ago: He "decided to keep his hands off gambling because he was 'elected on the liberal ticket and the people want it.'"[103] Direct elections of sheriffs inject political considerations (and community preferences) into law enforcement decisions, including decisions not to enforce criminal statutes. Given the obvious democratic impulse, the question becomes whether nullification is a problem worth addressing.

C. THE RISKS OF SHERIFF NULLIFICATION

Constitutional sheriffs defend their nonenforcement decisions along two normative dimensions: democracy and liberty. With respect to the former, these sheriffs emphasize their status as the nation's only elected law enforcement officials and argue that they have an obligation to enforce the law according to the values and priorities of their constituents. This was Sheriff Bob Songer's basis for objecting to protections for gray wolves—that his community valued protecting their livestock more than the ecological and biodiversity benefits that might accrue from protecting the wolves.[104] With respect to liberty, these sheriffs emphasize that nonenforcement is necessary to protect the public from unjust application of criminal laws. A leader of the constitutional sheriffs movement argues, for example, that a constitutional sheriff would not have arrested Rosa Parks.[105]

This Section begins by examining each of these justifications—democracy and liberty—finding both are contestable and that serious threats arise when nonenforcement authority is left unchecked. This Section concludes with a broader concern about unchecked nonenforcement discretion: the risk of arbitrariness and discrimination. That is, without adequate checks on nonenforcement, criminal enforcement will amount to government by men, not by laws.[106]

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103. *Permitted Gambling, Florida Sheriff Says*, N.Y. TIMES, July 23, 1950, at 34, https://timesmachine.nytimes.com/timesmachine/1950/07/23/113167276.html?pageNumber=34. For an in-depth examination of Broward County Sheriff Walter Clark and the role of the sheriff in local government, see generally Cindy Hahamovitch, *The "Profane Margins" of the State: Florida Sheriff Walter R. Clark and the Local History of Crime, Policing, and Incarceration*, 110 J. AM. HIST. 643 (2024).

104. *See* Goodwin, *supra* note 11.

105. PISHKO, *supra* note 22, at 23–25 (recounting a story told by Richard Mack, founder of the Constitutional Sheriffs and Peace Officers Association (CSPOA), who "recites a made-up tale about Rosa Parks, who, in his imagined version, would have been helped by a sheriff who refused to arrest her when she did not move to the back of the bus").

106. *Cf.* Richard Samuelson, *A Government of Laws, Not of Men*, 17 CLAREMONT REV. BOOKS 45, 46 (2017) (reviewing RICHARD ALAN RYERSON, JOHN ADAMS'S REPUBLIC: THE ONE, THE FEW, AND THE MANY (2016), and LUKE MAYVILLE, JOHN ADAMS AND THE FEAR OF AMERICAN OLIGARCHY (2016)) ("And what, according to [John] Adams, were to be the principles at the heart of the American regime? . . . Adams famously called a republic 'a government of laws, not of men.'").

1. Democracy Concerns

Consider, first, the democracy justification. As described in more detail below, there is substantial reason to doubt that sheriff elections are accurate measures of democratic sentiment in these communities.[107] But even assuming sheriff elections provide an accurate barometer of community sentiment on particular enforcement practices, there are democracy-based reasons to contest a sheriff's authority to nullify.

It is not clear that sheriffs' elected status makes legitimate their unilateral decision to effectively repeal (through nonenforcement) a democratically enacted criminal statute. After all, the sheriff's oath of office obligates them to uphold all relevant laws, including both federal and state mandates.[108] And as the Supreme Court has explained: "Foremost among the prerogatives of [state] sovereignty is the power to create and enforce a criminal code."[109] Why should a sheriff be permitted to violate this sovereignty? A sheriff's decision to follow local popular will merely preferences voters at a county level over those at the state level.[110] The legitimacy of this preference is subject to ongoing debate in the scholarly literature about the value of localism in criminal law and is plainly up for debate.[111]

Sheriff nullification also creates another democracy problem—it sidelines the democratically elected county prosecutor. With modest exceptions discussed below,[112] a sheriff's enforcement decision is binary: to enforce or not to enforce. The former has the virtue of bringing the county prosecutor (and often, the courts) into the process, while nonenforcement cuts out the prosecutor's office. Yet the county prosecutor typically also is a constitutional officer elected by the same constituency as the sheriff.[113] In fact, the prosecutor seems better situated to reflect the community's preferences because they have at their disposal a far greater range of tools to approximate the community's sense of justice—in particular: declining to prosecute the case, conditioning dismissal on a period of good behavior, offering a plea with a non-carceral sentence,

107. *See infra* Section II.A.

108. *See, e.g.*, TENN. CODE ANN. § 8-8-104; ALA. CONST. art. XVI, § 279; N.J. STAT. ANN. § 40A:9-96; TEX. CONST. art. XVI, § 1(a); GA. CODE ANN. § 15-16-4.

109. Heath v. Alabama, 474 U.S. 82, 93 (1985).

110. Following preferences at the county level can be critiqued, for example, as not accounting for the spillover effects of criminal enforcement. *See* Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 976–77 (2019).

111. *See generally* JOSHUA KLEINFELD, STEPHANOS BIBAS & RICHARD BIERSCHBACH, BY THE PEOPLE: RESTORING DEMOCRACY IN CRIMINAL JUSTICE (forthcoming 2025); Ponomarenko, *supra* note 36; John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711 (2020); Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693 (2017). My goal is not to enter the ongoing debate about the virtues of criminal law localism but instead to focus specifically on nonenforcement.

112. *See infra* notes 385, 418, and accompanying text (discussing statutory authority to issue citations and "station adjustments" in lieu of arrest).

113. *See, e.g.*, MICH. CONST. art. VII, § 4; N.J. CONST. art. VII, § 2, ¶¶ 1–2; N.C. CONST. art. IV, §§ 2, 18; OKLA. CONST. art. XVII, § 2; VT. CONST. ch. II, § 50; VA. CONST. art. VII, § 4; WASH. CONST. art. XI, § 5; W. VA. CONST. art IX, § 1; WIS. CONST. art. VI, § 4(b)–(c).

and much more.[114] The sheriff's options are far more limited. Thus, nonenforcement's stronger democratic claimant probably is the prosecutor.[115]

2. Liberty Concerns

Putting the democratic legitimacy of nullification to one side, it is worth interrogating the sheriff's claim that nonenforcement is liberty enhancing. There is obvious appeal to this assertion. We live in an era of racially disparate criminal enforcement,[116] mass incarceration,[117] and overreliance on criminal penalties to address social ills.[118] In light of these practices, one can easily imagine a range of nonenforcement decisions that are defensible as liberty enhancing.[119] Rosa Parks would be just the tip of the iceberg.[120] In fact, appeals to mercy and justice are a common defense of jury nullification, prosecutorial nullification, and other avenues of relief from criminal prosecution.[121]

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114. *See* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTOR FUNCTION, Standards No. 3-4.4, No. 3-5.6, No. 3-5.7 (AM. BAR ASS'N, 4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/resources/standards/prosecution-function [https://perma.cc/3HXV-JPSQ]; *see also* Alexandra Natapoff, *Misdemeanor Declination: A Theory of Internal Separation of Powers*, 102 TEX. L. REV. 937, 941–42 (2024) (discussing the unique power of prosecutorial declinations).

115. *See generally* Murray, *supra* note 12 (developing a theory of democratically justified prosecutorial nullification).

116. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 130–37 (2020).

117. The literature on mass incarceration is too expansive to recount here, but scholars have explored a variety of causes and drivers. *See, e.g.*, *id.* at 5 (describing mass incarceration as the product of institutional racism); RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 5–6 (2019) (explaining how populist punitive policies have driven mass incarceration).

118. Regarding our overreliance on policing to address social problems, see Farhang Heydari, *The Invisible Driver of Policing*, 76 STAN. L. REV. 1, 5 (2024) ("[T]his Article identifies a pattern of agencies shying away from exercising their civil regulatory authority over private industry and instead addressing the social problems under their respective purviews through criminal law enforcement."); Vincent M. Southerland, *The Master's Tools and a Mission: Using Community Control and Oversight Laws to Resist and Abolish Police Surveillance Technologies*, 70 UCLA L. REV. 2, 10 (2023) ("Policing and caging people is the knee jerk response to all manner of social problems . . . ."); Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925, 986 (2021) ("The police themselves realize all too well that they are at best a band-aid on the chronic social problems they encounter.").

119. Many scholars view liberty concerns as the primary driver of separation of powers. *See, e.g.*, F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 306–07 (2021); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1012–14 (2006). And police scholars find police discretion desirable. *See* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 589 (1997) ("Police scholars recognize that 'it is especially desirable' in the community policing context 'that officers have the option, except when a serious offense is committed, to choose not to enforce the law if another alternative appears more effective.'" (quoting Herman Goldstein, *Toward Community-Oriented Policing: Potential, Basic Requirements, and Threshold Questions*, 33 CRIME & DELINQ. 6, 23 (1987))).

120. *See supra* note 105 and accompanying text.

121. *See* Bowers, *supra* note 28, at 1670–71 ("Law and equity can and do coexist harmoniously within justice systems. . . . [I]t is no sign of the deficiency of law that the system permits—and indeed requires—some amount of equitable exception (particularly in petty cases). It is, instead, a sign only of the complexity of existence." (footnote omitted)); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679, 700–01 (1995); Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1336 (2008)

At the same time, however, there are many circumstances in which nonenforcement creates real threats to liberty. The most obvious historical examples of this are the Reconstruction- and Jim Crow-era sheriffs who ignored racialized violence.[122] Additional examples are easy to find: a sheriff who chooses not to pursue charges against individuals who injure civil demonstrators;[123] sheriffs who decline to charge crimes of domestic violence;[124] sheriffs who ignore potential hate crimes.[125]

In these circumstances, nonenforcement can leave victims feeling vulnerable, unprotected, and without recourse. This itself is a threat to liberty and personal autonomy. Crime victimization has a range of negative impacts on a person's quality of life, including "substantial and lasting physical (and mental) health impacts."[126] There is also evidence that victimization causes tangible changes in people's lives: they are more likely to move, they take more sick time, and they expereince an overall decrease in earnings.[127]

Nonenforcement can also create cycles of victimization. It can embolden lawbreakers and invite repeated violations.[128] Evidence from college campuses, for example, finds that the vast majority of sexual assaults are committed by a small

(arguing that "unreviewable decisions to grant mercy should still have a place in the criminal justice system").

122. *See* Fox, *supra* note 87; *infra* note 175 and accompanying text.

123. *See* Dusty Lane, *5 Sheriff's Deputies Disciplined for Not Arresting Man for Assault at Trump Rally*, FOX 13 SEATTLE (Mar. 16, 2016, 6:24 PM), https://www.fox13seattle.com/news/5-sheriffs-deputies-disciplined-for-not-arresting-man-for-assault-at-trump-rally [https://perma.cc/4S2H-CLTB].

124. *See* Max Marin, *Philadelphia Sheriff's Office Seizes Firearms in Just 13% of Domestic-Abuse Cases. Victims Say It's Unacceptable*, PHILA. INQUIRER (July 23, 2023, 5:08 AM), https://www.inquirer.com/news/philadelphia/domestic-violence-philadelphia-protective-order-act-79-sheriffs-office-20230723.html; Emily M. Farris & Mirya R. Holman, *Public Officials and a "Private" Matter: Attitudes and Policies in the County Sheriff Office Regarding Violence Against Women*, 96 SOC. SCI. Q. 1117, 1130 (2015) ("[W]e provide clear evidence that . . . there remains a portion of sheriffs who continue to believe in domestic violence and rape myths, including that some women invite sexual assault on themselves, and that domestic violence may be a result of income, education, and alcohol and drug use.").

125. *See Minami Tamaki LLP and Szeto-Wong Law File Civil Rights Lawsuit Alleging Sutter County Delayed Hate Crime Investigation*, MINAMI TAMAKI LLP (May 19, 2022), https://www.minamitamaki.com/2022/05/minami-tamaki-llp-and-szeto-wong-law-file-civil-rights-lawsuit-alleging-sutter-county-delayed-hate-crime-investigation [https://perma.cc/J65F-L5B5]. There are also examples of prosecutors refusing to charge cases as hate crimes. *See* Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 863, 881 (2014).

126. Anna Bindler, Nadine Ketel & Randi Hjalmarsson, *Costs of Victimization*, *in* HANDBOOK OF LABOR, HUMAN RESOURCES AND POPULATION ECONOMICS 15 (2020); *see also* Rochelle F. Hanson, Genelle K. Sawyer, Angela M. Begle & Grace S. Hubel, *The Impact of Crime Victimization on Quality of Life*, 23 J. TRAUMATIC STRESS 189, 194 (2010) (concluding "studies indicate that crime victimization is associated with changes and impairments in functioning that adversely impact quality of life" and advocating for further research); Dean G. Kilpatrick, Benjamin E. Saunders, Lois J. Veronen, Connie L. Best & Judith M. Von, *Criminal Victimization: Lifetime Prevalence, Reporting to Police, and Psychological Impact*, 33 CRIME & DELINQ. 479, 479 (1987) ("Of all crime victims [sampled], 27.8% subsequently developed posttraumatic stress disorder (PTSD)." (emphasis omitted)).

127. Bindler et al., *supra* note 126, at 20.

128. *See* PAUL H. ROBINSON, JEFFREY SEAMAN & MUHAMMAD SARAHNE, CONFRONTING FAILURES OF JUSTICE: GETTING AWAY WITH MURDER AND RAPE 70 (2024). Although I would not overstate the deterrent effect of enforcement, for a discussion of some of the relevant empirical studies, see *id.* at 67–

number of offenders.[129] Nonenforcement also can create a misleading picture about the impact and frequency of crime.[130] Imagine a policing agency that frequently fails to take reports of sexual assaults, either convincing victims not to make reports or misclassifying the offense. In that jurisdiction, sexual assault crime rates appear low, which in turn may encourage authorities to devote fewer resources or discourage victims from reporting.

At scale, nonenforcement risks creating "entrenched patterns of victimization."[131] Nonenforcement can send an official message of disregard and create an impression that certain types of victimization are unworthy of government intervention.[132] Domestic violence was (and perhaps still is) a prime example of this.[133] When communities (or subpopulations) see nonenforcement, they are also less likely to cooperate with law enforcement efforts,[134] again creating a cycle of crime and victimization. Sexual assaults are woefully underreported in part because of the "predictability of a non-response" by authorities.[135]

Moving beyond particular victims or particular categories of crimes, granting law enforcement authority to choose their enforcement targets will not necessarily result in less enforcement overall. One might hope that discretion would translate to less attention on low-level offenses in favor of more serious investigations, but experience teaches differently. The New York Police Department's use of "stop, question and frisk" is one example.[136] The practice was justified as a tactic deployed at an officer's discretion in order to fight violent crime, but in practice, officers ended up conducting huge numbers of stops for low-level offenses.[137] Similarly, when jurisdictions implement programs that rely on traffic stops to

72 and Shaun Ossei-Owusu, *Gimme Some More: Centering Gender and Inequality in Criminal Justice and Discretion Discourse*, 18 AM. U. J. GENDER SOC. POL'Y & L. 607, 617–18 (2010).

129. *See* John D. Foubert et al., *Is Campus Rape Primarily a Serial or One-Time Problem? Evidence from a Multicampus Study*, 26 VIOLENCE AGAINST WOMEN 296, 304 (2020).

130. *See* Ossei-Owusu, *supra* note 128, at 617–18 ("Over-policing and profiling dominate the discussion on race, class, gender, and crime, but underenforcement of the law is an equally, if not more egregious, phenomenon. Specifically, underenforcement is not subject to review; formal statistics of underenforcement are not kept; underenforcement decreases the amount of crime that is officially recognized; and it increases real crime by giving some offenders solace in knowing that certain crimes won't be investigated rigorously." (footnotes omitted)).

131. Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1748 (2006).

132. *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 29–30 (1997).

133. *See* G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 239–41 (2005).

134. *See* Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 265 (2008) (discussing how law enforcement's loss of legitimacy can lead to less cooperation).

135. Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1292–93 (2016).

136. *Stop, Question and Frisk*, NYC CIVILIAN COMPLAINT REV. BD., https://www.nyc.gov/site/ccrb/investigations/stop-question-and-frisk.page [https://perma.cc/BLH4-4F96] (last visited Mar. 28, 2025).

137. *See* The New York Times, *N.Y. Region: Stop and Frisk in Brownsville, Brooklyn | The New York Times*, YOUTUBE, at 2:52 (July 12, 2010), https://www.youtube.com/watch?v=iW8ZXrps9ys (interviewing officers who conducted stops for "throwing a cigarette on the sidewalk or spitting").

fight crime, officers tend to make increasing numbers of stops for non-public-safety violations.[138]

Sheriffs, in particular, are a poor bet to exercise enforcement discretion in a decarceral manner. As discussed above, rural incarceration rates are spiking,[139] even in the face of downward trends in urban areas.[140] Because a sheriff's budget is tied substantially to the jails they operate, sheriffs have a financial incentive to keep their jails full and even to build new ones.[141] And, as discussed below, sheriff candidates tend to favor greater enforcement more than their communities do.[142]

In sum, the liberty-enhancing effects of nonenforcement are highly case-specific. Given the sheriff's institutional role as enforcer and jailer, nonenforcement authority seems unlikely to result in substantial decarceration.

3. Arbitrariness Concerns

Although the democracy and liberty calculus of sheriff nullification is contestable, what is less contestable is the risk created by leaving enforcement decisions to the sole discretion of the sheriff. Vesting such broad authority in a single elected official raises concerns that the sheriff's decisionmaking could be influenced by political considerations or personal biases rather than impartial application of the law. In the criminal context, our system of checks and balances exists in large part to mitigate the chance that law enforcement will exercise its authority in arbitrary and discriminatory ways[143]—that is, without adequate and legitimate justification. Without robust checks and balances, nonenforcement authority could be abused or applied inconsistently, undermining equal protection and due process principles that are fundamental to the rule of law.

Concerns about arbitrariness often arise in the context of government *action*, such as the imposition of criminal sanctions.[144] This is certainly true of the Fourth Amendment's protections, which the Supreme Court has stated repeatedly are

138. *See* Heydari, *supra* note 118, at 6–8 (discussing pretextual stop programs underwritten by the U.S. Department of Transportation); *see also* Farhang Heydari, *Rethinking Federal Inducement of Pretext Stops*, 2024 WIS. L. REV. 181, 204–35 (2024) (examining the federal government's broader role in promoting the use of pretextual stops).

139. *See supra* text accompanying note 55.

140. KANG-BROWN & SUBRAMANIAN, *supra* note 55, at 6–7.

141. *See* Littman, *supra* note 53, at 920, 925–27.

142. *See* Thompson, *supra* note 42, at 223, 233.

143. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 468 (2003) ("The concern for arbitrariness can be seen as one of the primary evils at which our traditional checks and balances are aimed."). *See generally* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (Illini Books 1971) (1969) (discussing the need to control discretionary applications of the law in various contexts, including arrest and criminal prosecutions).

144. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1676 (1975) (discussing the need to protect individuals from arbitrary agency actions, noting "individual autonomy is vulnerable to the imposition of sanctions at the unruled will of executive officials"); Abraham D. Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1374–75 (1972).

meant to protect individuals against the arbitrary exercise of police investigative and arrest authority.[145] It is a mistake, however, to think that concerns for arbitrariness subside in the context of nonenforcement.[146]

When government is not required to justify its choices, there is the risk that it will act in ways that favor groups in power and disadvantage marginalized ones.[147] Historically, in the law enforcement context, this dynamic manifested in law enforcement's failure to prevent or prosecute (and sometimes facilitate) lynchings and other forms of racialized violence by white Americans against Black Americans.[148] Today, enforcement decisions continue to drive disparate outcomes—evidence suggests that law enforcement more often exercises its discretion not to charge, or to charge more leniently, in favor of white individuals.[149] Racially disparate nonenforcement also manifests in disparities between traffic citations and warnings, again favoring whites.[150] And race is not the only point of arbitrary nonenforcement. In Nashville, for example, during the height of the COVID-19 pandemic, police used nonenforcement discretion widely in the face

145. *See, e.g.*, Carpenter v. United States, 585 U.S. 296, 303 (2018); Camara v. Mun. Ct. of the City & Cnty. of S.F., 387 U.S. 523, 528 (1967); Boyd v. United States, 116 U.S. 616, 630 (1886).

146. *See* Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1503 (2007) ("[E]nforcement discretion can be understood as a function of both affirmative and negative choices. By 'affirmative choice,' I mean the authority of police affirmatively to subject people to enforcement procedures. By 'negative choice,' I mean the authority of police to decline to subject people to enforcement procedures even when police are legally authorized to enforce the laws against them.").

147. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 4 (2011) ("Discretion and discrimination travel together.").

148. *See* Holliday v. Fields, 275 S.W. 642, 647 (Ky. 1925) ("[T]here was serious criticism of the laxness of law enforcement, and of the prevalence of the crime of lynching, and the amendment was enacted and adopted in obedience to a popular demand for the correction of these abuses."); HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875, at 425 (1982) (discussing nonenforcement when whites perpetrated offenses against Blacks); *see also infra* note 175.

149. *See* EMILY OWENS ET AL., QUATTRONE CTR. FOR THE FAIR ADMIN. OF JUST., U. PA. L. SCH., EXAMINING RACIAL DISPARITIES IN CRIMINAL CASE OUTCOMES AMONG INDIGENT DEFENDANTS IN SAN FRANCISCO 45 (2017), www.law.upenn.edu/live/files/6793-examining-racial-disparities-may-2017-full [https://perma.cc/BLZ5-B2B4] ("[C]omparing the seriousness of cases booked against Black and White defendants accused of the same broad crime in the same neighborhood reveals that, in certain police districts, particularly the Bayview and Southern districts, black residents are booked for more, and more serious charges than white residents."); NAZGOL GHANDNOOSH & CELESTE BARRY, SENT'G PROJECT, ONE IN FIVE: DISPARITIES IN CRIME AND POLICING 3 (2023), www.sentencingproject.org/reports/one-in-five-disparities-in-crime-and-policing [https://perma.cc/6AJW-MR3A] ("Black and white Americans use illicit drugs at roughly similar rates, but about one in four people arrested for drug law violations are Black, although Black people make up 14% of the U.S. population."); Emmanuel Mauleón, *Legal Endearment: An Unmarked Barrier to Transforming Policing, Public Safety, and Security*, 112 CAL. L. REV. 755, 778–79 (2024) ("[T]o the extent that criminality attaches to one's identity, not when one breaks the law, but rather when one is pursued for law enforcement, discretionary nonenforcement withholds the production of White criminality.").

150. *See* Rudi Keller, *Report Shows Black Drivers in Missouri More Likely to Be Ticketed, Arrested*, MO. INDEP. (June 3, 2023, 5:55 AM), https://www.missouriindependent.com/2023/06/03/report-shows-black-drivers-in-missouri-ticketed-arrested-at-much-higher-numbers-than-whites [https://perma.cc/FB32-SP2G] ("White motorists were released with a warning or no action after more than half of those stops, with just under 40% receiving a citation and arrests in 3.65% of cases. Black drivers received a citation after almost 58% of stops, with 5.26% arrested.").

of violations of the city's public health orders; the only two arrests made for violations of COVID restrictions were of homeless individuals.[151] In short, leaving nonenforcement unchecked raises the risk that government will make arbitrary and illegitimate decisions.

The lack of protection and risks to personal liberty that arise from nonenforcement do not fall equally across society. Rather, they disproportionately impact already marginalized groups.[152] Often, the groups that suffer are non-white, less afluent, and less powerful.[153] In 2021, for example, Black women and girls were killed at a 51% higher rate than 2019, while the number of unsolved homicides in this demographic rose by 89% between 2018 and 2021, "a far bigger increase than any other demographic group."[154] The crisis in unsolved murdered and missing Native American women and girls bears similar hallmarks of disparate impact from nonenforcement.[155]

Arbitrary nonenforcement of criminal laws causes harm beyond immediate victims. It perpetuates the impression (perhaps accurately) that criminal enforcement operates as a mere reflection of subjective preferences, rather than more objective considerations of utility or desert. This sense of lawlessness undermines the criminal law's legitimacy,[156] which is a key reason why people obey the law to begin with.[157]

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151. Mariah Timms, *Nashville's Public Health Orders Have Sent Two Homeless Men to Jail—and So Far No One Else*, TENNESSEAN (Aug. 6, 2020, 4:54 PM), www.tennessean.com/story/news/crime/2020/08/06/nashville-mask-mandate-arrest-homeless-man-highlights-enforcement-disparity-sparks-outcry/3309150001 [https://perma.cc/N89Q-8EW6].

152. *See* Natapoff, *supra* note 131, at 1719 ("Over- and underenforcement are twin symptoms of a deeper democratic weakness of the criminal system: its non-responsiveness to the needs of the poor, racial minorities, and the otherwise politically vulnerable. Because of this weakness, justice and lawlessness are distributed unevenly and unequally across racial and class lines, crime remains rampant in some communities but not others, and some people can trust and rely on law enforcement while others cannot.").

153. *See* KENNEDY, *supra* note 132, at 19 ("[T]he principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws.").

154. Zusha Elinson & Dan Frosch, *Murders of Black Women Rose During the Pandemic. The Solving of Their Cases Fell*, WALL ST. J. (Dec. 31, 2022, 9:00 AM), https://www.wsj.com/articles/black-women-homicides-clearance-rates-murders-11672431377; *see also* Gian Maria Campedelli, *Homicides Involving Black Victims Are Less Likely to Be Cleared in the United States*, 62 CRIMINOLOGY 90, 116 (2024).

155. *See* Morgan B. Hawes et al., *Understanding the Missing and Murdered Indigenous Women Crisis: An Analysis of the NamUs Database*, 34 CRIM. JUST. POL'Y REV. 184, 184 (2023) ("American Indian/Alaska Native women are 135% more likely to be listed within the 'unidentified remains' cases than women of other races. The results also showed that in states with relatively high urban population densities, women of all races were 250% more likely to be found dead and remain unidentified than women in places with a low urban population.").

156. *See* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 138–39 (1997) ("A consistent strain of our constitutional politics asserts that legitimacy flows from 'the rule of law.' By that is meant a system of objective and accessible commands, law which can be seen to flow from collective agreement rather than from the exercise of discretion or preference by those persons who happen to be in positions of authority. By reducing discretion, and thereby the possibility for the exercise of the individual preferences of officials, specific rules reinforce the rule of law.").

157. *See generally* Paul H. Robinson & Lindsay Holcomb, *The Criminogenic Effects of Damaging Criminal Law's Moral Credibility*, 31 S. CAL. INTERDISC. L.J. 277 (2022).

In short, a sheriff's choices about when not to enforce the law impose serious consequences—on democratic governance, on personal liberty, and on the most vulnerable groups in our society. The question becomes whether there exist adequate checks on the sheriff's exercise of discretion to mitigate these risks. Part II explores political checks and ultimately finds them lacking. Part III, in turn, examines the need for legal checks—judicially enforceable rules to govern the sheriff's nonenforcement decisions.

II. THE LIMITS OF POLITICAL ACCOUNTABILITY

As a general matter, one can consider two types of checks on a sheriff's nonenforcement authority: legal rules enforceable via judicial review, and political checks dependent on non-judicial actors.[158] Although Part III addresses legal checks in detail, the traditional view is that enforcement discretion primarily is checked via political processes.[159] This Part evaluates three of those political checks in the context of the sheriff and details their shortcomings. Section II.A explores sheriff elections and democratic accountability. Section II.B considers the power of other county officials to check the sheriff, primarily through budget authority. Section II.C considers the possibility of other law enforcement agencies stepping in for the sheriff. Having found these checks wanting, Part III turns to legal checks that existed historically but appear long forgotten.

A. ELECTIONS AND DEMOCRATIC ACCOUNTABILITY

Many sheriffs argue that their elected status provides democratic legitimacy—proof of popular support—for their enforcement (and nonenforcement)

Belief in the law's legitimacy is a key part of why people obey the criminal law. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3–4 (2006); Andrew V. Papachristos, Tracey L. Meares & Jeffrey Fagan, *Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders*, 102 J. CRIM. L. & CRIMINOLOGY 397, 401 (2012).

158. One could also imagine internal bureaucratic checks, but given the sheriff's near absolute authority over deputies, this route offers little meaningful resistance to a sheriff's nonenforcement decisions. *See* Jonathan Drew, *Court Upholds Sheriff's Firing of Deputies Who Didn't Donate*, BLUERIDGENOW (Jan. 29, 2016, 2:03 PM), https://www.blueridgenow.com/story/news/2016/01/29/court-upholds-sheriffs-firing-of-deputies-who-didnt-donate/28336451007 [https://perma.cc/2LXL-CUJP] ("The state Supreme Court on Friday upheld the firings of sheriff's deputies who declined to donate to their boss's political campaign, ruling that they aren't covered by a state law protecting county workers from political coercion."); Emily M. Farris & Mirya R. Holman, *The Political Power of Sheriffs Is Rarely Seriously Challenged*, GOVERNING MAG., Summer 2024, at 38, 39, https://online.flippingbook.com/view/1037261407/38 [https://perma.cc/EX2Y-W5NE] ("The need to suppress potential opponents from within their own subordinate ranks leads to a wide set of bad behaviors by sheriffs. Deputies who've run against their own bosses have faced demotion and sometimes been fired. Deputies do not even need to actually run for office to face these actions from a sheriff; many suffer consequences for simply supporting a sheriff's opponent. When a sheriff gets sued for retaliation, it's the county that pays the settlement, not the sheriff himself.").

159. *See* Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 MINN. L. REV. 843, 846 (2018) ("Decisions *not* to arrest or charge are virtually immune from judicial review or other nonpolitical oversight."); Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 551–52 (2000) ("Today's practice of law enforcement is atheoretical . . . . The general motivation behind the shape of enforcement is practical and political, the allocation of limited resources coupled with the desire of elected officials to remain in office.").

policies.[160] These sheriffs contend that if their constituents did not approve of their nonenforcement practices, they would vote the sheriffs out.[161] This suggestion is not entirely spurious: In recent years, a few sheriff elections have turned on the nature of the sheriff's enforcement policies,[162] suggesting that elections might provide some check, at least in cases of extreme public disapproval.

But, in truth, as scholars have documented, sheriff elections give more of a veneer of political accountability than any real constraint.[163] As a general matter, rural elections are "low turn-out affairs, with local politics controlled by business interests."[164] Sheriffs in particular often run unopposed and enjoy an incumbency advantage that "far exceeds that of other local offices" and even members of Congress.[165] This advantage is at its apex in smaller jurisdictions, where sheriffs often operate.[166] As a result, sheriffs enjoy incredible job security, with average tenures that far exceed those of municipal police executives.[167]

Furthermore, there is evidence that voter preferences have limited influence on sheriff policy. One detailed examination of sheriff policies on immigration detention found that sheriffs took similar positions, regardless of their party affiliation.[168] These choices could not be explained by voter preferences—voters exhibited a range

160. *See* NAT'L SHERIFFS' ASS'N, PRESERVE THE OFFICE OF SHERIFF BY CONTINUING THE ELECTION OF OUR NATION'S SHERIFFS 1–2, https://sheriffs.org/sites/default/files/tb/Preserving_the_Office_of_Sheriff_Through_Election.pdf [https://perma.cc/DAH9-EZ96] (last visited Mar. 28, 2025) ("The elected Office of Sheriff is 'directly' accountable and responsible to eligible voters and an 'elected' Office of Sheriff is not directly controlled by local county board/commissioners, supervisors, mayor, etc."); Farris & Holman, *supra* note 158, at 39 ("Sheriffs argue that elections keep the office independent of other influences and make them directly accountable to voters."); *cf.* WXIA Staff, *Who Holds the Sheriff Accountable?*, 11ALIVE (May 7, 2015, 10:45 PM), https://www.11alive.com/article/news/local/riverdale-jonesboro/who-holds-the-sheriff-accountable/85-130331850 [https://perma.cc/99TA-RE7M] ("Because he is an elected official, Sheriff Victor Hill does not face the same scrutiny as other heads of law enforcement agencies in the state. Only voters can hold him accountable.").

161. NAT'L SHERIFFS' ASS'N, *supra* note 160, at 2–3; *see also* PISHKO, *supra* note 22, at 21 ("The [constitutional sheriffs] ideology echoes the same themes that sheriffs of both political parties use to resist reform and preserve their political power: the carefully built myth that sheriffs are uniquely accountable to voters and, as a result, do not require additional oversight."); *id.* at 135 ("The job of sheriff, I have been told many times over, is unique because of the closeness between the sheriff and the voters.").

162. Littman, *supra* note 53, at 940–41 (discussing recent efforts around sheriff elections).

163. In their recent book, political scientists Emily M. Farris and Mirya R. Holman forcefully make this point. *See* FARRIS & HOLMAN, *supra* note 21, at 36–63.

Similar concerns have been raised about prosecutor elections. *See* Jennifer E. Laurin, *Progressive Prosecutorial Accountability*, 50 FORDHAM URB. L.J. 1067, 1077 (2023); Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1543 (2020).

164. Littman, *supra* note 53, at 938 (citing Rick Su, *Democracy in Rural America*, 98 N.C. L. REV. 837, 856–58, 886 (2020)).

165. *See* Michael Zoorob, *There's (Rarely) a New Sheriff in Town: The Incumbency Advantage for Local Law Enforcement*, ELECTORAL STUD., Nov. 2022, at 1, 2–3, 7.

166. *See* Maria Ponomarenko, *The Small Agency Problem in American Policing*, 99 N.Y.U. L. REV. 202, 243 (2024) (citing J. ERIC OLIVER, SHANG E. HA & ZACHARY CALLEN, LOCAL ELECTIONS AND THE POLITICS OF SMALL-SCALE DEMOCRACY 125 (2012)).

167. Tomberlin, *supra* note 21, at 129, 132, 143; *see also* Thompson, *supra* note 42, at 224, 235 (describing practical difficulties in ousting elected sheriffs from office).

168. Thompson, *supra* note 42, at 233–34.

of preferences and other elected officials followed suit, but not sheriffs.[169] The results suggest that the policy views of sheriff candidates are ideologically homogenous—far more than their electorate.[170] This constraint limits the electorate's ability to influence sheriff policies.[171] Perhaps unsurprisingly, therefore, sheriffs report low levels of solicited community engagement on important matters of policy.[172]

But even if sheriff elections were robust, they are unlikely to protect the politically powerless.[173] The majority of a community may well approve of the sheriff nullifying certain laws.[174] Think here of the Reconstruction-era sheriffs who entrenched white power and permitted violence against Black members of their community.[175] These sheriffs were acutely aware that standing in the way of these practices meant risking their careers.[176] Or consider the sheriff who takes a hands-off approach to domestic

169. *See id.* at 223.

170. *See id.*

171. "[C]andidates for sheriff need law enforcement credentials to run," and this requirement produces candidates that fall within a "narrow band of the ideological spectrum." *Id.* at 224.

172. *See* BROOKS, *supra* note 56, at 19 (according to the Bureau of Justice Statistics, in 2020 "[m]ore than a third of all sheriffs' offices solicited community feedback on prioritizing crime or disorder problems (41%), evaluating deputy or agency performance (39%), assessing community trust (38%), informing agency policies and procedures (35%), and allocating resources to neighborhoods (34%) in 2020" (citation omitted)).

173. *See* William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 10–11 (1960) (criticizing vagrancy laws on the ground that their enforcement tends to fall on minorities that lack political power). Some have called for the elimination of sheriff elections entirely. *See* Janet C. Hoeffel & Stephen I. Singer, *Elections, Power, and Local Control: Reining in Chief Prosecutors and Sheriffs*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 319, 327 (2015).

174. *Cf.* Ponomarenko, *supra* note 166, at 235 ("The problem is that the people who bear the burdens of policing are not always the same people who have the ear of city officials or with whom officers are likely to interact with in their day-to-day lives. The more that local communities are stratified . . . and the more that the specific harms of policing fall on those who are most marginalized, the less likely these street-level checks are likely to work.").

175. Scholars and historians have collected extensive records of sheriffs who not only declined to pursue racial violence but also facilitated it. *See, e.g.*, MANFRED BERG, POPULAR JUSTICE: A HISTORY OF LYNCHING IN AMERICA 155 (2011) (noting sheriffs were "almost immune from federal or state interference and could count on the refusal of all-white local juries in the South to convict officers for aiding a lynch mob"); Emma Coleman Jordan, *A History Lesson: Reparations for What?*, 58 N.Y.U. ANN. SURV. AM. L. 557, 585–86 (2003) (collecting examples of sheriff complicity with lynchings and nonenforcement from Mississippi, Louisiana, Missouri, South Carolina, and other places); Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 L. & INEQ. 263, 300 (2003) ("Local law enforcement routinely failed to participate in efforts to identify and try lynchers for their crimes."); Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 40–41 (1996) ("[T]he paucity of law enforcement resources, while perhaps contributing to the states' failure to prevent lynchings, does not tell the whole story. Local sheriffs harbored indifference, or outright hostility, toward their duties to prevent mobs from killing blacks and to apprehend lynchers.").

176. Holden-Smith, *supra* note 175, at 40–41 ("Politics certainly contributed to the Southern states' failure to protect blacks from lynching and prosecute white mob members. Whites voted; blacks could not. The local sheriffs, prosecutors, and judges were usually elected officials. They were aware that any vigorous protection of blacks from white violence would pave their way out of office. Lynching, after all, enjoyed widespread support among Southern whites.").

violence[177] or violence against civil demonstrators;[178] or sheriffs who ignored prohibitions on alcohol, gambling, or prostitution.[179] Each of these examples may well find popular support among the sheriff's electorate. And yet, in each case, nonenforcement has its victims. Some of those victims suffer violence or injustice,[180] others simply find their policy preferences ignored.[181] In short, local democracy is unlikely to provide a consistent cure to the ills of nonenforcement.

B. SEPARATION OF POWERS AT THE COUNTY LEVEL

Like elections, other county-level officials provide little constraint on the sheriff. In many states, the office of the sheriff is established by the state constitution[182]—typically alongside other local officials, such as the county commissioners and county attorney.[183] This constitutional structure, as interpreted by state courts, puts the office of the sheriff beyond the reach of other officials that might serve as a moderating influence.[184] For example, sheriffs generally cannot be removed by fellow county officials.[185] The sheriff is considered to have "exclusive power [vis-à-vis other elected county officials] to determine law enforcement priorities."[186] Meaningful civilian oversight over sheriffs is rare.[187] Add to this the decline in rural

177. *See supra* note 124 and accompanying text.

178. *See supra* note 123 and accompanying text.

179. *See supra* notes 35, 99–100, 102–03, and accompanying text.

180. *See supra* note 175.

181. *See supra* note 169 and accompanying text.

182. Many states establish the elected office of the sheriff in their state constitution. *See, e.g.*, ARIZ. CONST. art. XII, § 3; CAL. CONST. art. XI, §§ 1(b), 4(c); COLO. CONST. art. XIV, § 8; FLA. CONST. art. VIII, § 1(d); GA. CONST. art. IX, § 1, ¶ III(a); ILL. CONST. art. VII, § 4(c); MD. CONST. art. IV, pt. VII, § 44; ME. CONST. art. IX, § 10; MICH. CONST. art. VII, § 4; MISS. CONST. art. V, § 135; N.H. CONST. art. LXXI; N.J. CONST. art. VII, § 2, ¶ 2; N.C. CONST. art. VII, § 2; N.D. CONST. art. VII, § 8; OKLA. CONST. art. XVII, § 2; OR. CONST. art. VI, § 6; VT. CONST. ch. II, § 50; VA. CONST. art. VII, § 4; WASH. CONST. art. XI, § 5; W. VA. CONST. art IX, § 1; WIS. CONST. art. VI, § 4(b).

183. *See, e.g.*, State *ex rel.* Johnston v. Melton, 73 P.2d 1334, 1336–37 (Wash. 1937) ("The people are the source of all governmental power, and, in setting up a constitutional government, they provided that certain of their powers should be exercised through county governments, governments close to the people, and they further provided, in section 5 of article 11 of the Constitution, that the powers to be thus exercised through county governments should be exercised only through officials elected by themselves. In section 5 of article 11, they named the officers whom they then thought needful, county commissioners, sheriffs, . . . prosecuting attorneys . . . .").

184. *See* Tomberlin, *supra* note 21, at 129–30, 130 n.109.

185. *Id.* at 129–30.

186. Gregory Howard Williams, *Police Rulemaking Revisited: Some New Thoughts on an Old Problem*, 47 LAW & CONTEMP. PROBS. 123, 128 (1984) ("In each county, the sheriff had exclusive power to determine law enforcement priorities, and any controls on the sheriff's power were indirect. No state or local official had the power specifically to direct the sheriff in the performance of his day-to-day duties."); *see also* Wolfe v. Huff, 205 S.E.2d 254, 255 (Ga. 1974) (enjoining county commissioners, who could properly establish a new police force, from directly interfering with the sheriff or his deputies).

187. *See* Sharon R. Fairley, *Survey Says: Powerful Sheriffs Successfully Limit the Rise of Civilian Oversight*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 803, 817 (2021); *see also* BROOKS, *supra* note 56, at 2 ("In 2020, about 10% of all sheriffs' offices had a civilian complaint review board or agency."); *id.* ("About 30% of sheriffs' offices required investigations by an external agency for use of force resulting in death, and 37% of all deputies worked in such offices.").

journalism,[188] limiting yet another potential source of information and accountability for the sheriff.

Because direct interference with enforcement policy is impermissible, the sheriff's budget is the county's primary form of leverage.[189] Unsurprisingly, county commissioners and sheriffs frequently disagree on the appropriate level of funding that the county must provide.[190] As a general principle, county governments are not obligated to fund sheriffs at their desired level and have some discretion in setting funding levels.[191] States have developed a variety of standards to assess, in particular cases, the adequacy of a sheriff's budget. Many appear quite permissive. Some courts will disturb a county budget only if "clearly inadequate" for performance of the sheriff's statutory duties.[192] In other states, courts require funding that permits sheriffs to perform their duties at a "minimally serviceable" level.[193] In other states, funding decisions are subject to "arbitrary and capricious"

Attempts to establish an oversight entity with authority to conduct independent investigations into the conduct of the sheriff's office have been successfully challenged as inconsistent with the office's status under the state constitution. *See, e.g.*, Demings v. Orange Cnty. Citizens Rev. Bd., 15 So. 3d 604, 605–06 (Fla. Dist. Ct. App. 2009).

188. *See* MARNIE WERNER, CTR. FOR RURAL POL'Y & DEV., THE DISAPPEARING RURAL NEWSPAPER 2 (2023), https://www.ruralmn.org/the-disappearing-rural-newspaper [https://perma.cc/Q4AK-625E].

189. *See* Rick Su, Anthony O'Rourke & Guyora Binder, *Defunding Police Agencies*, 71 EMORY L.J. 1197, 1219–20 (2022); State v. Winne, 96 A.2d 63, 71 (N.J. 1953) ("In contrast, the sheriff, although he possesses by the common law broad powers of law enforcement in his county, is not given the right to incur expenses in the prosecution of criminals that has been granted to the county prosecutor. The inevitable result of this is that his work as a law enforcement officer has been rendered less effective than that of the county prosecutor, without, however, any diminution of his powers or responsibilities.").

190. *See, e.g.*, Alyse Jones, *Sheriff's Office Budget Battle Continues in Cleveland County*, KOCO NEWS 5 (Sept. 25, 2024, 10:06 PM), https://www.koco.com/article/sheriffs-office-budget-battle-continues-in-cleveland-county/62376851 [https://perma.cc/2PQN-T3ZQ]; Jeff Hager, *Harford County Sheriff Disagrees with Budget Cuts Proposed by County Executive*, WMAR 2 NEWS (Apr. 26, 2023, 7:25 PM), https://www.wmar2news.com/local/harford-county-sheriff-disagrees-with-budget-cuts-proposed-by-county-executive [https://perma.cc/8HP2-RGSW]; Chandler Watkins, *Clackamas Co. Sheriff Says County Cut Her Office out of Budgeting Process*, FOX 12 OR. (May 20, 2023, 1:34 AM), https://www.kptv.com/2023/05/20/clackamas-co-sheriff-says-county-cut-her-office-out-budgeting-process [https://perma.cc/7EQL-Q7NP]; Catalina Gaitán, *Oregon Funding for Supervising, Jailing Felons Locally Is Inadequate, Sheriff Says*, OREGONLIVE (Mar. 26, 2024, 11:58 AM), https://www.oregonlive.com/news/2023/08/oregon-funding-for-supervising-jailing-felons-locally-is-inadequate-sheriff-says.html.

191. *See, e.g.*, Chaffin v. Calhoun, 415 S.E.2d 906, 908 (Ga. 1992) ("This does not mean, however, that county commissioners must approve the budget that a sheriff proposes.").

192. *See, e.g.*, Cnty. Comm'n v. Cummings, 720 S.E.2d 587, 595 (W. Va. 2011) ("In this case, the record is devoid of any evidentiary basis for the trial court's conclusion that the Sheriff's statutory duties will be affected by the reduction. Moreover, absent evidence that a county commission has budgeted a clearly inadequate sum for the performance of the statutory duties of a county officer, a trial court lacks the authority to direct a county commission to meet for the purpose of preparing a revised budget.").

193. *See, e.g.*, Lucas v. Wayne Cnty. Bd. of Comm'rs, 385 N.W.2d 267, 270 (Mich. Ct. App. 1983) ("The issue is whether the elimination of the division in question renders plaintiff unable to provide statutorily mandated services at a 'minimally serviceable' level . . . . [A] 'serviceable' level of funding need not be an optimal level; in order for a level of funding to be deemed less than 'serviceable', there must be some showing of an 'emergency immediately threatening the existence of the function.'" (quoting Cahalan v. Wayne Cnty. Bd. of Comm'rs, 286 N.W.2d 62, 67 (Mich. Ct. App. 1979))).

review.[194] Others combine these standards.[195]

The problem with relying on budgetary control, however, is that it is unlikely to provide a sufficiently granular constraint to curb nonenforcement discretion. Some sheriff tactics—particularly those that rely on significant personnel power,[196] incarceration,[197] or new deployments of technology[198]—are likely to be somewhat cost sensitive. But constraining the purchase of new equipment is not the same as using a budget to control nonenforcement. Even assuming a sheriff's funding could be withheld in response to nonenforcement that county officials disagree with—perhaps on the theory that the sheriff had failed to fulfill their duties—courts generally resist attempts to use the budget to exercise policy control.[199] In Georgia, for example, courts are explicit that a county's authority to set a budget does not grant it powers to determine how that budget will be spent.[200] Other states follow a similar pattern.[201] There is some precedent for a county reducing a sheriff's budget in order to contract for law enforcement services with another policing agency.[202] In Georgia, for example, its supreme court upheld a

194. *See, e.g.*, Rogers v. Excise Bd., 701 P.2d 754, 758 (Okla. 1984) ("The Sheriff acknowledges that under *Summey* the Board has discretionary authority to examine and to adjust items contained in an estimate of needs. However, the Sheriff argues that the Board violated the *Summey* doctrine because it acted arbitrarily and capriciously."); Tihonovich v. Williams, 582 P.2d 1051, 1056 (Colo. 1978) ("Further, though he established that his requests were reasonably necessary for the sheriff's department and jail, he failed to demonstrate that the board had acted unreasonably or arbitrarily in denying his request in light of all the circumstances."); MINN. STAT. ANN. § 387.20(7) (authorizing a court, on appeal by the sheriff, to overturn a budget allocation "[i]f the court shall find that the board acted in an arbitrary, capricious, oppressive or unreasonable manner or without sufficiently taking into account the extent of the responsibilities and duties of the office of the sheriff, the sheriff's experience, qualifications, and performance").

195. *See, e.g.*, Daniels v. Hanson, 342 A.2d 644, 649 (N.H. 1975) ("Unless the appropriation for the operation of the sheriff's department is arbitrary and capricious or in such an amount as will, for all practical purposes, prevent the sheriff from performing a legally mandated function of his office it cannot be declared illegal or invalid.").

196. For example, using K-9s for detection and enforcement. *See* BROOKS, *supra* note 56, at 11 tbl.5.

197. *See* Russell M. Gold, *The Price of Criminal Law*, 56 ARIZ. ST. L.J. 841, 903, 907 (2024); HADAR AVIRAM, CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT 107 (2015).

198. For example, license plate readers. *See* BROOKS, *supra* note 56, at 23 tbl.14. On the limited regulation of police use of surveillance technologies, see generally Barry Friedman, Farhang Heydari, Max Isaacs & Katie Kinsey, *Policing Police Tech: A Soft Law Solution*, 37 BERKELEY TECH. L.J. 701, 713–22 (2022).

199. *See, e.g.*, Wolfe v. Huff, 210 S.E.2d 699, 701 (Ga. 1974) (holding commissioners may not "do indirectly, by the exercise of their fiscal authority and their control of the county property, that which they could not do directly").

200. Su et al., *supra* note 189, at 1220.

201. Cal. Op. Att'y Gen., No. 93-903 at 1 (1994), https://oag.ca.gov/system/files/opinions/pdfs/93-903.pdf [https://perma.cc/9FJ7-4KKA] ("A county board of supervisors is not authorized to govern the actions of a sheriff or district attorney concerning the manner in which their respective budget allotments are expended or the manner in which personnel are assigned.").

202. *See* Lucas v. Wayne Cnty. Bd. of Comm'rs, 385 N.W.2d 267, 268, 271 (Mich. Ct. App. 1983) ("We find no occasion to overrule the trial court's factual finding that most of the functions performed by the division in question continued to be performed at 'serviceable' levels, because they were (1) duplicated by other divisions or departments, including the State Police . . . ." (footnote omitted)); Daniels v. Hanson, 342 A.2d 644, 648 (N.H. 1975) ("In budgeting funds for the operation of the office of

47% reduction in a sheriff's budget where the trial court found the budget "sufficient" to perform the sheriff's core functions.[203] This might serve as a precedent to address a sheriff who engaged in widespread nonenforcement, but it is a dramatic step and might require the county to create or fund an alternative enforcement agency. There is also the political reality that county commissioners may be hesitant to take on a sheriff put into authority by the commissioners' constituents. In short, budgetary control seems ill-suited to the task of controlling nonenforcement.

C. FEDERALISM AND DECENTRALIZATION

A somewhat more realistic check on nonenforcement derives from our overlapping national system of law enforcement. There are nearly 18,000 federal, state, county, and municipal policing agencies across the country.[204] These agencies often operate with concurrent jurisdiction: a sheriff will sometimes share jurisdiction with municipal police.[205] State police often have plenary jurisdiction over violations anywhere in the state.[206] And with the expansion of federal criminal law to cover much of the conduct prohibited by state codes, even federal law enforcement can prosecute seemingly local crime.[207]

It is possible, therefore, that other law enforcement agencies will step in when sheriffs fail to enforce the law. Federal law enforcement is one option.[208] History

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sheriff, the convention could properly consider and decide that the county's interest would be better served by decreasing the law enforcement support previously given by the sheriff's department to the towns in the county. This would require these towns to provide more personnel, training and equipment for their own protection.").

203. Chaffin v. Calhoun, 415 S.E.2d 906, 908 (Ga. 1992) ("Here, the commissioners have removed about 47% of the sheriff's budget. Although this is a substantial portion of the Sheriff's budget and will reduce the Sheriff's law enforcement capability, the trial court found that the budget is sufficient to allow the Sheriff to perform his duties. On the record before the court, we cannot say that the trial court's finding is clearly erroneous.").

204. DUREN BANKS ET AL., OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA 1 (2016), https://bjs.ojp.gov/content/pub/pdf/nsleed.pdf [https://perma.cc/GE5W-SARU]. Largely ignored among these 18,000 are the police officers employed by administrative or regulatory agencies—a subset of law enforcement I hope to explore in future work.

205. *See supra* note 52 and accompanying text.

206. *See* David Gutman, *Inslee, Ferguson Warn Gun Dealers to Comply with New Firearms Law or Face 'Legal Jeopardy*,*'* CHRONICLE (Mar. 7, 2019, 4:04 PM), https://www.chronline.com/stories/inslee-ferguson-warn-gun-dealers-to-comply-with-new-firearms-law-or-face-legal-jeopardy,10769 [https://perma.cc/J38Y-MYQW]. As a legal matter, the existence of alternative, redundant enforcement authorities does not absolve the sheriff of his enforcement duties. *See, e.g.*, Freas v. State *ex rel.* Freeling, 235 P. 227, 229 (Okla. 1925) ("No degree of remissness in other officers could excuse the sheriff for remissness in the discharge of his duties, and it was the conduct of the sheriff alone which was under investigation in this case.").

207. Brown, *supra* note 159, at 884. The federal government has also used state and local police for its law enforcement ends. *See* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 311–12 (2016).

208. Some commentators have noted the relevance of federal enforcement redundancy as a check on sub-federal enforcement decisions. *See, e.g.*, Erin C. Blondel, *The Structure of Criminal Federalism*, 98 NOTRE DAME L. REV. 1037, 1039–40 (2023) ("So the federal system has evolved to doing something different: 'backstop' state enforcement errors and breakdowns, which inevitably occur given how much states have to do. Together, those very different roles keep the states entrenched on the front lines of

is replete with examples of federal interventions into local non-prosecution, with varying degrees of justification—from federal prosecutions for lynchings in the Jim Crow South[209] to federal gun prosecutions in District Attorney Larry Krasner's Philadelphia.[210] State police are another option. In fact, a number of state officials have threatened constitutional sheriffs with this type of intervention.[211] For example, when sheriffs in Washington began to ignore the state's new gun-control mandates, the state Attorney General threatened to call in state police and even considered federal involvement.[212]

But like other political checks, relying on outside enforcement agencies to fill the sheriff-nullification gap has serious limits. As an initial matter, given their lack of familiarity with local communities, federal and state police start at a disadvantage when investigating local crime. This is precisely why federal law enforcement often relies on task forces when operating locally.[213] More importantly, these would-be intervenors do not have the resources to intercede on a regular basis. Primary state law enforcement agencies, for example, employ only about one-third the number of officers and one-quarter the total personnel as sheriffs' offices;[214] federal law enforcement is also fewer in number than sheriff personnel and has the added burden of enforcing federal statutes.[215] Thus, while threatened interventions are good political theatre and

criminal justice and the federal system small, supplemental, and dependent."); Brown, *supra* note 159, at 850 ("Redundant enforcement through overlapping federalism has had considerable success addressing some underenforcement problems, such as corruption by state and local officials, certain kinds of civil rights violations, or crimes against disfavored minority groups."); William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL'Y 665, 666 (2002) (discussing federal enforcement as a "backstop").

209. *See, e.g.*, United States v. Guest, 383 U.S. 745, 746–48, 747 n.1, 760 (1966).

210. *See* Julie Shaw, *U.S. Attorney Says Philly DA Larry Krasner's 'Radical Experiment Has Failed' in Announcing Federal Charges in 2 Cases*, PHILA. INQUIRER (Sept. 14, 2020, 6:05 PM), https://www.inquirer.com/news/us-attorney-william-mcswain-philadelphia-district-attorney-larry-krasner-violent-crime-cases-20200914.html (discussing U.S. Attorney prosecutions and claims that District Attorney Krasner's policies were too lenient).

It should go without saying that I draw no equivalency between these two examples—the former is abhorrent and the latter a policy choice. Rather, I simply seek to demonstrate a range of possibilities.

211. *See, e.g.*, Greg Bishop, *Attorney General Says If Sheriffs Won't Enforce Gun Ban 'There Are Other People There to Do the Job,'* CTR. SQUARE (Jan. 13, 2023), www.thecentersquare.com/illinois/article_8b6d435c-938f-11ed-bf51-3b89f7f861d3.html [https://perma.cc/HV9A-E3PC] ("Attorney General Kwame Raoul said Friday if local law enforcement won't act, someone will. 'As law enforcement agencies, there's overlapping jurisdiction as well, so if they don't do their jobs, there are other people there to do the job,' Raoul said.").

212. Gutman, *supra* note 206.

213. *See* Barry Friedman, Rachel Harmon & Farhang Heydari, *The Federal Government's Role in Local Policing*, 109 VA. L. REV. 1527, 1556–57, 1622–23, 1626 (2023).

214. BROOKS, *supra* note 45, at 2 tbl.2.

215. *See id.* (reporting about 174,000 full-time sworn officers employed in sheriffs' offices in 2020); CONNOR BROOKS, OFF. OF JUST. PROGRAMS, U.S. DOJ, FEDERAL LAW ENFORCEMENT OFFICERS, 2020 – STATISTICAL TABLES 1 (2023), https://bjs.ojp.gov/document/fleo20st.pdf [https://perma.cc/Q3ZQ-JMD5] (reporting nearly 137,000 full-time federal law enforcement officers employed in fiscal year 2020).

surely carry some weight,[216] they likely are not a sustainable constraint on nonenforcement discretion.[217]

Ultimately, the political checks discussed in this Part play an important but limited role in checking nonenforcement discretion. Elections are unlikely to protect those few most directly injured by nonenforcement. County budgetary moves are too blunt, and threats of involvement by federal and state law enforcement too episodic. Given the limits of these political interventions, the next question to ask is whether there are any stricter legal bounds on the sheriff's exercise of nonenforcement discretion.

III. LAW FOR THE LAWMAN

Today, commentators widely recognize that there are few legal limits on nonenforcement decisions.[218]

Federal constitutional law, for example, imposes modest requirements. This is not because the county sheriff is above federal law, as some constitutional sheriffs assert.[219] Federal law remains the supreme law of the land.[220] Although anti-commandeering principles limit the ways in which the federal government can encourage participation in national regulatory efforts,[221] leaving local law enforcement free

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216. *Cf.* Nicholas J. Johnson, *Second Amendment Sanctuaries: Defiance, Discretion, and Race*, 50 PEPP. L. REV. 1, 5 (2023) (explaining that even if legally suspect, firearm sanctuary policies will still carry practical weight); Murray, *supra* note 30, at 395.

217. There also may be political costs of state politicians interfering in local law enforcement matters. *See* PISHKO, *supra* note 22, at 192–93 ("The best most governors can do is use other law enforcement, like state police, to enforce the laws sheriffs will not. Because this solution is so politically distasteful, many politicians seek to avoid the issue altogether.").

218. *See, e.g.*, Natapoff, *supra* note 131, at 1756 ("Even when nonenforcement decisions reach systemic proportions, law enforcement decision makers are well shielded from judicial scrutiny."); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1492 (1989) (explaining that "random underenforcement is not constitutionally objectionable").

219. *See supra* notes 76–87 and accompanying text (discussing history of sheriff nullification of federal laws); JJ MacNab, *Context Matters: The Cliven Bundy Standoff – Part 3*, FORBES (June 25, 2014, 9:09 PM), www.forbes.com/sites/jjmacnab/2014/05/06/context-matters-the-cliven-bundy-standoff-part-3/?sh=60b84eec6599 ("Like most Sovereigns, [resident of the county Cliven] Bundy believes that the County Sheriff is the most powerful law enforcement officer in the entire country, with unlimited authority that trumps that of any federal agent, elected official, local police officer, or perceived enemy."). The purported authority to nullify federal law is prevalent among groups that embrace "county supremacy." *See, e.g.*, *Explainer: The Influence of County Supremacy Doctrine in the Oregon Standoff*, CTR. FOR W. PRIORITIES (Jan. 8, 2016), https://westernpriorities.org/2016/01/explainer-the-influence-of-county-supremacy-doctrine-in-the-oregon-standoff/ [https://perma.cc/C6NF-SXDW] (discussing adherents to the ideology of "county supremacy"); Robert L. Glicksman, *Fear and Loathing on the Federal Lands*, 45 U. KAN. L. REV. 647, 654 (1997) (discussing the "County Supremacy Movement").

The legal arguments here echo nullification theories espoused in the southern states prior to the civil war. *See* Jessica Pishko, *Sheriffs Undermine Democracy Through Nullification*, DEMOCRACY DOCKET (July 26, 2023), www.democracydocket.com/opinion/sheriffs-undermine-democracy-through-nullification [https://perma.cc/Y45R-TJHG]; Jamelle Bouie, *America Holds onto an Undemocratic Assumption from Its Founding: That Some People Deserve More Power than Others*, N.Y. TIMES MAG. (Aug. 14, 2019), www.nytimes.com/interactive/2019/08/14/magazine/republicans-racism-african-americans.html (discussing multiple iterations of nullification history and its focus on limiting the power of Black Americans).

220. U.S. CONST. art. VI, cl. 2 (making federal law "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

221. *See* Friedman et al., *supra* note 213, at 1588 (citing Printz v. United States, 521 U.S. 898 (1997)).

to withhold support in implementing federal criminal statutes,[222] sheriffs may not actively nullify federal law.[223] However, most criminal enforcement is state-law driven.[224] On that front, the federal Constitution sets a meager floor. It requires that nonenforcement comport with the Equal Protection Clause,[225] but demonstrating an equal protection violation in this context is exceedingly difficult.[226] This difficultly is compounded for sheriffs, whose operations often are insulated from external oversight.[227]

To fill the gap left by constitutional law, scholars have proposed various ways to create rules and policies that constrain enforcement discretion.[228] Some scholars suggest turning to administrative law, such as requiring police to operate via rulemaking.[229] At present, however, it is doubtful that Administrative Procedure

222. Sheriffs can even do so on their view that a federal law is unconstitutional. *See* Response in Opposition to Application of the Injunction Issued by the U.S. Dist. Ct. for the W. Dist. of Mo. at 23, Missouri v. United States, 144 S.Ct. 7 (2023) (No. 23A296), 2023 WL 6627387, at *23 ("The government has not argued, and the district court did not hold, that Missouri is required to assist in the enforcement of federal law. . . . The State is free to withhold that assistance – including based on the State's view that certain federal laws are unconstitutional.").

223. *See* Bush v. Orleans Parish Sch. Bd., 364 U.S. 500, 501 (1960) ("[I]nterposition . . . is illegal defiance of constitutional authority." (quoting Bush v. Orleans Parish Sch. Bd., 188 F. Supp. 916, 926 (E.D. La. 1960))); United States v. Reynolds, 235 U.S. 133, 149 (1914) (noting "state statutes" that "nullify" federal statutes "must fail"); Anderson v. Carkins, 135 U.S. 483, 490 (1890) ("The law of Congress is paramount; it cannot be nullified by direct act of any State, nor the scope and effect of its provisions set at naught indirectly."); United States v. Peters, 9 U.S. 115, 136 (1809) ("If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy rights acquired under those judgments, the [C]onstitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals.").

224. *See State Policy Drives Mass Incarceration*, PRISON POL'Y INITIATIVE (2022), https://www.prisonpolicy.org/graphs/state_driver_numbers_1925-2020.html [https://perma.cc/ED6X-SZGA]; Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POL'Y INITIATIVE (Mar. 14, 2024), https://www.prisonpolicy.org/reports/pie2024.html [https://perma.cc/2CKN-D9QB] (indicating only about 11% of currently incarcerated people are in the federal system).

225. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996).

226. *See* Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 NW. U. L. REV. 987, 991–92 (2021) (discussing selective enforcement claims and difficulties obtaining discovery to prove such claims); Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1238 (2016) (calling *Armstrong*'s requirements "insuperably difficult to meet").

227. *See supra* notes 187–88 and accompanying text (discussing lack of civilian oversight and paucity of rural press).

228. *See, e.g.*, Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 543, 580 (1960) (suggesting creation of an oversight entity to review police decisions not to invoke the criminal process).

229. Many scholars see administrative law (rulemaking in particular) as a key potential constraint on police discretion. *See, e.g.*, DAVIS, *supra* note 143, at 96; Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1907 (2015); Livingston, *supra* note 119, at 658–63; Luna, *supra* note 159, at 594–608; Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 449–51 (1990); Samuel Walker, *Controlling the Cops: A Legislative Approach to Police Rulemaking*, 63 U. DET. L. REV. 361, 382–91 (1986); Williams, *supra* note 186, at 124.

For some contrary perspectives on the propriety of administrative law processes in this context, see, for example, Ponomarenko, *supra* note 26, at 15–20, and Ronald J. Allen, *The Police and Substantive*

Act (APA) requirements apply to many sheriffs.[230] And, even assuming its applicability, administrative law does little to constrain nonenforcement (failures to act).[231]

Other suggestions rely on legislative action, but public choice theory suggests legislatures will have little incentive to eschew tough-on-crime politics in favor of limits on police discretion.[232] In fact, outside of specific contexts (such as domestic violence enforcement),[233] much of the legislative intervention to constrain nonenforcement discretion has been targeted at reform prosecutors,[234] not sheriffs or police. These interventions vary, but for the most part, they target categorical nonenforcement, while leaving case-by-case nonenforcement untouched.[235] As discussed in more detail below, this approach seems oddly backwards, at least when trying to limit arbitrariness.[236]

Missing from this discussion is an understanding of the sheriff's traditional duty to enforce the law. Throughout the nation's history, the sheriff was not understood to be a constitutional officer with "no superior in his county"[237] but one whose authority was bound by state law. Most obviously, the state legislature defined prohibited criminal behavior.[238] As the state's representative in the

Rulemaking: Reconciling Principle and Expediency, 125 U. PA. L. REV. 62, 67, 70 (1976) (noting various doctrinal objections to substantive rulemaking by law enforcement agencies).

230. *See* Stephen C. Emmanuel & Alexandra E. Akre, *Judicial Review*, *in* FLORIDA ADMINISTRATIVE PRACTICE § 12.2 (2023) ("Unlike the situation with state agencies in which *F.S.* 120.68 provides for judicial review of final agency action, there may be no comparable statute authorizing an appeal from a decision by a local governmental entity. For example, county commissions, sheriffs' offices, and municipalities are not considered agencies, within the meaning of *F.S.* 120.52(1) unless expressly made subject to the APA by general law, special law, or existing judicial decision."); Kondylis v. Strain, 117 So. 3d 1255, 1257 (La. 2013) ("The APA requires an a [sic] 'agency' to file its rules with the Department of State Register, and the definition of 'agency' articulated therein, excludes 'political subdivisions,' such as sheriffs." (citations omitted)).

Some have argued that although local officers are not governed directly by the APA, they are nonetheless bound by the federal APA and state APAs because the federal and state governments that enacted the underlying substantive criminal prohibitions are bound by the APA. *See* Christopher Slobogin, *Policing as Adminisration*, 165 U. PA. L. REV. 91, 126, 135 (2016).

231. *See* Heckler v. Chaney, 470 U.S. 821, 832 (1985).

232. *See* BARKOW, *supra* note 117, at 5–6 (explaining how populist punitive policies have driven mass incarceration); Friedman & Ponomarenko, *supra* note 229, at 1862–65; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001).

233. *See infra* note 259 and accompanying text.

234. *See* JORGE CAMACHO ET AL., LOC. SOLS. SUPPORT CTR., PREEMPTING PROGRESS: STATES TAKE AIM AT LOCAL PROSECUTORS 3, A1–A6 (2023), https://static1.squarespace.com/static/5ce4377caeb1ce00013a02fd/t/63cf18da2a1300367cfec952/1674516705430/ProsecutorialDiscretion2023.pdf [https://perma.cc/37TW-KK5M].

235. *See* Carissa Byrne Hessick & Rick Su, *The (Local) Prosecutor*, 2023 WIS. L. REV. 1669, 1699 (2023) ("At first glance, sanctions—in particular sanctions that are triggered by nonenforcement or underenforcement policies—appear to attack the very foundation of prosecutorial discretion. But in practice they may instead require prosecutorial discretion to take a certain form—namely, the ad hoc and opaque decisionmaking that has dominated prosecutorial decisionmaking for many decades.").

236. This preference encourages law enforcement to keep its nonenforcement policies a secret, while leaving most day-to-day nonenforcement decisions untouched. *See infra* Section IV.B.

237. ANDERSON ET AL., *supra* note 74, at 5.

238. Though interest groups, including law enforcement, play a role in this process as well. *See generally* Brenner M. Fissell, *Police-Made Law*, 108 MINN. L. REV. 2561 (2024).

county, the sheriff's enforcement decisions shaped the legislature's choices.[239] Left unchecked, however, enforcement discretion could swallow the legislature's role.[240] To mediate this potential conflict, state courts, over the course of decades, developed a robust body of case law defining when a sheriff's failure to act (non-enforcement) amounted to a neglect of the sheriff's official duties—an offense for which the sheriff could be removed from office.[241] This provided a legal check on the sheriff's enforcement discretion, while still demonstrating a nuanced understanding of the sheriff's responsibilities and the proper role of courts.

The remainder of this Part details this law: Section III.A begins the analysis by explaining why historical understanding is important and why existing statutes that define the sheriff's enforcement obligations often are ambiguous as to the sheriff's nonenforcement discretion. Section III.B details the general understanding that the sheriff had a mandatory duty to arrest in most cases. Section III.C explains how courts refined and enforced this duty, with a particular focus on when a sheriff's failure to investigate allegations of criminal activity, to enforce judicial orders, or to make arrests amounted to "neglect of duty."

This Part largely is descriptive—detailing a seemingly forgotten history of how the law bound sheriff discretion. Part IV, in turn, explores the import of reviving these principles.

A. AMBIGUITY OF THE SHERIFF'S STATUTORY ENFORCEMENT OBLIGATIONS

Before turning to historical practice, one ought to examine existing statutory schemes and the extent to which they permit nonenforcement. For the most part, criminal statutes say nothing about enforcement discretion. Statutes generally proscribe conduct by the public without reference to law enforcement's obligations.[242] The sheriff's obligations with respect to those statutes are set out in other sections of that state's code that define the office's powers and duties.[243]

When it comes to a sheriff's arrest authority, these general statutes fall into two seemingly distinct categories: On the one hand, some states provide that the sheriff

239. Subordinate officials may not overrule state law. *See* Brenner M. Fissell, *Against Criminal Law Localism*, 81 MD. L. REV. 1119, 1139 (2022). However, enforcement choices set the practical terms of the law on the ground. *See* Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 369 (1940) ("It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law. . . . Deeply embedded traditional ways of carrying out state policy, . . . are often tougher and truer law than the dead words of the written text.").

240. That result would be contrary to our democracy's founding principles. *See* Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) ("It is the proud boast of our democracy that we have 'a government of laws and not of men.'").

241. *See infra* Section III.C.

242. *See, e.g.*, TENN. CODE ANN. § 39-17-418(a) ("It is an offense for a person to knowingly possess or casually exchange a controlled substance, unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of professional practice.").

243. *See, e.g.*, TENN CODE ANN. § 38-3-102.

may enforce criminal laws,[244] suggesting a degree of discretion. Iowa law, for example, provides that "[a] peace officer *may* make an arrest under any of the following circumstances."[245] On the other hand, in many other states, the statutory language appears more mandatory. Arizona law provides that "[t]he sheriff *shall*: . . . Arrest and take before the nearest magistrate for examination all persons who attempt to commit or who have committed a public offense."[246] Texas law provides that "[e]ach sheriff . . . *shall* arrest all offenders against the laws of the State, in his view or hearing, and take them before the proper court for examination or trial."[247] Nebraska law states: "It *shall* be the duty of the sheriff by himself or deputy to preserve the peace in his county, to ferret out crime, to apprehend and arrest *all* criminals . . . [and] to file [charges] against *all* persons who he knows, or has reason to believe, have violated the laws of the state . . . ."[248]

One might be tempted to think that these general enforcement mandates, on their own, determine the extent of sheriff nonenforcement discretion. In other words, in states that provide a sheriff *may* arrest, discretion exists; in states that provide a sheriff *shall* arrest, discretion does not. Although attractively simple, this view is an oversimplification.

First, a purely textualist approach would mean that legislatures intended dramatically different enforcement regimes based on a single word difference. This is possible,[249] but so is imprecise legislative drafting. Look at Section 26601 of the California Government Code, which provides that "[t]he sheriff *shall arrest* and take before the nearest magistrate for examination *all persons* who attempt to commit or who have committed a public offense."[250] And yet, Section 836 of the California Penal Code provides that an officer "*may arrest* a person . . . [if] [t]he officer has probable cause to believe that the person to be arrested has committed a public offense in the officer's presence."[251]

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244. *See, e.g.*, GA. CODE ANN. § 17-4-20(a)(1) (defining circumstances under which "[a]n arrest for a crime may be made by a law enforcement officer"); IND. CODE ANN. § 35-33-1-1(a) (same); *see also* People v. Hammond, 959 N.E.2d 29, 48 (Ill. 2001) ("Section 107–2(1)(c) of the Code of Criminal Procedure of 1963 provides that a 'peace officer *may* arrest a person when' the officer 'has reasonable grounds to believe that the person is committing or has committed an offense.' This statute has been construed to mean that an officer has discretion to arrest a person 'immediately, later, or perhaps never.'" (citation omitted) (quoting People v. Geier, 944 N.E.2d 793, 799–800 (Ill. App. Ct. 2011))).

245. IOWA CODE ANN. § 804.7(1) (emphasis added).

246. ARIZ. REV. STAT. ANN. § 11-441(A) (emphasis added). A number of states use similar language. *See, e.g.*, CAL. GOV'T CODE § 26601; N.D. CENT. CODE ANN. § 11-15-03(1)(b); MONT. CODE ANN. § 7-32-2121(2); IDAHO CODE ANN. § 31-2202(2); WASH. REV. CODE ANN. § 36.28.010(1).

247. TEX. CODE CRIM. PROC. ANN. art. 2.17 (emphasis added). The law also provides that the sheriff "*shall* quell and suppress *all* assaults and batteries, affrays, insurrections and unlawful assemblies." *Id.* (emphasis added).

248. NEB. REV. STAT. ANN. § 23-1710 (emphasis added).

249. A detailed legislative history of some of these statutes might be helpful (though perhaps unlikely). *See* William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435, 1462 (2020) (noting the Progressive Era origins of some of these full-enforcement statutes).

250. CAL. GOV'T CODE § 26601 (emphasis added).

251. CAL. PENAL CODE § 836(a) (emphasis added); *see also* Tomlinson v. Pierce, 2 Cal. Rptr. 700, 702–03 (Dist. Ct. App. 1960) ("The power of a police officer to arrest or not to arrest is a power in which discretion is vested in the officer. Section 836, . . . describing the circumstances permitting an arrest,

Second, a textual reading using today's common vernacular may not track what these historic statutes intended. Although "may" and "shall" have accepted meanings in our modern parlance—the former implying discretion, the latter not[252]—these meanings are not invariable.[253] And when reading statutes of some vintage, we should be particularly careful.[254] Context is essential.[255] As Justice Scalia explained when confronted with the seemingly mandatory language of a domestic violence statute, enforcement discretion cannot be understood outside of the "well established tradition of police discretion."[256] Perhaps unsurprisingly then, scholars disagree on whether "shall" statutes are in fact mandatory.[257]

Third, even permissively written statutes (e.g., "may arrest") do not explain what sort of discretion the legislature intended. For example, one might reasonably understand a statute that provides officers "may" arrest as affording officers the authority and the discretion to determine whether probable cause exists, but not necessarily affording them the authority to decline to arrest once probable cause has been established. Determinations of probable cause are fact-bound and often made in time-sensitive circumstances.[258] But an enforcement decision after

provides that a peace officer 'may' arrest under such circumstances. If he 'may' arrest, he may 'not' arrest.").

252. *See* Yoo v. United States, 43 F.4th 64, 72 (2d Cir. 2022).

253. *See, e.g.*, *id.* at 73 ("Of course, the use of the word 'may' is not 'necessarily conclusive of congressional intent to provide for a permissive or discretionary authority.' We have also acknowledged that 'in some limited scenarios, the word "may" can impose a mandatory directive,' because '[a]lthough the word "may," when used in a statute, usually implies some degree of discretion, this common-sense principle of statutory construction is by no means invariable and can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute.'" (alteration in original) (citations omitted) (first quoting Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 198 (2000); and then quoting *In re* Clinton Nurseries, Inc., 998 F.3d 56, 66 (2d Cir. 2021))).

254. *See* Bd. of Supervisors v. United States *ex rel.* State Bank, 71 U.S. 435, 438 (1866) ("If the statute had simply said, '*may levy a tax*,' it might then well be argued, that in cases where the interests of a third party were concerned the court would construe may to mean *shall*, and would enforce the levy."); Minor v. Mechanics Bank of Alexandria, 26 U.S. 46, 64 (1828) ("The argument of the defendants is, that 'may,' in this section, means 'must,' and reliance is placed upon a well known rule in the construction of public statutes, where, the word 'may,' is often construed as imperative. Without question, such a construction is proper, in all cases where the legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power.").

255. *See* Fischer v. United States, 603 U.S. 480, 491–92 (2024) (interpreting federal criminal statute "in light of the history of the provision").

256. Town of Castle Rock v. Gonzales, 545 U.S. 748, 760 (2005); *see also* Diaz v. Comm'r of Corr., 279 A.3d 147, 160–61 (Conn. 2022) ("To start, treating the statute as mandatory would deprive police officers of the necessary discretion as to whether and when to arrest a suspected felon."); Escoe v. Zerbst, 295 U.S. 490, 494 (1935) ("Statutes are not directory when to put them in that category would result in serious impairment of the public or the private interests that they were intended to protect.").

257. *Compare* Goldstein, *supra* note 228, at 557 (explaining "shall" means "shall"), *with* KENNETH CULP DAVIS, POLICE DISCRETION 79–80 (1975) (explaining "shall" practically means "may").

258. *See* Maryland v. Pringle, 540 U.S. 366, 370–71 (2003) ("[T]he probable-cause standard is a 'practical, nontechnical conception' that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. '[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.'" (second alteration in original) (citations omitted) (quoting Illinois v. Gates, 462 U.S. 213, 231–32 (1983))).

probable cause has been established is more of a policy judgment than a factual one. Perhaps more importantly, any subsequent prosecution and punishment are filtered through multiple actors (e.g., prosecutors, juries, judges).

In short, rather than assume these general pronouncements ("shall" or "may") decide the extent and nature of a sheriff's enforcement discretion, one must further explore the relevant context, including the history and tradition of the sheriff's duty to arrest.

Before turning to that context, one final point about existing statutes. There are a few criminal statutes today that are more specific when it comes to the sheriff's (or any law enforcement officer's) obligations. For example, a significant number of states have laws that purport to require law enforcement to arrest whenever there is probable cause of a domestic violence incident.[259] Putting aside whether these statutes are sound policy,[260] it is possible to read these statutes as indicating that, in the absence of such specificity, sheriffs (and law enforcement generally) have discretion to choose not to enforce other criminal prohibitions.

But there are at least two reasons to doubt such an interpretation: First, domestic violence laws can be understood as limiting a particular *type* of law enforcement discretion that might otherwise be permissible even under the duty-to-arrest and neglect-of-duty framework described below.[261] A common scenario officers face is when the victim of an offense declines to cooperate with an investigation.[262] Imagine, for example, a theft offense where the perpetrator returns the stolen goods and the victim seeks not to "press charges." Even assuming the officer has probable cause to arrest without the victim's testimony, it is plausible to imagine that courts would find the officer has fulfilled their enforcement duties by facilitating a resolution short of arrest. Some domestic violence statutes, however, are the legislative expression that such extra-legal resolutions are impermissible. And rather than debate the merits of such an approach in every instance, the statutes create a blanket prohibition on non-arrest resolutions.

Second, mandatory arrest laws can coexist with a general duty-to-arrest because they serve an important signaling function. Legislatures sometimes enact specific criminal statutes even when not strictly necessary. Take, for example,

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259. *See* COMM'N ON DOMESTIC & SEXUAL VIOLENCE, AM. BAR ASS'N, DOMESTIC VIOLENCE ARREST POLICIES (2014), https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/charts/migrated_charts/2014-domestic-violence-arrest-policy-chart.pdf [https://perma.cc/PCS9-49N7]; *see, e.g.*, CONN. GEN. STAT. ANN. § 46b-38b(a).

260. For data potentially relevant to the debate on this point, see Lawrence W. Sherman & Heather M. Harris, *Increased Death Rates of Domestic Violence Victims from Arresting Vs. Warning Suspects in the Milwaukee Domestic Violence Experiment (MilDVE)*, 11 J. EXP. CRIMINOLOGY 1, 2, 6 (2015) (finding, contrary to earlier results, that fatalities among victims of domestic abuse were more likely after an arrest). *See also* AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION 68 (2020).

261. *See infra* Section III.C.

262. *See* Rachel Louise Snyder, Opinion, *We Prosecute Murder Without the Victim's Help. Why Not Domestic Violence?*, N.Y. TIMES (May 4, 2019), https://www.nytimes.com/2019/05/04/opinion/sunday/domestic-violence-recanting-crawford.html.

laws that criminalized law enforcement facilitation of lynching.[263] It is hard to imagine that such conduct was lawful prior to the enactment of the statute. But the legislature likely sought to send a message—to make a political point, to call attention to an issue, and to encourage others to adopt similar policy positions. Mandatory arrest statutes in the domestic violence context might serve a similar expressive function.

Importantly, these mandatory-arrest laws are of relatively modern vintage, enacted after modern conceptions of law enforcement discretion had taken hold.[264] The history recounted below suggests, in fact, that such discretion is ahistorical and the presumption of enforcement was reversed.

B. THE HISTORIC DUTY TO ARREST

To understand the meaning of these general statutes defining the sheriff's enforcement obligations, historical practice is a useful place to start, for two reasons.

First, as discussed above, historical practices provide context for statutory language.[265] If sheriffs historically were understood to exercise broad nonenforcement discretion, then even seemingly mandatory statutes (e.g., "shall arrest") might not in fact be mandatory absent some obvious evidence of legislative intent to reverse this practice. Conversely, if sheriffs historically were understood to have an obligation to arrest, then even seemingly permissible statutes (e.g., "may arrest") might not be ushering in a radical change but rather simply providing sheriffs the statutory authority to make arrests.

Second, under many states' laws, the sheriff's common law authority helps define the powers of the modern sheriff. Many state courts have held that by creating an office of the sheriff—either in the constitution or by statute—the legislature intended to imbue the office with the powers and duties of that office at common law.[266] If the sheriff had a particular power at common law, unwinding

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263. For example, the constitutional amendment at issue in *Holliday v. Fields*, 275 S.W. 642, 647 (Ky. 1925). *See also, e.g.*, People *ex rel.* Davis v. Nellis, 94 N.E. 165, 167–68 (Ill. 1911).

264. The 1994 Violence Against Women Act (VAWA) marked a turning point in efforts relating to mandatory arrest, sparking significant change across the country. *See* Monica N. Modi, Sheallah Palmer & Alicia Armstrong, *The Role of Violence Against Women Act in Addressing Intimate Partner Violence: A Public Health Issue*, 23 J. WOMEN'S HEALTH 253, 254 (2014).

265. *See supra* notes 252–56 and accompanying text.

266. *See, e.g.*, State *ex rel.* Johnston v. Melton, 73 P.2d 1334, 1338 (Wash. 1937) ("The office of sheriff is a constitutional office. In naming the county officers in section 5, article 11 of the Constitution, the people intended that those officers should exercise the powers and perform the duties then recognized as appertaining to the respective offices which they were to hold."); McCoy v. Key, 123 So. 873, 875 (Miss. 1929) (looking to the "general powers under the common law as sheriff of the county"); State *ex rel.* Kennedy v. Brunst, 26 Wis. 412, 414 (Wis. 1870) ("Now, it is quite true that the [C]onstitution nowhere defines what powers, rights and duties shall attach or belong to the office of sheriff. But there can be no doubt that the framers of the [C]onstitution had reference to the office with those generally recognized legal duties and functions belonging to it in this country, and in the territory, when the constitution was adopted."); *see also* People *ex rel.* Ferrill v. Graydon, 164 N.E. 832, 834 (Ill. 1928) ("Where the Legislature has created an office which was known to the common law, and by virtue of the common law was vested with certain powers and duties, those common-law powers and duties, attached to the office by reason of its adoption by the Constitution. It was so held in regard to the office of sheriff in the case of Dahnke v. People, [48 N. E. 137 (Ill. 1897)] . . . .").

that power could be complicated.[267] Conversely, if the sheriff did not have such a power at common law, explicit statutory language would be required to provide that authority.

Thus, understanding the sheriff's traditional authority (or lack thereof) to decline to enforce criminal statutes is essential. This Section now discusses that authority.

An extensive array of historic authorities describes the sheriff's duty to arrest in mandatory terms.[268] In 1898, for example, the Supreme Court of Ohio, while quoting Lord Coke, defined the sheriff's duty as to "apprehend and commit to prison all persons who break or attempt to break the peace."[269] A few decades later, the Supreme Court of Mississippi, reviewing English common law authorities, explained that "[w]henever a charge of felony was brought to [the sheriff's] notice, supported by reasonable grounds of suspicion, they were required to apprehend the offenders, or at least to raise hue and cry."[270] These authorities

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267. Many states are clear that a sheriff's common law authority is defeasible by statute. *See, e.g.*, Linehan v. Rockingham Cnty. Comm'rs., 855 A.2d 1271, 1274–75 (N.H. 2004); Williams v. Matthews, 448 S.E.2d 625, 628 (Va. 1994); Soper v. Montgomery County, 449 A.2d 1158, 1161 (Md. 1982); Merrill v. Phelps, 84 P.2d 74, 76 (Ariz. 1938); State *ex rel.* Thompson v. Reichman, 188 S.W. 225, 227 (Tenn. 1916).

But others take a different view. *See, e.g.*, Fortney v. Sch. Dist., 321 N.W.2d 225, 234 (Wis. 1982) ("[T]he sheriff, under common law, had certain powers and duties in his relationship to the courts which were incorporated into the constitution. The sheriff cannot be divested of those powers and duties by statute."); People *ex rel.* Ferrill v. Graydon, 164 N.E. 832, 834 (Ill. 1928) ("[I]t was further held that the officer could not be deprived of the common-law functions pertaining to his office by the Legislature, but new duties might be imposed."); *Ex parte* Corliss, 114 N.W. 962, 965 (N.D. 1907) (noting that permitting constitutional officers to have their powers stripped by an act of the legislature, "carried to its logical and inevitable result, would lead to the monstrous doctrine that the Constitution means nothing, and, notwithstanding its plain provisions, the legislative assembly may provide that the duties pertaining to all these offices shall be discharged by officers appointed in some manner prescribed by them").

As a result, state courts reach disparate conclusions on similar questions: Wisconsin courts have struck down any attempt to transfer operations of a jail from the sheriff, *see* State *ex rel.* Kennedy v. Brunst, 26 Wis. 412, 412–15 (1870), while other states with similar constitutional provisions have reached the opposite conclusion. *See, e.g.*, Beck v. Cnty. of Santa Clara, 251 Cal. Rptr. 444, 446, 450 (Ct. App. 1988); Beasly v. Ridout, 52 A. 61, 62, 66 (Md. 1902).

268. *See, e.g.*, JOHN IMPEY, THE PRACTICE OF THE OFFICE OF SHERIFF AND UNDER SHERIFF 31 (3d ed. 1812); *see also* Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 688 & n.62 (1994) (discussing common law duty of private individuals to assist in keeping the peace, citing historical sources indicating that public officials have a duty to arrest); Goodman v. Condo, 12 Pa. Super. 456, 461–62 (1899) (citing English common law on the sheriff's arrest duty); State *ex rel.* Att'y Gen. v. McLain, 50 N.E. 907, 907–08 (Ohio 1898) (same).

269. *McLain*, 50 N.E. at 908.

270. Orick v. State, 105 So. 465, 469–70 (Miss. 1925) (quoting "2 R. C. L., p. 446," a common law authority); *accord* Powe v. State, 235 So. 2d 920, 921–22 (Miss. 1970).

The "hue and cry" was a common law duty to respond to a crime by loudly calling for help. *See* T. Jarrett Bouchette, *Citizen's Arrest in South Carolina: Shield or Sword?*, S.C. LAW, Jan. 2021, at 20, 22, 24 n.5. Members of the public had an obligation to heed the call and to assist with apprehending the allged offender. *See id.* at 22 ("In 1285, the Statute of Winchester not only gave citizens the right to arrest those who had committed crimes, but required it whenever the 'hue and cry' was raised. Failure to participate was itself a punishable offense." (emphasis omitted) (endnote omitted) (citing THE STATUTE OF WINCHESTER (1285), reprinted in SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 76–79 (George Burton Adams & H. Morse Stephens eds., 1901))); Laura K. Donohue, *The Original Fourth*

focused on felonies and breaches of the peace because, as a historical matter, sheriffs did not always have authority to arrest for minor offenses not committed in their presence.[271] Yet, when they had authority, the common law rejected discretionary arrest authority. As one scholar explained:

> [P]eace officers [a term that includes sheriffs] had no such choice at common law: if they had authority to arrest for the offense, they were obligated to do so; if not, they were obligated to present their information regarding the offense to a justice of the peace, who could then bring the offender to court using either a summons or a warrant.[272]

This historic understanding was carried into U.S. law, which in the late nineteenth century and early twentieth century continued to describe the sheriff's arrest duty in mandatory terms. The Idaho Supreme Court, for example, described itself as "apply[ing] the common law rule" that if an officer

> had reasonable cause to believe [a suspect] was committing, or was about to commit, a crime, it was his duty, without a warrant, to endeavor to prevent him from committing it, and to arrest him, even though he had completed the offense before he could be prevented from so doing.[273]

In Nebraska, the state supreme court, interpreting a statute similar to the one that exists today,[274] declared in the context of a chief of police: "It was then his duty to arrest at once any one he personally found violating the law."[275] The Court of Criminal Appeals of Texas explained that upon a credible report of a person carrying a pistol, the sheriff's duty was "to arrest [that] person without warrant . . . [and] to carry such person before the nearest justice of the peace for trial."[276] Similar statements abound,[277] making clear that U.S. courts at the turn of

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Amendment, 83 U. CHI. L. REV. 1181, 1231, 1233–34 (2016) (explaining that a constable's decision to raise a hue and cry to apprehend a felon was not discretionary, but depended on the existence of two conditions: "first that a felony has been really committed, and the second, that the person [arrested] is properly suspected." (alteration in original) (quoting SAUNDERS WELCH, OBSERVATIONS ON THE OFFICE OF CONSTABLE WITH CAUTIONS FOR THE MORE FAFE EXECUTION OF THAT DUTY 17 (1754))).

271. *Orick*, 105 So. at 469–70 (explaining that traditional arrest authority extended to felonies as well as breaches of the peace committed in the officer's presence).

272. Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 399–400 (2002).

273. State v. Clarke, 446 P.3d 451, 457 (Idaho 2019) (quoting State v. Mox Mox, 152 P. 802, 804 (Idaho 1915))).

274. *Compare* State v. Donahue, 135 N.W. 1030, 1036 (Neb. 1912) ("Our statute provides that 'every sheriff, deputy sheriff, constable, marshal, or deputy marshal, watchman, or police officer shall arrest and detain any person found violating any law of this state, or any legal ordinance of any city or incorporated village, until a legal warrant can be obtained."), *with* NEB. REV. STAT. ANN. § 23-1710 ("It shall be the duty of the sheriff by himself or deputy . . . to apprehend and arrest all criminals . . . .").

275. *Donahue*, 135 N.W. at 1036–37.

276. Garner v. State, 97 S.W. 98, 100 (Tex. Crim. App. 1906).

the twentieth century carried forward the English common law understanding that the sheriff's duties to arrest and enforce were mandatory.

C. NONENFORCEMENT AS NEGLECT OF DUTY

Section III.B outlined the basic understanding that the sheriff's arrest authority was mandatory. This Section explains how state courts refined and enforced that duty in various contexts.

Sheriffs, like other government officials, hold their office subject to the faithful performance of their duties. Failure to perform these duties—often termed "neglect of duty" or "nonfeasance"—has long been a removable offense.[278] At common law, neglect of duty also was punishable by criminal prosecution and

277. *See, e.g.*, Bassinger v. U.S. Fid. & Guar. Co., 58 F.2d 573, 574 (8th Cir. 1932) ("In so far as arrests by the sheriff are concerned, the law of Nebraska makes it the duty of a sheriff to arrest for a felony upon a warrant or upon view of the commission of the felony or in an honest belief, based upon reasonable grounds, that the person arrested has been guilty of a felony."); State v. Driscoll, 144 P. 153, 155 (Mont. 1914) ("A riot existing to the knowledge of the sheriff, it becomes his duty to suppress it; he must command the rioters to disperse; he must arrest them if they do not disperse; and for that purpose he may command the aid of all persons present or within the county. The duty thus imposed is absolute . . . ." (citations omitted)); Scougale v. Sweet, 82 N.W. 1061, 1064 (Mich. 1900) ("What was the duty of the sheriff? Upon this point we need say but little. The law is not disputed. It was his duty to prevent the game, and, if the players persisted in proceeding with it, it was his duty to promptly arrest them all."); People *ex rel.* McEwen v. Keeler, 64 How. Pr. 478, 482 (N.Y. Gen. Term 1883) ("He is bound to take all misdoers and commit them to jail for safe custody . . . . This general statement is substantially correct now, and need not be enforced by citations. It has been the duty of the sheriff to arrest and confine all persons charged with crime . . . ."), *cited with approval in Ex parte* Corliss, 114 N.W. 962, 973–74 (N.D. 1907); Darlington v. Mayor of New York, 31 N.Y. 164, 187, 206 (1865) (upholding statute indemnifying property owners for damage caused by riot that public officials failed to prevent because officials had a duty to prevent such damage); Roberts v. State, 14 Mo. 138, 146 (1851) ("Where persons are found loitering about and lodging in groceries, tippling-shops, [etc.], or begging from door to door, or with burglarious instruments upon them, the officer so finding them, is required to arrest them and take them before the recorder."); Coyles v. Hurtin, 10 Johns. 85, 87 (N.Y. Sup. Ct. 1813) ("The sheriff is, *ex officio*, a conservator of the peace; and it is not only his right, but his duty to arrest all persons, with their abettors, who oppose the execution of process.").

278. *See* Gay v. Dist. Ct., 171 P. 156, 157 (Nev. 1918) ("From time immemorial society has found it necessary to make some provision for the removal of venal, corrupt, faithless, and negligent public officers. The importance of this was realized when the Constitution of the United States was drafted, and this policy has been carried into the Constitution of every state in the Union."); State *ex rel.* Att'y Gen. v. McLain, 50 N.E. 907, 907 (Ohio 1898) ("By the rule of the common law, the faithful performance of the duties of an office was the tacit condition upon which the continued right to hold the office depended, and any breach of that condition constituted cause for the forfeiture of the office."); Governor v. Dodd, 81 Ill. 162, 165 (1876) ("Numerous authorities might be cited from the courts of other States to show that the law imposes the liability, if they were needed to sustain so plain a proposition. All understand that sheriffs, constables, and other ministerial officers, are held liable for mere *nonfeasance* of duty. Sheriffs and constables are not unfrequently held liable for failing to levy an execution, failing to return it, for permitting property seized on execution to be re-taken by the defendant, and in a number of other cases, where loss is occasioned to the plaintiff by mere non-action, unintentional, and caused by mere negligence or omission to perform a duty."); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 28 (2021) ("Neglect of duty and malfeasance in office, it shows, are terms that have been used for hundreds of years to address the problem of an officer's failure to faithfully execute the laws. Courts have used them to define and analyze the obligations of officeholding, while legislatures have employed them to motivate an office's 'faithful execution.'").

fines.[279] Today, states have codified their removal procedures and penalties.[280]

State courts in the early twentieth century had frequent occasion to determine when the sheriff's failure to enforce the law constituted a dereliction of the sheriff's duties.[281] Over decades, across various states, courts developed a body of case law detailing the sheriff's obligations. This law was structured around several key principles:

1. Given sufficient notice of criminal activity, a sheriff's failure to enforce the law constituted a removable offense.
2. The sheriff was obligated to follow judicial orders, including arrest warrants.
3. The sheriff could not fulfill their statutory duties merely by enforcing warrants.
4. The sheriff had an affirmative obligation to investigate alleged criminal violations.
5. Courts provided some flexibility for a sheriff's unwitting failures and generally would not sanction removal without some evidence of recklessness or deliberate neglect.

The remainder of this Section details each of these principles.

1. A Duty to Enforce

First and foremost, courts repeatedly held that sheriffs had an affirmative obligation to enforce criminal statutes by arresting offenders and that failure to do so constituted an offense for which the sheriff could be removed from office.[282]

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279. 2 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750: THE CLASH BETWEEN PRIVATE INITIATIVE AND PUBLIC INTEREST IN THE ENFORCEMENT OF THE LAW 161 (1956) ("Conversely, there were many provisions which appointed fines to be imposed upon constables who neglected or refused to execute their duties. The courts were empowered to inflict these, the amount being left to the discretion of the bench."); *id.* at 162 ("This code of fines covered a great variety of cases in which a constable might have failed to preserve morality, public safety or peace in general."); South v. Maryland, 59 U.S. 396, 402–03 (1855) (indicating that neglect of public duty to preserve the public peace was punishable by indictment at common law).

280. Each state provides some method of removing county officials during the course of their elected term. Meighan R. Parsh, *Dueling Discretion: The Imperfect Mechanisms for removing Elected Prosecutors*, 102 N.C. L. REV. 573, 577 (2024); *see, e.g.*, MINN. STAT. ANN. § 351.15. Although the mechanics of these removals differ (e.g., who may remove, timing of judicial review), FACT SHEET, *supra* note 22, my focus here is the substance of the removal standards—often termed neglect of duty or nonfeasance. *See, e.g.*, ALA. CODE §§ 36-11-1(a), 36-11-1(b)(1), 36-11-4; ARK. CODE ANN. § 16-90-112 (a). For more information on the considerable variation among removal procedures and standards, see generally Charles M. Kneier, *Some Legal Aspects of the Governor's Power to Remove Local Officers*, 17 VA. L. REV. 355 (1931) (exploring variations among removal laws).

281. *See, e.g.*, Goodell v. Woodbury, 52 A. 855, 856 (N.H. 1902).

282. *See, e.g.*, State *ex rel.* McDonald v. Dyson, 183 N.W. 298, 300 (Neb. 1921) ("The section of the law under which this proceeding was instituted is broad in its scope and purpose. It provides that, if a sheriff fails to do his duty, neglects to do his duty, or refuses to do his duty in the enforcement of this law, he may be removed from office. Evidently the Legislature intended that, if the law was being violated and the sheriff was failing habitually to do his duty because of incompetency, inefficiency, or unwillingness to aid in its enforcement, there should be a direct method provided by law for his summary removal.").

Although not a removal case, *Scougale v. Sweet* drives home the clarity with which courts of this era viewed the sheriff's duty to enforce the laws as written.[283] In *Scougale*, the Michigan Supreme Court heard an appeal of a sheriff's libel action against a local clergyman.[284] The claim of libel stemmed from a scathing open letter written by the clergyman calling for the sheriff's resignation for having "allowed two gangs of criminals to commit crime after due notification had been given you of such intention, first by the criminals themselves, and subsequently by more than one law-abiding citizen."[285] The offense in question: playing a game of baseball on the Sabbath, in violation of Michigan law.[286] The Michigan Supreme Court reversed the sheriff's victory below, and in the process, spoke to the sheriff's duties: "What was the duty of the sheriff? Upon this point we need say but little. The law is not disputed. It was his duty to prevent the game, and, if the players persisted in proceeding with it, it was his duty to promptly arrest them all."[287]

Consistent with this admonition, courts of this era repeatedly held that even a single instance of nonenforcement could support a sheriff's removal. In 1914, the Montana Supreme Court affirmed the removal of a sheriff for failure to take steps to suppress a riot.[288] A few years later, the Supreme Court of Nebraska upheld a sheriff's removal for having "willfully failed, neglected and refused to do his duty in the enforcement of the liquor laws" based on the testimony of a single witness who witnessed a single incident of the sheriff providing liquor, contrary to law.[289] A single failure to arrest for bribery was deemed sufficient to support a charge of nonfeasance.[290] So too was a single failure to arrest the perpetrator of an assault.[291] In a case in which those seeking to remove the sheriff had not met their burden of proof, the Kentucky Supreme Court listed a number of examples of actions that qualify as "neglect of duty," including "carelessly or intentionally

283. 82 N.W. 1061 (Mich. 1900).

284. *Id.* at 1061–62.

285. *Id.* at 1062.

286. *Id.*

287. *Id.* at 1064, 1066.

288. State *ex rel.* Rowe v. Driscoll, 144 P. 153, 153–56 (Mont. 1914) ("A riot existing to the knowledge of the sheriff, it becomes his duty to suppress it; he must command the rioters to disperse; he must arrest them if they do not disperse . . . . The duty thus imposed is absolute, and to charge that the riotous assembly occurred with the knowledge of the sheriff; that it continued for eight hours; that it was accompanied by disorder and destruction of property; that it was not dispersed; that participants therein were not arrested; and that no physical resistance was offered to its acts—is to charge official delinquency upon the part of that officer . . . ." (citations omitted)).

289. State *ex rel.* McDonald v. Dyson, 183 N.W. 298, 299–300 (Neb. 1921).

290. State *ex rel.* Beazley v. Dist. Ct., 241 P. 1075, 1076 (Mont. 1925).

291. Gay v. Dist. Ct., 171 P. 156, 156–57 (Nev. 1918) ("A complaint was filed in the district court of said county, wherein it was alleged that the defendant, Sam Gay, as sheriff, was guilty of nonfeasance in office, in that he neglected and refused to arrest one Joe Keate, his deputy, while the latter was making an assault with a pistol upon W. H. Harkins, a justice of the peace, in the presence of the defendant. . . . [T]he court had jurisdiction to hear and determine the matter presented in the complaint filed in the district court charging the petitioner with nonfeasance in office.").

to suffer a criminal to escape or a prisoner to be lynched, or to fail to arrest a person who committed a public offense in his presence."[292]

2. A Duty to Execute Judicial Orders

A sheriff's duty to enforce most often applied when the sheriff personally observed (or could have observed) a criminal violation.[293] But there was a parallel obligation on sheriffs to arrest for offenses committed outside of their presence—namely, a duty to execute judicial orders.

Although the sheriff began as an extension of the King in the countryside,[294] English reforms stripped the office of its quasi-judicial authority, removing discretion from the sheriff's role in enforcing judicial orders.[295] In fact, the sheriff's failure to execute judicial orders was an indictable offense.[296] And if damages resulted from a sheriff's failure to promptly execute, liability would follow.[297]

U.S. law followed suit. U.S. courts embraced the sheriff's duty to execute judicial orders, routinely describing the sheriff's role in enforcing judicial orders as ministerial and obligatory.[298] This historical understanding gives context to modern statutes,

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292. Holliday v. Fields, 275 S.W. 642, 647–48 (Ky. 1925). Ultimately, the court dismissed the charges against the sheriff on the grounds that they were supported by only one witness affidavit (the statute required two), occurred before the statute's effective date, or were personal misconduct. *Id.* at 648.

293. *See id.* at 647.

294. *See* Magna Carta 1297, 25 Edw. c. 9 (Eng.); THE STATUTE OF WINCHESTER, *supra* note 270, at 77–78.

295. *See* Justices of the Peace Act 1968, c. 69 (UK).

296. *See* South v. Maryland, 59 U.S. 396, 403 (1855) ("Actions against the sheriff for a breach of his ministerial duties in the execution of process are to be found in almost every book of reports."); Forrist v. Leavitt, 52 N.H. 481, 482 (1872) ("A justice of the peace is a judicial officer, and the sheriff, being a ministerial officer, is subordinate to and under control of the former. Such is the doctrine of the common law. 'In all cases where a justice has power to make an order and direct it to an inferior ministerial officer, and he disobeys it, if there be no particular remedy prescribed, it is indictable.'" (quoting 1 WM. OLDNALL RUSSELL, A TREATISE ON CRIMES & MISDEMEANORS *525)).

297. *See, e.g.*, Johnson v. Price, 36 So. 1031, 1032 (Fla. 1904) ("At common law it seems that a sheriff was liable to be ruled and held in contempt and amerced for failure to execute a writ or for not making a return. This was a summary remedy. The plaintiff also had his remedy against the sheriff in an action on the case for damages."); Bank of Hartford Cnty. v. Waterman, 26 Conn. 324, 339 (1857) ("The opinion of Lord Denman in the case of *Randell v. Wheble*, 10 A. & E. 719, contains this passage: 'We agree with the case of *Brown v. Jarvis*, that it is the duty of the sheriff to arrest the party on the first opportunity that he can; but we also agree with the court in that case, that some actual damage must be shown in order to make the negligence of the sheriff in that respect a cause of action.'").

298. *See, e.g.*, Kendall v. Aleshire, 45 N.W. 167, 168 (Neb. 1890) ("Meeker, as sheriff of the county, had a warrant in his possession, directed to him, issued by a justice of the peace of the county, for the arrest of the plaintiff upon a criminal charge. This warrant was, for aught that appears, fair on its face. It was the duty of the sheriff to arrest said Aleshire, defendant in said warrant, if found within this state."); People *ex rel.* Kellogg v. Schuyler, 4 N.Y. 173, 192 (1850) ("There is clearly a duty resting upon the sheriff, not only to return the writ but to return it truly. If he should fail to do so, it would most clearly be a violation of official duty."); State v. Hood, 12 N.C. 506, 507 (1828) ("[I]f the criminal is at large, *without taking the oath of insolvency,* it should be the duty of the Clerk to issue his writ of *capias ad satisfaciendum,* and the duty of the Sheriff to arrest the body of the said criminal, if to be found, and him confine until he either pays off the costs of prosecution, *or discharges himself by taking the oath of insolvency*."); *see also* IMPEY, *supra* note 268, at 32 ("The sheriff being obliged to execute every writ and process issuing and directed to him by lawful authority, he is likewise obliged by the duty of his

which define the sheriff's obligation to enforce warrants and court orders. Some state it is "the duty" of the sheriff to diligently execute such orders.[299] Other statutes use more explicitly mandatory language (e.g., the sheriff "shall" or "must").[300]

3. Beyond Warrant Enforcement

Although enforcement of warrants and judicial orders is an inexorable part of a sheriff's duties, it does not fulfill a sheriff's duty to enforce the law. From time to time, sheriffs attempted to justify their inaction (nonenforcement) by arguing that their enforcement obligations were limited to warrants and other court orders.[301] Courts roundly rejected this limit. The Michigan Supreme Court explained: "We cannot shut our eyes to the fact that this [that no warrants had been issued] has been a common excuse of sheriffs and other police officers for not enforcing this and other laws."[302] The Tennessee Supreme Court put it simply: "We cannot agree that [the sheriff] is a mere process server, or that he may, if he would discharge the duties of his office, be passive until some one swears out a warrant for him to serve."[303] A few decades later, the Virginia Supreme Court reiterated that a sheriff's enforcement duties are "not discharged by simply executing warrants which are placed in his hands."[304]

4. A Duty to Investigate

A corollary of the fact that sheriffs could not rely solely on warrants (or lack thereof) is that their enforcement duties included an affirmative obligation to investigate alleged criminal violations brought to their attention.[305] The Virginia

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office to execute such process *without favour*, with the utmost expedition and secrecy; and as soon after he receives it as the nature of the thing will admit of . . . .").

299. *See, e.g.*, GA. CODE ANN. § 15-16-10(a) ("It is the duty of the sheriff: (1) To execute and return the processes and orders of the courts and of officers of competent authority, if not void, with due diligence, when delivered to him for that purpose . . . ."); *see also In re* Smith, 424 S.E.2d 45, 46 (Ga. Ct. App. 1992) ("In light of the foregoing statutes, it is clear that a sheriff can be found in contempt of court by 'neglecting' to perform his duties. . . . [T]he Supreme Court of Georgia held that whether a sheriff neglected his duty 'would depend on the good faith of his conduct, in view of the circumstances under which he acted, of which the court is to judge.'" (quoting Heard v. Callaway, 51 Ga. 314, 317 (1874))).

300. *See, e.g.*, WASH. REV. CODE ANN. § 36.28.010 ("The sheriff . . . . [s]hall execute the process and orders of the courts . . . ."); 55 ILL. COMP. STAT. ANN. § 5/3-6019 ("Sheriffs shall serve and execute, within their respective counties, and return all warrants, process, orders and judgments . . . ."); IND. CODE ANN. § 35-33-8.5-12 ("The sheriff must return every process issued to the sheriff with the sheriff's doings fully endorsed thereon, and every process, judgment and commitment of the circuit and criminal courts must be executed by the sheriff."); WYO. STAT. ANN. § 18-3-604 ("The county sheriff or his deputy shall serve and execute according to law all processes, writs, precepts and orders issued by any court of record in his county . . . .").

301. *See, e.g.*, State *ex rel.* Thompson v. Reichman, 188 S.W. 225, 227 (Tenn. 1916); Scougale v. Sweet, 82 N.W. 1061, 1062 (Mich. 1900).

302. *Scougale*, 82 N.W. at 1065.

303. *Reichman*, 188 S.W. at 228.

304. Barbee v. Murphy, 141 S.E. 237, 240 (Va. 1928).

305. *See, e.g.*, Maxwell v. Andrew County, 146 S.W.2d 621, 625 (Mo. 1940) ("[T]he sheriff is under a legal duty to investigate alleged crimes and to suppress crime and arrest felons."); Farmers' Mut. Fire Ass'n of Shelby Cnty. v. Hunolt, 81 S.W.2d 977, 981 (Mo. Ct. App. 1935) ("It has been held that the duty of a sheriff in the enforcement of the law implies initiative on his part, and that he must be reasonably alert with respect to possible violations of the law, and is not entitled to wait until they come to his personal knowledge, but must follow up information received from any source."); *Reichman*, 188

Supreme Court explained that a sheriff's duties not only prohibited willful blindness but also required the sheriff to "be active and vigilant, and pursue those who he has cause to believe are violating the law."[306] By 1941, the Supreme Court of Minnesota explained more specifically that the sheriff was not permitted "to wait until [violations] come to his personal knowledge, but must follow up information received from any source."[307] The sheriff's duties required "initiative."[308]

At the same time, however, courts were careful not to extend this investigative responsibility so far as to micromanage a sheriff's affairs. For example, courts drew a distinction between a duty to investigate allegations of criminal activity and a duty to patrol and proactively ferret out crime.[309] The former was required as a natural extension of the sheriff's duty to enforce the laws.[310] But a duty to patrol did not exist, in part because patrol was not considered a part of the sheriff's traditional responsibilities.[311]

S.W. at 228 ("It is idle to say that all this [legal authority] does not imply initiative on the part of the sheriff in the enforcement of the law against public offenses. The duties imposed cannot be performed without some degree of activity and diligence to inform himself of conditions in his county. Certainly they preclude the idea that he may, without dereliction, shut his eyes to what is common knowledge in the community, or purposely avoid information, easily acquired, which will make it his duty to act."); *cf. In re* Sulzmann, 29 Ohio N.P. (n.s.) 92, 98 (Ct. C.P. 1931) ("[I]t is urged that the sheriff need act only when there is an uprising or disquietude of a general nature in his county, perhaps a riot, or lynching, or other public violence. . . . As the chief law enforcement officer of the county [the sheriff] is the only officer in the county who directly represents the sovereignty of the state . . . . To hold that he shall be only a 'process server' and shall be active only in enforcing the laws of the state when great physical outbursts are threatened, would be robbing the executive of the state of 88 assistants in the enforcement of law and would leave our citizens still more helpless under the assaults of organized crime.").

306. *Barbee*, 141 S.E. at 240; *accord* Ohio Op. Att'y Gen. No. 94-081 at 2-403 (1994), https://www.ohioattorneygeneral.gov/getattachment/c7bfcb03-a117-4041-a0dd-a835bfc6d131/1994-081.aspx [https://perma.cc/Z64G-ENWY] ("Moreover, the exercise of law enforcement powers by the county sheriff necessarily requires the sheriff to investigate crimes that occur within his jurisdiction.").

307. *In re* Olson, 300 N.W. 398, 400 (Minn. 1941) (quoting *Hunolt*, 81 S.W.2d at 981).

308. *Id.*

309. *See, e.g.*, *In re* Sulzmann, 183 N.E. 531, 532 (Ohio 1932) ("While the sheriff is not required to patrol his county as a policeman, nor to ferret out crime as a detective, under the conceded facts of this case he committed malfeasance in office . . . ."); *Reichman*, 188 S.W. at 228 ("We do not mean that it is his duty to patrol the county as the streets of the city are patrolled by the police, or to maintain a detective force to ferret out crimes. All we now decide is that it is the duty of the sheriff and his deputies to keep their eyes open for evidence of public offenses, and that it is a distinct neglect of duty for them to ignore common knowledge of law violations or to intentionally avoid being where they have reason to believe that such offenses are being committed.").

310. *See Reichman*, 188 S.W. at 228.

311. *See id.*; MARK R. ELLIS, LAW AND ORDER IN BUFFALO BILL'S COUNTRY: LEGAL CULTURE AND COMMUNITY ON THE GREAT PLAINS, 1867–1910, at 64 (2007) ("The sheriff's primary role in law enforcement involved investigating felony crimes such as murders, horse and cattle thefts, serious assaults, burglaries, and various larcenies. Lincoln County sheriffs did not do much in the way of crime prevention. They did not monitor the outlying ranches for stock rustlers, walk through the rail yards looking for thieves, or patrol the Front Street saloons for drunk and disorderly patrons. These responsibilities fell upon North Platte police officers and Union Pacific detectives. As the chief lawman of the county, however, the sheriff had to do everything in his power to apprehend suspected felons."); Lorain Cnty. Deputies Ass'n v. Vasi, No. 92CA005337, 1992 WL 380604, at *1 (Ohio Ct. App. Dec. 16, 1992) ("The Ohio Supreme Court has held that the mandate to 'preserve the public peace' does not require that a sheriff patrol his county as a policeman or ferret out crime as a detective." (quoting *Sulzman*, 183 N.E. at 532)); Jones v. Wittenberg, 357 F. Supp. 696, 700 (N.D. Ohio 1973) ("The weight

5. Limits and Potential Defenses

This nuanced understanding of the sheriff's duty to investigate parallels other ways in which state courts preserved some flexibility for law enforcement while still serving as a check against arbitrary nonenforcement. First, as a practical matter, the only cases that came to the attention of these courts were ones in which the violations sufficiently irked or injured someone to justify bringing a removal action[312]—a natural filtering mechanism. Second, and more importantly, in determining whether a sheriff had neglected their enforcement duties, courts made accommodations for the sheriff's state of mind and often required those challenging the sheriff to present a detailed record of the sheriff's enforcement decisions (and their failures).[313] Courts would not necessarily countenance removal merely because of the widespread existence of unenforced criminal activity.[314] Rather, courts required clear knowledge (or at least reckless disregard) of the violations

of what little authority there is indicates that the Sheriff is only required to respond to calls. He does not have to serve as a patrolman for the County.").

312. Language in some opinions suggests that some sort of injury to the public welfare is required. *See, e.g.*, State *ex rel.* Hardie v. Coleman, 155 So. 129, 132 (Fla. 1934) ("Neglect of duty has reference to the neglect or failure on the part of a public officer to do and perform some duty or duties laid on him as such by virtue of his office or which is required of him by law. It is not material whether the neglect be willful, through malice, ignorance, or oversight. When such neglect is grave and the frequency of it is such as to endanger or threaten the public welfare it is gross."). But I have found no general support for that proposition as it appears to be in tension with the case law recounted above that one-off failures will support removal for neglect of duty. *See supra* notes 282–92 and accompanying text.

313. *See, e.g.*, State v. Lombardi, 99 N.W.2d 829, 840 (1959) ("The evidence of the prostitutes shows that although when [Sheriff] Lombardi knew indisputably the nature and activities of Club 166 he found no reason to interfere with its operations but on the contrary protected it against interference by others. Other evidence . . . is competent to show that the sheriff intended not to disturb the Club's operations though his knowledge of them was complete, that is, he wilfully refused or neglected to perform the duties of his office."); Freas v. State *ex rel.* Freeling, 235 P. 227, 228 (Okla. 1925) (although not requiring a jury instruction on the matter, noting that the sheriff was permitted to present evidence regarding "palliation or extenuation of his alleged failure to enforce the gambling and prohibitory laws"); Ferguson v. Superior Ct., 147 P. 603, 605–06 (Cal. Dist. Ct. App. 1915) ("Such offenses as vagrancy, prostitution and (usually) the letting of houses for prostitution, depend for their criminal character, not upon a single act, but upon a series of acts extending over a considerable period of time, and are criminal offenses because of their continuance and repetition. From the very nature of the offense of letting a house for prostitution and the conducting of prostitution therein, such offenses are rarely, if ever, committed in the presence of the officer; and while he may have had, as a result of information obtained from various sources an acquaintance with the fact, and hence in a limited sense, knowledge, of the commission of such offenses, nevertheless the act which would require, as a positive official duty, the making of an arrest without a warrant was not committed in his presence.").

314. *See, e.g.*, State *ex rel.* Riddle v. Jeansonne, 18 So. 2d 306, 307–08 (La. 1944) ("The other charges brought against the sheriff were for the most part neglect of duty in the matter of suppressing gambling, particularly with slot machines. The evidence shows and the judge found that the sheriff was not neglectful of his duty in that respect. The only vicinities in which the playing of slot machines or other forms of gambling flourished were the vicinities where public sentiment tolerated it and the majority of the citizens winked at it, and hence no one would inform against the offenders. One of the witnesses who had firsthand—not hearsay—information assured the judge that the sheriff suppressed gambling and enforced all of the so-called blue laws in every locality in which he had enough information and the necessary cooperation.").

and a subsequent failure to act.[315] Poor judgement as to what qualified as a violation of state law generally was insufficient to constitute neglect of duty.[316] As the Tennessee Supreme Court explained when reversing a sheriff's ouster from office:

> Shreds of human imperfections gathered together to mold charges of official dereliction should be carefully scanned before a reputable officer is removed from office. These derelictions should amount to knowing misconduct or failure on the part of the officer if his office is to be forfeited; mere mistakes in judgment will not suffice.[317]

Although they afforded sheriffs some flexibility, courts rejected the notion sheriffs could shirk their enforcement duties based on policy objections—either their own or their community's.[318] The Tennessee Supreme Court explained:

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315. *See, e.g.*, *In re* Olson, 300 N.W. 398, 400 (Minn. 1941) ("Where, as here, the operation of slot machines was open and notorious within the corporate limits of the cities and villages of Scott county, including the county seat, where relator resides and has his office, his claim of ignorance of what everyone else knew about this situation cannot excuse him. His statutory duties and his obligations to the public cannot be discharged by willful failure to see the obvious. He may not shut his eyes or close his ears to what others see and hear."); *Freas*, 235 P. at 228 ("Mere thoughtless acts with no bad or evil purpose, in which there is no inexcusable carelessness or recklessness on the part of the officer, will not constitute such a willful failure or neglect of duty as is contemplated by the law of the state relating to the removal of officers, or by these instructions."); *see also* State *ex inf.* Fuchs v. Foote, 903 S.W.2d 535, 538 (Mo. 1995) ("'Willful neglect,' on the other hand, is a hybrid between conduct that is wholly willful and conduct that is wholly neglectful. It is something more than mere mistake or the thoughtless failure to act. Neglect pertains to nonfeasance, the failure to act, whereas willfulness refers to intentional or self-determined conduct. Implicit in the idea of willfulness is the actor's knowledge of the duty neglected; one cannot intentionally neglect a duty without knowing that the duty exists."), *abrogated by* State v. Olvera, 969 S.W.2d 715 (Mo. 1998).

Some states appeared to impose a slightly higher intent standard, at least formally. *See, e.g.*, State *ex rel.* Thompson v. Donahue, 135 N.W. 1030, 1034 (Neb. 1912) ("[W]illful neglect to perform an official duty is considered to be something more than oversight or carelessness or a merely voluntary neglect. It must be prompted by some evil intent or legal malice, or without sufficient ground for believing himself justified in the course pursued. . . . '[W]here such act results from a mere error of judgment or omission of duty without the element of fraud, or where the alleged negligence is attributable to a misconception of duty rather than a willful disregard thereof, it is not impeachable, although it may be highly prejudicial to the interests of the state.'" (quoting State v. Hastings, 55 N.W. 774, 774 (Neb. 1893))).

316. *See, e.g.*, Phillips v. State, 181 P. 713, 714 (Okla. 1919) ("Betting on the result of an election is wrong, and is to be condemned. We believe, from the record in the instant case, that the act of the sheriff in betting on an election, and his failure to arrest the one against whom he bet, was a thoughtless act, and that there is total lack of evidence showing beyond a reasonable doubt that in so doing he was guilty of 'willful neglect of official duty.'"); *Donahue*, 135 N.W. at 1035 ("It may be that the chief of police and every member of the police force was mistaken in supposing that they ought to be controlled by [the mayor and police commission's] policy of enforcing the law, but we cannot believe that they were guilty of a willful refusal to do their duty because of this mistaken notion that they should be governed by the policy of their superiors.").

317. Vandergriff v. State *ex rel.* Davis, 206 S.W.2d 395, 395, 397 (Tenn. 1937).

318. *See, e.g.*, State *ex rel.* Timothy v. Howse, 183 S.W. 510, 516 (Tenn. 1916); *see also* Price, *supra* note 28, at 749 ("[E]ven in areas like criminal law, where substantial nonenforcement of statutes is inevitable, executive officials should understand their task as a matter of priority setting within the parameters of statutory policy, not one of crafting policy-based exceptions to statutory coverage.").

> The attempted justification . . . on the ground that the local public sentiment was opposed to law enforcement is no sort of justification . . . . An official is elected and sworn to enforce the law, not public sentiment; and any suggestion that a municipality, a creature of the state, or its officers may set at naught or defy the laws of a sovereign state cannot be too severely rebuked. That way leads to anarchy. The officer who treads it brands himself as unworthy.[319]

The concern was not that the sheriff misunderstood their community's desires but a firm conviction that the sheriff's duties ran to the state and the public as a whole, not merely to local constituents.[320] And, as a practical matter, courts must have recognized that permitting nonenforcement based on community preferences would effectively gut courts' abilities to constrain nonenforcement.

The case law discussed above should dispel the notion, reinvigorated by the constitutional sheriffs, that a sheriff has discretion to nullify criminalization decisions of the state legislature. Failure to adequately investigate allegations of illegality and failure to take enforcement actions were removable offenses, regardless of policy disagreements with the law.[321] Likewise for ignoring court orders.[322]

The history of sheriffs in the United States indicates courts were willing to review the sheriff's decisions in specific cases and to impose on the sheriff a duty to make arrests and to investigate allegations of criminal activity. Policy or political opposition to criminal statutes was particularly disfavored, and nonenforcement on those grounds a removable offense. In short, at least as a historical matter, the sheriff's opinion is not the highest law in their county.

One reasonably might ask whether this law, some of it from over a century ago, applies today. The answer is complicated: On the one hand, these cases have not been overruled. The fundamental structure of the office of the sheriff, its statutory powers, and its obligations have not evolved much. In fact, one can find

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319. *Howse*, 183 S.W. at 516; *accord* State *ex rel.* Jackson v. Wilcox, 97 P. 372, 372 (Kan. 1908) (upholding removal of mayor although "[t]he mayor appears to have proceeded on the theory that he was justified in following this course so long as the wide open policy was in vogue in the county").

320. *See, e.g.*, Frederick v. Combs, 354 S.W.2d 506, 508 (Ky. 1962) ("The people of the whole state have an interest in the peace and good order of every individual community within it. . . . In fact, it is hardly possible for vice and corruption to flourish very long without the indulgence of the local community, and a remedy resting exclusively with the legislative body of that community could not be adequate protection to the rights of the public as a whole.").

321. Basic principles of judicial supremacy also undermine any suggestion that sheriffs can decline to enforce laws based on their own theory of constitutionality. Presidents and chief executives in the states have a duty to "take care" and see that laws are "faithfully" executed. U.S. CONST. art. II, § 3; *see* Manners & Menand, *supra* note 278, at 28. Sheriffs, however, have no such authority to intrude on the role of the courts. *See In re* Fortney, 478 P.3d 1061, 1068 (Wash. 2021) ("Fortney does not have the authority as Snohomish County sheriff to determine the constitutionality of laws. That is the role of the courts.").

322. This would apply to red flag laws, which some sheriffs rail against. *See supra* note 90 and accompanying text.

aspects of these legal controls—the duty to enforce the law and observe judicial mandates—in modern decisions.[323]

On the other hand, there is no question that the tenor of modern discussions around enforcement discretion has shifted.[324] References to discretion, not duty, fill volumes. Why this shift? This Article does not offer a definitive answer, but one can speculate: the massive expansion in criminal codes;[325] the rise of criminal procedure as the primary avenue of governing law enforcement discretion;[326] the acceptance of plea bargaining and the judiciary's reluctance to police the practice.[327] Perhaps the shift to discretion is due to some combination of these changes.

Given this evolution, the question becomes: What are the objections to or negative implications of reviving the sheriff's duties to investigate and enforce? Part IV turns to these questions.

IV. OBJECTIONS & IMPLICATIONS

Sixty years ago, Kenneth Culp Davis, studying police enforcement in Chicago, revealed a troubling state of affairs: Police would pay lip service to the notion that they were required to enforce the criminal laws as written, but, in reality, they engaged in selective enforcement based on principles and values entirely of their own design.[328] Davis suggested that police eschew the outward notion that they were bound to enforce the laws and that society should develop clear rules to constrain police discretion.[329]

The state of affairs today is, in some ways, worse than what Davis observed. The first half of Davis's wishes have been realized. Today, police discretion is common parlance, both in the legal academy and among law enforcement.[330] The constitutional sheriffs, for example, pay no lip service to the notion of mandatory enforcement; they cloak themselves in discretion.[331] We should be grateful that police are transparent in their embrace of discretion. After all, as Davis said, "[police] work for the public. In a democratic system, the members of the public—the electorate—are their bosses. And the bosses have a right to know what is going

323. *See, e.g.*, *Fortney*, 478 P.3d at 1066–67 ("Though Sheriff Fortney is entitled to a great deal of discretion in his enforcement decisions, he is still subject to recall if he uses his discretion in a 'manifestly unreasonable manner.' If Fortney leveraged his discretionary power to refuse to enforce the governor's proclamation with the objective of inciting noncompliance in the midst of a pandemic, the voters may determine that this was a manifestly unreasonable use of discretion. (citation omitted)); Sarasino v. State, 215 So.3d 923, 930 (La. Ct. App. 2017) (noting that sheriffs retain some discretion in the timing and manner of executing arrest warrants but not questioning they are obligated to serve them).

324. *See supra* notes 25–29 and accompanying text.

325. *See* Brown, *supra* note 159, at 884; Luna, *supra* note 159, at 522, 527.

326. *See generally* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

327. *See* Ortman, *supra* note 249, at 1440, 1496–97.

328. *See* DAVIS, *supra* note 257, at III.

329. *See id.* at IV–V.

330. *See, e.g.*, McFarland, *supra* note 25. *See generally, e.g.*, DAVIS, *supra* note 257.

331. *See* McFarland, *supra* note 25.

on."[332] Today there is improved transparency, but the meaningful constraints on discretion that Davis hoped for remain elusive.[333]

The result is a system of law enforcement that is increasingly forthright about selectively enforcing certain laws while ignoring others based on policy choices about the relative importance of various laws. These enforcement preferences inevitably come to reflect the sheriff's politics—with some sheriffs ignoring gun restrictions and others ignoring drug or abortion laws.[334] The risks of this approach are significant, particularly for those under the sheriff's jurisdiction who lack meaningful political clout.[335]

Rather than having courts rubber-stamp police enforcement decisions and cede nonenforcement discretion to the world of politics, historical practice suggests a different path is possible. As detailed in Part III, state courts often evaluated nonenforcement decisions under a neglect-of-duty framework. Reviving the possibility of judicial review of nonenforcement could help avoid the lawlessness that appears to characterize modern nonenforcement.

Having already discussed the potential benefits of reviving this approach, this Part examines several possible objections. Section IV.A explores what this Article calls the "myth of full enforcement"—the false dichotomy between full enforcement of the criminal laws (which is impractical) and unfettered enforcement discretion. Section IV.B challenges the view that courts cannot review nonenforcement decisions in particular cases. Section IV.C examines strategies for mitigating the harms that might result from limiting nonenforcement discretion. Section IV.D explains why legal constraints and judicial review need not result in crippling monetary liability. Finally, Section IV.E argues that this Article's suggestion to restore limits on nonenforcement reinforces legislative supremacy over the criminal law.

A. THE MYTH OF FULL ENFORCEMENT

Although the neglect-of-duty case law discussed in Part III has not been explicitly overruled, it has fallen out of favor. A key argument in favor of expansive nonenforcement discretion is that the alternative is a regime of "full enforcement" of the criminal laws.[336] Full enforcement, in turn, is thoroughly dismissed as a "false pretense,"[337] unrealistic,[338] "thoroughly impractical,"[339] a myth,[340]

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332. DAVIS, *supra* note 257, at 71–72.

333. *See supra* notes 228–29 (collecting scholarly suggestions on constraining police discretion).

334. *See supra* notes 88–92, 97–98, and accompanying text.

335. *See supra* Section I.C.

336. *See* Herman Goldstein, *Police Discretion: The Ideal Versus the Real*, 23 PUB. ADMIN. REV. 140, 141, 148 (1963).

337. DAVIS, *supra* note 257, at 52–54.

338. Goldstein, *supra* note 228, at 560–62.

339. Luna, *supra* note 159, at 604.

340. Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 915 (1962); Williams, *supra* note 186, at 128.

intolerable,[341] and extreme.[342] The Connecticut Supreme Court, for example, construed a statute containing mandatory enforcement language as preserving police discretion because to construe the statute as meaning what it says would be "unworkable on many levels and would lead to absurd results."[343]

But "full enforcement" has always been a straw man. As a practical matter, no one believes law enforcement can enforce every criminal law to the fullest.[344] That would be impossible in today's era of expansive and overlapping criminal codes.[345] And it would have been impossible in earlier eras as well, with alcohol bans, gambling bans, and bans on playing baseball on Sundays all to be enforced before the development of massive modern policing agencies. But the impracticability of full enforcement does not imply that officers must have unfettered discretion to decline to enforce the law.[346]

The neglect-of-duty case law discussed in Part III demonstrates a commitment, not to full enforcement in the abstract but to reasoned decisionmaking in particular cases. Courts assessing whether nonenforcement amounted to neglect of duty did so not based on generalized allegations of underenforcement but instead on specific examples and evidence.[347] The Louisiana Supreme Court, for example, saw evidence of widespread gambling as relevant but nonetheless asked what the sheriff did in response.[348] Discretion has a role to play: Absent a court order, sheriffs must make judgments about the existence of probable cause.[349] Ambiguous laws require interpretation.[350] Witnesses must be credible.[351] Conduct must meet *mens rea* requirements.[352] Undercover officers are permitted to protect their identity.[353] But these reasons can be presented and tested in court. What was beyond

341. *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, PRINCIPLES OF CRIMINAL PROCEDURE: POST-INVESTIGATION § 13.2(d), at 454 (2d ed. 2009) (explaining how enforcing ambiguous plea agreements fully and literally can lead to unfair results for defendants).

342. Markowitz, *supra* note 28, at 515.

343. Diaz v. Comm'r of Corr., 279 A.3d 147, 160–61 (Conn. 2022).

344. *See, e.g.*, Luna, *supra* note 159, at 562.

345. *Id.* ("[T]he current state of criminal law enactment and adjudication makes full enforcement prohibitive and police discretion inevitable; legislatures overcriminalize and courts defer, more or less.").

346. *See* Allen, *supra* note 229, at 75 ("[E]ven if the police are unable to enforce 'all the criminal laws,' that alone does not necessarily justify the deliberate nonenforcement of any particular statute . . . .").

347. *See supra* notes 313–16 and accompanying text.

348. *See* State *ex rel.* Riddle v. Jeansonne, 18 So. 2d 306, 307–08 (La. 1944).

349. *See, e.g.*, CAL. PENAL CODE § 836(a).

350. *See* Delahunty & Yoo, *supra* note 28, at 799 n.104 ("Enforcement also implies interpretation. In order to carry out the laws, an Executive must determine their meaning. Sometimes those laws will be clear, as when the Constitution sets the minimum age for a President, but more often than not, the laws are ambiguous or delegate decision making to the Executive.").

351. *See* Mustafa v. City of Chicago, 442 F.3d 544, 548 (7th Cir. 2006); United States v. Wyche, 307 F. Supp. 2d 453, 463 (E.D.N.Y. 2004); Wilson v. Russo, 212 F.3d 781, 794 (3d Cir. 2000).

352. *See* District of Columbia v. Wesby, 583 U.S. 48, 59 (2018); Dollard v. Whisenand, 946 F.3d 342, 362 (7th Cir. 2019); Williams v. City of Alexander, 772 F.3d 1307, 1312 (8th Cir. 2014).

353. *See* Diaz v. Comm'r of Corr., 279 A.3d 147, 160–61 (Conn. 2022).

the pale was nonenforcement based on policy preferences or local indulgence.[354] As the Tennessee Supreme Court explained, "[t]hat way leads to anarchy."[355]

Clinging to the false dichotomy between discretion and full enforcement makes it impossible for state courts to ensure a sheriff's faithful execution of their duties. Rubber-stamping police enforcement decisions makes it impossible to judge whether law enforcement exercised its discretion appropriately.[356] By contrast, the case law discussed in Part III charted a middle course between full enforcement and unfettered discretion, attempting to control unnecessary or inappropriate discretion under the neglect-of-duty framework, much like the calls from Kenneth Culp Davis and others decades later.[357]

Rather than a precursor to full enforcement or a wholesale rejection of discretion, a sheriff's duties to investigate and enforce were seen as a necessary backstop.[358] Without these duties, a sheriff's inaction would go unchallenged. Naked policy choices would be unreviewable. The real choice, therefore, is not between full enforcement and discretion but between unfettered discretion and reviewable discretion. Neglect-of-duty case law supplies a framework to implement the latter.

B. THE UNASSAILABILITY OF CASE-BY-CASE DISCRETION

Reviving judicial review of sheriff nonenforcement under a neglect-of-duty framework will encounter a second challenge from modern conceptions of enforcement discretion—that so long as law enforcement exercises its discretion on a case-by-case (not categorical) basis, those choices are unreviewable.[359]

At present, much of today's discussion of enforcement discretion focuses on "categorical" nonenforcement policies—that a particular type of crime will not be enforced.[360] Sparked by Obama-era immigration policies and a raft of declination policies from reform prosecutors, scholars have explored the propriety of categorial nonenforcement in great detail.[361] Some claim that categorical nonenforcement is

354. *See supra* notes 318–20 and accompanying text.

355. State *ex rel*. Timothy v. Howse, 183 S.W. 510, 516 (Tenn. 1916).

356. *Cf.* Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 193 ("[The] notion that police are ministerial officers—an idea that police have sometimes encouraged—still pervades much of the public discourse about law enforcement in ways detrimental to the reasonable restraint of arbitrary and capricious police behavior.").

357. *See* DAVIS, *supra* note 257, at 112–20 (discussing fourteen reasons in favor of police rulemaking to govern police-enforcement discretion); Kadish, *supra* note 340, at 915 ("Certainly the challenge of making accountable the policeman's exercise of power not to arrest is formidable. Neither the perpetuation of the myth of full enforcement nor of the myth of the benignity and inevitability of unfettered discretion will move us towards an acceptable accommodation.").

358. *See supra* Section III.C.1, 4.

359. *See* sources cited *supra* note 28; *see also* Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379 (2d Cir. 1973) ("The primary ground upon which this traditional judicial aversion to compelling prosecutions has been based is the separation of powers doctrine."); Moses v. Kennedy, 219 F. Supp. 762, 764–65 (D.D.C. 1963) (holding that "the inherent limitations upon the judicial power" prevented the court from granting mandamus ordering a criminal prosecution).

360. Although this Article contrasts only categorical and case-by-case nonenforcement, there are in fact a variety of ways that law enforcement can deploy its enforcement discretion. *See* Price, *supra* note 29, at 666–68 (offering a typology of enforcement discretion).

361. *See, e.g.*, Price, *supra* note 28, at 673–75, 677–78.

impermissible because it violates the executive's constitutional obligations and is more akin to the legislative function.[362] Others defend the practice, at least under certain conditions.[363]

Both sides of this debate share the view, however, that case-by-case discretion is different. All recognize the executive's prerogative in particular cases.[364] While this debate is of somewhat modern vintage, the distinction between categorical and case-by-case discretion has constitutional roots.[365] Administrative law makes a similar distinction, operating with a "presumption of unreviewability" for particular instances of inaction,[366] leaving the door open for review if the agency "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."[367]

The hesitancy to get involved in reviewing case-by-case discretion rests on notions of executive prerogative and judicial manageability. Under the former, certain matters are committed to the discretion of the executive as a matter of separation of powers.[368] Under the latter, judicial intervention is inappropriate because courts lack the institutional capacity to decide questions according to neutral criteria.[369] In such cases, the argument goes, executive action is better left to political checks.[370]

The neglect-of-duty law discussed above, however, suggests that neither of these concerns is insurmountable. First, as a historical matter, nonenforcement never was committed to the sheriff's sole prerogative.[371] Sheriffs were beholden to judicial orders to enforce.[372] Courts removed sheriffs who failed to investigate allegations of criminal activity or who failed to take enforcement actions when

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362. *See, e.g.*, *id.* at 674–75.

For a discussion of English monarchs' power to suspend and dispense with application of statutes, and the Founders' desire not to vest the federal executive with that power, see, for example, *id.* at 675; Bellia, *supra* note 28, at 1774–75; Delahunty & Yoo, *supra* note 28, at 784–85, 796–98.

In fact, state legislatures attempting to reign in local prosecutors cite categorical nonenforcement as a basis for removal or discipline. *See* TENN. CODE ANN. § 67-5-2406(b).

363. *See, e.g.*, Markovic, *supra* note 28, at 1525–26, 1542–43; Murray, *supra* note 12, at 200, 255; Sawyer, *supra* note 28, at 603, 608–10; Wright, *supra* note 28, at 828, 857.

364. *See, e.g.*, Price, *supra* note 28, at 675 (proposing two default presumptions to "structure the law of federal enforcement discretion": "first, that [executive officials] hold discretion to decline enforcement in particular cases, but second, that they lack discretion to categorically suspend enforcement or prospectively exclude defendants from the scope of statutory prohibitions").

365. *See* Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 7 (1964) ("Although the area of police and prosecutorial discretion not to invoke the criminal process is demonstrably broad, it is common ground that these officials have no general dispensing power.").

366. Heckler v. Chaney, 470 U.S. 821, 833 (1985).

367. *Id.* at 833 n.4 (quoting Adams v. Richardson, 480 F.2d 1159 (1973)).

368. *See* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1662, 1689, 1697–702 (2004) (advocating a narrow view of matters committed to agency discretion by law).

369. As the Supreme Court explained in *Heckler*, judicial review of agency inaction is difficult because it often turns on "a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." 470 U.S. at 831.

370. *See* Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571, 1619–20 (2016).

371. *See supra* Section III.C.

372. *See supra* Section III.C.2.

confronted with criminal behavior.[373] Some strategic choices were reserved for sheriffs—if, how, and when to patrol, for example[374]—but enforcement discretion was not beyond judicial review.

Second, the neglect-of-duty law discussed above undermines the notion that courts cannot develop manageable standards to adjudicate nonenforcement disputes. At bottom, the assumption that courts cannot do so rests on the assumption that courts are ill-suited to make judgements about which regulatory targets are most deserving.[375] While there is some truth to this, it is a mistake to assume that the mine run of cases turn on such judgments. There will be instances for which the sheriff has no explanation for nonenforcement or only an impermissible one. For example, high courts across the country confronted sheriffs who justified their inactivity based on a lack of warrants and uniformly rejected the notion that a sheriff was a "mere process server"[376] who could otherwise "shut his eyes, or close his ears, to what he might see and hear."[377] These are the cases for which legal limits on nonenforcement are critical and workable.

Some justifications will be more difficult for courts to assess on the merits. Allocating resources among competing public safety priorities is one example. But, even in those instances in which the judiciary ought to defer to the sheriff, there is much to be gained through judicial review. One can stipulate that there will be instances of nonenforcement that turn on judgments better suited for the sheriff than a court, but even in such cases, judicial review should require law enforcement to commit its reasoning to the public record to allow courts to evaluate the genuineness of the claim and to further public debate on the matter.[378] The analogy in administrative law is judicial review to ensure "reasoned decisionmaking" based "on a consideration of the relevant factors."[379]

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373. *See supra* Section III.C.1, 4.

374. *See supra* notes 309–11 and accompanying text.

375. *See* Price, *supra* note 370, at 1601 (discussing resource constraints and explaining that "[n]onenforcement, in other words, is judicially unmanageable because it is practically inevitable").

376. State *ex rel*. Thompson v. Reichman, 188 S.W. 225, 228 (Tenn. 1916).

377. Barbee v. Murphy, 141 S.E. 237, 240 (Va. 1928).

378. *See* Bressman, *supra* note 368, at 1697 ("If an agency bases a nonenforcement decision on legitimate reasons of resource allocation and priority setting, then it is entitled to demand judicial respect. I maintain, however, that the agency is not entitled to evade judicial review. At a minimum, it must *demonstrate* to a court that it has rational, public-minded reasons for a particular nonenforcement decision. It also should demonstrate to a court that it has promulgated and followed rational, public-minded standards governing all enforcement decisions."); Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1636 (2012) (discussing the value of requiring police to seek a warrant before a judge even if the judge is likely to defer to their judgments); *cf*. Leigh Osofsky, *The Case for Categorical Nonenforcement*, 69 TAX L. REV. 73, 93–94 (2015) ("Specifically, as a result of increasing the salience of nonenforcement decisions and by serving as a means of committing the agency to a policy of nonenforcement, categorical nonenforcement, under certain circumstances, may increase the accountability, deliberation, and nonarbitrariness of an agency's inevitable nonenforcement of the law.").

379. Michigan v. EPA, 576 U.S. 743, 750 (2015) (first quoting Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374 (1998); and then quoting Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983)); *id*. at 750–51 (finding the EPA's decision to improve public health and protect the environment by reducing power plants' emissions to be unlawful because "[t]he

In short, judicial review of the sheriff's choices on a case-by-case basis is not as unmanageable as assumed in modern canon.

Of course, permitting review of nonenforcement decisions takes a particular view of the tradeoffs involved. Leaving nonenforcement decisions beyond the reach of the judiciary likely would make the sheriff's operations more efficient. Oversight has costs—courts will be called upon to adjudicate cases; there is a risk of political misuse of the system. These costs will need to be calibrated through standing and evidentiary requirements. Admittedly, the neglect-of-duty law discussed above is not a fully-formed doctrine. But these are surmountable problems of law and procedure. In contrast, leaving enforcement discretion to pure politics ensures those without power will have no recourse.

C. MITIGATING THE HARMS OF ENFORCEMENT

Another hesitation with limiting nonenforcement discretion might stem from the harms that result from additional enforcement. These concerns are critically important, but they too can be addressed.

It is difficult to predict empirically whether the regime described in this Article would result in additional incarceration. On the one hand, any limit on nonenforcement discretion would seem to lend itself to an increase in the number of arrests. On the other hand, sheriffs already have financial incentives to keep their jails full, and rural incarceration is spiking under our current regime of nonenforcement discretion.[380] Rather than decrease overall incarceration, nonenforcement discretion may simply make it easier for sheriffs to direct resources against politically popular targets.[381]

Still, given the enormous human costs of arrests,[382] it is essential to pair any limits on nonenforcement with specific reforms to mitigate those harms.

First, rather than seeing the sheriff's duty as a command to eliminate discretion throughout the criminal system, it is more appropriate to view limits on a sheriff's enforcement discretion as an imperative to reinvigorate other avenues for nonenforcement discretion.[383] For example, as discussed in more detail in Section IV.E,

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Agency gave cost no thought *at all*, because it considered cost irrelevant to its initial decision to regulate").

380. *See supra* Section I.A.

381. *See supra* Section I.C.

382. *See* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 19–38 (2018) (exploring the wide-ranging impact of misdemeanor enforcement); Samuel R. Wiseman, *Bail and Mass Incarceration*, 52 GA. L. REV. 235, 241 (2018) ("Each day in jail is a missed day of work and time with family, and each day increases the likelihood of losing employment and housing."); Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 715–16 (2017) (identifying consequences of pretrial detention for misdemeanor offenses); Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 313–20 (2016); Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1303–23 (2012).

383. One might also consider reviving another historical site of nullification authority that we have abandoned: the jury. *See* Daniel Epps, *Checks and Balances in the Criminal Law*, 74 VAND. L. REV. 1, 67 (2021) ("This vision of the jury is one that is more tolerant of jury nullification than our judicial

legislatures should codify scenarios in which nonenforcement is acceptable or preferred,[384] as well as the circumstances in which citation is required in lieu of arrest.[385] In fact, because sheriff investigation and enforcement would otherwise be mandatory, legislatures should be more motivated to create these alternative avenues than they are today.[386]

Second, it is important to pair limits on nonenforcement with reforms that substantially reduce the use of pretrial detention. Today, pretrial detention is the norm, particularly for those who are financially unable to pay for their freedom.[387] As a result, jails, often run by the county sheriff,[388] are about two-thirds full of pretrial detainees.[389] These people are presumed innocent, and yet, because of the burdens of detention (independent of actual guilt or innocence), many are forced to plead guilty.[390] To ease these harms, jurisdictions might implement a number of changes, such as providing appointed counsel at pretrial release hearings;[391] accounting for a person's ability to pay when imposing bail;[392] and imposing "the

system is today."). Jury nullification has a substantial historical pedigree. *See* Laura I. Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413, 1415–18 (2017) (discussing the centrality of the jury in early America, including the jury's ability "to both create and control the content of the colony's substantive law"); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 50–61 (2003) (explaining how the jury's power to nullify served "as a potent check on the legislature"). But even under a system that permits greater jury nullification, it is likely to serve a modest few. Jury trials are vanishingly few, and they cannot mitigate the harms of the initial arrest. *See Jury Trials Still on the Decline, Other Trends Identified in National Jury Improvement Survey*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/newsroom/at-the-center/2024/jury-trials-still-on-the-decline,-other-trends-identified-in-national-jury-improvement-survey [https://perma.cc/85RP-ZJDH] (last visited Mar. 28, 2025).

384. *See* Price, *supra* note 28, at 674–75 (discussing the defeasibility of presidential nonenforcement authority).

385. *See* Littman, *supra* note 53, at 906–07 (describing state "cite and release" policies).

386. *See* Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 828–31 (2016) (arguing that more adversarial prosecutors may reduce legislative incentives to draft overly broad and overly harsh statutes); *cf.* Goldstein, *supra* note 228, at 573 ("Full enforcement will place the legislature in a position to evaluate its . . . laws by providing a basis for answering such questions as: . . . [W]ill full enforcement reduce . . . the frequency of connected crimes?" (emphasis omitted)).

387. *See* Sawyer & Wagner, *supra* note 224.

388. Littman, *supra* note 53, at 870 & n.28, 876 & n.55.

389. *Id.*

390. *See* Wiseman, *supra* note 382, at 250 ("A group of studies published in the past five years shows a compelling empirical connection between bail and convictions and bail and guilty pleas, specifically."); *see also* SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM 84 (2018).

391. *See* Andrew Davies & Alyssa Clark, Gideon *in the Desert: An Empirical Study of Providing Counsel to Criminal Defendants in Rural Places*, 71 ME. L. REV. 245, 247–48, 263 (2019) (finding that criminal defendants in rural Texas were significantly less likely to receive appointed counsel in misdemeanor cases than in urban Texas).

392. *See* Russell M. Gold & Ronald F. Wright, *The Political Patterns of Bail Reform*, 55 WAKE FOREST L. REV. 743, 756 (2020); Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1472–73, 1475–76 (2017); Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 434 (2016); *see also* Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 507–08 (2018).

least restrictive conditions of release."[393] The details of these reforms will depend on the particularities of the jurisdiction, which injects an important element of local democracy.

Finally, reining in the sheriff's nonenforcement discretion should not be seen as a command to eliminate other potential sites of leniency, such as via the prosecutor. At first, this might seem an odd distinction. Both the sheriff and the prosecutor are law enforcement officials answerable to their county electorate.[394] And unchecked prosecutorial discretion raises serious concerns, as many scholars have noted.[395] But the sheriff and the prosecutor diverge in important ways that suggest prosecutors ought to retain greater nonenforcement discretion. First, as a historical matter, while courts were establishing a sheriff's duty to enforce the laws,[396] the prosecutor wielded the power to *nol pros*—to decline to prosecute a case.[397] Second, many states view their prosecutors as quasi-judicial officers,[398] which arguably gives them more authority to recognize leniency-argument defenses or otherwise decline a case. Third, prosecutors may be a better site of nonenforcement discretion because unlike a sheriff's decision not to arrest, a prosecutor's decision to decline a case is not invisible (there will be an arrest record and paperwork dismissing the charges).[399] Fourth, unlike sheriffs, prosecutors can exercise their discretion in more nuanced ways. The sheriff's enforcement decision essentially is binary—arrest or not. But prosecutors can vary the charges brought, offer a plea, seek a non-carceral sentence, and engage in a host of other options short of complete nonenforcement.[400]

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393. Jordan Gross, *Pretrial Justice in Out-of-the-Way Places – Including Rural Communities in the Bail Reform Conversation*, 84 MONT. L. REV. 159, 193 (2023) (considering pretrial reforms as applied to rural communities).

394. *See, e.g.*, State v. Annala, 484 N.W.2d 138, 146 (Wis. 1992) ("On numerous occasions, we have explained that in general the district attorney is answerable to the people of the state and not to the courts or the legislature as to the manner in which he or she exercises prosecutorial discretion."). *But see* Cassandra Bryne Hessick, Sarah Treul & Alexander Love, *Understanding Uncontested Prosecutor Elections*, 60 AM. CRIM. L. REV. 31, 45 (2023) (explaining the shortcomings of elections at producing accountability for prosecutors); *supra* Section II.A.

395. Megan S. Wright, Shima Baradaran Baughman & Christopher Robertson, *Inside the Black Box of Prosecutor Discretion*, 55 UC DAVIS L. REV. 2133, 2140 (2022); STUNTZ, *supra* note 147; James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1523 (1981). Though, to be fair, these concerns focus on instances when prosecutors *enforce* (or over-enforce). *See* Wright et al., *supra*; STUNTZ, *supra* note 147. Nonenforcement discretion, by contrast, has its supporters. *See supra* note 18.

396. *See supra* Section III.C.1.

397. *See* Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, SETON HALL CIR. REV. 1, 19 (2009).

398. *See* Hessick & Su, *supra* note 235, at 1687; Brown, *supra* note 226, at 1242–43.

399. *See* Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 63 (2000); Adam M. Gershowitz, *Prosecutorial Dismissals as Teachable Moments (and Databases) for the Police*, 86 GEO. WASH. L. REV. 1525, 1546 (2018).

400. *See* sources cited *supra* note 114 and accompanying text.

D. MODERATING LIABILITY CONCERNS

Another practical concern should be brought to the fore—that recognizing a sheriff's duties to investigate and arrest, enforceable by the judiciary, might bring about financial exposure for the state.[401] Jurisdictions have paid billions in judgments resulting from police-misconduct lawsuits.[402] Although the impact of expanding liability for nonenforcement is debatable,[403] the prospect is likely to give courts pause. Similar liability concerns have driven the expansion of qualified immunity, for example.[404] In another context, to avoid liability, the Supreme Court in *Town of Castle Rock v. Gonzales* converted a statute that made police enforcement of restraining orders mandatory into a discretionary statute.[405] Other courts have followed suit, emphasizing the discretionary nature of arrest decisions in order to immunize police failures to enforce.[406]

However, the notion that liability must accompany accountability for nonenforcement is a fallacy. Even assuming one shares concerns about financially exposing the state, it does not follow that nonenforcement must be beyond the judiciary's reach. The Missouri Supreme Court, for example, rejected a civil cause of action arising from a sheriff's failure to enforce the gambling statute while still accepting that courts could review the sheriff's failure and have it serve as the basis for removal.[407]

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401. Sheriffs, like law enforcement officers generally, typically are indemnified by the county. *See, e.g.*, 55 ILL. COMP. STAT. ANN. 5/5-1002; NEB. REV. STAT. ANN. § 23-1720. *See generally* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014).

402. *Settlements*, NAT'L POLICE FUNDING DATABASE (July 17, 2023), https://policefundingdatabase.org/explore-the-database/settlements [https://perma.cc/QJ3P-KAE6] (identifying "217 publicly reported settlements that resulted in policy changes and over $2,340,780,094.00 in monetary compensation").

403. For a debate in the context of constitutional torts, compare Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 975 (2019) (noting concerns that eliminating immunity could result in "frivolous and distracting litigation" and impose "unanticipated financial drains on the public fisc"), and John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 248 (2013) ("[Without qualified immunity], every extension of constitutional rights, whether revolutionary or evolutionary, would trigger money damages. In some circumstances, that prospect might not matter. In others, it surely would. The impact of inhibiting constitutional innovation in this way is impossible to quantify, but I think it would prove deleterious."), with Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 316 (2020) (predicting even without qualified immunity, "settlements and judgments would continue to have a limited impact on officers' and municipalities' dollars and decisionmaking").

404. *See, e.g.*, Forrester v. White, 484 U.S. 219, 223 (1988) ("Special problems arise[] . . . when government officials are exposed to liability for damages. . . . [T]he threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties.").

405. 545 U.S. 748, 764–66, 768–69 (2005).

406. *See, e.g.*, Diaz v. Comm'r of Corr., 279 A.3d 147, 160–61 (Conn. 2022); Everton v. Willard, 468 So. 2d 936, 939 (Fla. 1985); Hildenbrand v. Cox, 369 N.W.2d 411, 416–17 (Iowa 1985) (noting that the state statutes regarding drunk driving and public drunkenness state that the officer "may" arrest, and thus finding no "duty" to arrest, and thus no basis for tort liability); *see also* Gregory Howard Williams, *Police Discretion: A Comparative Perspective*, 64 IND. L.J. 873, 894 & n.100 (1989) (arguing that criminal laws are "not specific commands" and "officers are to exercise their judgment in enforcing the criminal laws," and citing case law relating to government liability to make the point).

407. Parker v. Sherman, 456 S.W.2d 577, 580–81 (Mo. 1970).

There already exists doctrine to accommodate this distinction among available remedies. Under well-established law, a sheriff's duty, when owed to the public and not to a particular individual, is insufficient to sustain a private action for damages but sufficient to warrant proceedings against a sheriff for neglect of duty.[408] It is entirely plausible to understand the sheriff's duties to investigate and to enforce as duties owed to the public, thus providing a basis for judicial review but not monetary liability. Exceptional circumstances, such as when a police officer has a special duty to an individual, might give rise to liability in a particular case.[409] And states can, of course, craft more specific rules that better suit their needs.[410] As a general matter, however, financial liability is not a necessary byproduct of limiting a sheriff's nonenforcement discretion.

E. RESTORING LEGISLATIVE SUPREMACY

Finally, one might reasonably ask what role a system of judicial review of nonenforcement leaves for the legislature. The answer is, a robust one.

At present, the status quo looks something like this: The legislature formally defines what is criminal, but enforcement practices give those laws shape.[411] Legislatures know this. In fact, they depend on it, drafting broad laws that criminalize a range of relatively common everyday behavior and leaving it to police to sort out the result.[412] Law enforcement is thus left with expansive authority to pick and choose which laws to enforce and which to disregard.

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408. *See, e.g.*, Massengill v. Yuma County, 456 P.2d 376, 379 (Ariz. 1969) ("[I]f the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution."), *overruled on other grounds by* Ryan v. State, 656 P.2d 597 (Ariz. 1982) (en banc); South v. Maryland, 59 U.S. 396, 401 (1855) ("Actions against the sheriff for a breach of his ministerial duties in the execution of process are to be found in almost every book of reports. But no instance can be found where a civil action has been sustained against him for his default or misbehavior as conservator of the peace, by those who have suffered injury to their property or persons through the violence of mobs, riots, or insurrections."); People v. Md. Casualty Co., 132 F.2d 850, 852 (7th Cir.) ("[T]he law seems to be clear that if the duty discharged is a public duty and not a duty which the individuals owe to any particular person, then by their negligence or wanton or wilful omission in the performance of this public duty, the officers are not liable except to the State.").

409. *See, e.g.*, Dauffenbach v. City of Wichita, 667 P.2d 380, 385 (Kan. 1983) ("Police officers have immunity from liability on claims arising from performance or nonperformance of an officer's general duties to prevent crime and enforce the laws. Liability arises only where an officer breaches a specific or special duty owed an individual."); Hurd v. Flores, 221 S.W.3d 14, 29 (Tenn. Ct. App. 2006) ("The Hurds have alleged nothing more than Deputy Flatt's refusal to enforce the applicable law, a duty which he owed to the public in general.").

410. *Compare, e.g.*, CAL. GOV'T CODE § 821 ("A public employee is not liable for an injury caused by his adoption of or failure to adopt an enactment or by his failure to enforce an enactment."), *with* Annala v. McLeod, 206 P.2d 811, 815 (Mont. 1949) ("It was not until 1947, being almost a year after the plaintiffs' claimed cause of action arose, that the legislature of the state of Montana finally passed a law as to the civil liability of a sheriff in instances such as are here alleged [neglect of sheriff duties].").

411. *See generally* Brenner M. Fissell, *Police-Made Law*, 108 MINN. L. REV. 2561 (2024).

412. *See* Luna, *supra* note 159, at 522.

A regime of judicial review that enforces the sheriff's duties to investigate and to enforce leaves substantial room for legislative action to refine the boundaries of permissible enforcement discretion.

First, legislatures should define circumstances in which sheriffs (and other law enforcement officials) retain nonenforcement discretion. Although courts began the task of defining the contours of the sheriff's enforcement obligations,[413] much remains unresolved, particularly given the modern expansion of our criminal codes.[414] For example, although the sheriff's historical duties are clear as to certain categories of offenses—felonies, offenses committed in the sheriff's presence, breaches of the peace, and so forth[415]—it is largely an open question what sort of discretion should apply to misdemeanor, non-breaches-of-the-peace offenses committed outside of the sheriff's presence.[416] The legislature could cede enforcement discretion for certain offenses.[417] Or it could provide explicit alternatives to arrest, such as issuing a warning or a citation.[418]

A legislature that prefers to leave nonenforcement decisions to local officials could do so while also taking steps to ensure greater transparency and accountability. Drawing inspiration from administrative law,[419] legislatures might create

413. *See supra* Section III.C.

414. *See supra* note 325 and accompanying text.

415. *See* Prosser v. Parsons, 141 S.E.2d 342, 345 (S.C. 1965) ("At common law sheriffs, constables, and other peace officers had the power and authority to arrest without warrant felons or persons reasonably suspected of having committed a felony and also those who had committed a misdemeanor in his presence which amounted to a breach of the peace.").

416. *See, e.g.*, Commonwealth v. Copenhaver, 229 A.3d 242, 259 (Pa. 2020) (Wecht, J., concurring & dissenting) ("*Leet* was incorrect when it was decided, and it should be overruled. . . . This Court's fitful, episodic case-by-case common law approach to defining breach of the peace—an approach the General Assembly already had rejected when it abolished common law crimes—can never prove equal to the task of providing the necessary guidance. That is why we elect lawmakers.").

417. For instance, in New Mexico, it is "the duty of every sheriff . . . to investigate all violations of the criminal laws of the state which are called to the attention of any such officer or of which he is aware," but the sheriff is required to file criminal charges only "if the circumstances are such as to indicate to a reasonably prudent person that such action should be taken." N.M. STAT. ANN. § 29-1-1.

Some of the mask mandates that were the subject of sheriff opposition in Washington state provided that the mandates "may" be criminally enforced, thus perhaps implying discretion. *See, e.g.*, *In re* Snaza, 480 P.3d 404, 409 (Wash. 2021) ("While it is correct that Snaza has a duty to enforce the Order, he is not required to *criminally* enforce it. The plain language of the Order gives law enforcement officers discretion—it states that violators *may* be subject to criminal penalties. . . . Officers are under no mandatory duty, statutory or otherwise, to criminally enforce the Order. Therefore, Snaza had discretion. Such discretion is fundamental to his office.").

418. *See, e.g.*, 705 ILL. COMP. STAT. ANN. 405/5–301 (describing discretionary authority given to juvenile police officers to handle juvenile offenses through "station adjustments"—essentially, handling a juvenile offender based on an informal or formal agreement between the juvenile and officer).

419. *See, e.g.*, Sidney A. Shapiro, *Rulemaking Inaction and the Failure of Administrative Law*, 68 DUKE L.J. 1805, 1837 (2019) (calling for greater review of inaction and arguing that although "a judge cannot dive into a record, she or he can expect an agency to offer more than a perfunctory defense of its inaction and to back up its claims about priorities with an explanation that is 'adequate' to back up these claims"); Bressman, *supra* note 368, at 1661 (arguing "administrative nonenforcement decisions should be subject to the familiar requirement that agencies articulate reasons supporting their affirmative regulatory decisions" and that "administrative nonenforcement decisions should be subject to the important requirement that agencies promulgate and follow standards guiding their affirmative regulatory authority").

a safe harbor that protects local law enforcement officials against charges of neglect-of-duty if they provide advance notice, explanation, and public input on their enforcement priorities. Such a system of internal policy-development controls would provide greater transparency and accountability while still preserving nonenforcement as an option.[420]

Finally, the legislature will have a critical role in defining the procedures by which a sheriff's duties are enforced. At common law, the writ of *quo warranto* allowed courts "to hear challenges to a person's right to hold public office and remove an unqualified individual from office."[421] Today, almost every state has codified its *quo warranto* procedures, and more than two-thirds of states allow private individuals to initiate *quo warranto* proceedings.[422] State statutes also provide for specific removal procedures.[423] In developing these procedures, states should erect some barriers to filing suit against the sheriff in order to avoid unduly harassing sheriffs with litigation. Some sort of basic standing requirement might be sufficient. At the same time, making enforcement too difficult risks that the duty to enforce will be marginalized like other rights against selective enforcement or vindictive prosecution.[424]

CONCLUSION

Ceding unfettered nonenforcement discretion to the county sheriff (or any law enforcement official) comes with serious risks. Our experiences with the county sheriff make clear that the office will wield its authority in ways that favor its political supporters and pose grave risks to those with minority views, thus threatening basic principles of the rule of law. Today's constitutional sheriffs are only the latest manifestation of this certainty.

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420. *Cf.* Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1246 (2017) ("A legal regime that envisions external control as the only protection against administrative abuse is fundamentally at odds with the logic of contemporary administrative governance.").

421. LIZ HEMPOWICZ, DAVID JANOVSKY & NORMAN EISEN, PROJECT ON GOV'T OVERSIGHT, THE CONSTITUTION'S DISQUALIFICATION CLAUSE CAN BE ENFORCED TODAY 8 (2022), https://s3.amazonaws.com/docs.pogo.org/report/2022/14.3_Report_Constitutions-Disqualification-Clause-Can-be-Enforced-Today.pdf [https://perma.cc/2X4D-ZZ5J].

422. *Quo Warranto Processes: States and Territories Survey*, PROJECT ON GO'VT OVERSIGHT (Jan. 26, 2023), https://www.pogo.org/resources/quo-warranto-processes-states-and-territories-survey [https://perma.cc/KQ6S-ESBM] (listing forty-five states with statutory *quo warranto* procedures and thirty-nine that permit private initiation).

423. *See* Timothy D. Lanzendorfer, Note, *When Local Elected Officials Behave Badly: An Analysis and Recommendation to Empower State Intervention*, 82 OHIO ST. L.J. 653, 659, 674–78 (2021) ("This Note argues that the age-old practice of impeachment (a legislative solution) and the comparatively modern practice of recall (an electoral solution) are not wholly adequate removal mechanisms for today. After examining the pros and cons of various methods, this Note recommends that states implement removal mechanisms for local officials that are initiated by state-level executives followed closely by expedited review by a judicial or quasi-judicial body.").

424. On the difficulties of establishing a selective enforcement claim, see *supra* note 226 and accompanying text.

Understanding this, state courts historically played a role in curbing the sheriff's discretion. Routinely called upon to determine when sheriffs' failures to enforce the law amounted to a neglect of their duties, courts across the country developed a jurisprudence regarding the permissibility of nonenforcement. These decisions offered a clear retort to sheriff nullification—effectuating legally enforceable duties to investigate and to enforce the criminal law while also preserving a degree of flexibility and leniency. And yet, this approach largely has fallen by the wayside, replaced with broad pronouncements of law enforcement discretion.

This Article seeks a revival, or at least a reconsideration, of these past conceptions of the bounds of enforcement discretion. Doing so calls for a reassessment of much of our modern canon—such as the false choice between full enforcement and unfettered discretion and the unassailability of case-by-case discretion. To be sure, this approach imposes costs. It also calls for a variety of legislative actions—from specifying circumstances in which a citation (not an arrest) is mandated to limiting pretrial detention and restoring discretion elsewhere in the criminal process. These are challenges. But the alternative is to allow conceptions of law enforcement discretion to run unchecked, risking a regime of arbitrary enforcement that converts criminal law enforcement into politics and likely imposes costs on the most vulnerable in our society.