Blanket Nonenforcement Policies Are Unconstitutional in California

Overview

In local jurisdictions around the country, self-described "progressive prosecutors" like San Francisco district attorney Chesa Boudin have asserted (among other things) an absolute prerogative to suspend enforcement of laws they disfavor. Amid rising concern about crime, such nonenforcement policies are attracting attention and controversy nationwide. In San Francisco itself, the mayor plans to step up enforcement, while Boudin faces a recall election in June.[1] Yet an important dimension has been missing from local public debates over prosecutorial nonenforcement: Whatever their policy merits, and whatever their validity in other states, policies like Boudin's are at odds with California's constitution.

Analysis

The California attorney general has an affirmative duty to see that the state's laws are "uniformly and adequately enforced"

Like nearly every state, California has locally elected prosecutors.[2] Although progressive prosecutors have pursued various other goals (including increased accountability for police, retrospective review of flawed convictions, and less biased law enforcement), their movement has generally presumed that local prosecutors' electoral mandates empower them to suspend enforcement of laws within their jurisdiction that they consider misguided or inequitable. Boudin, for example, campaigned on abandoning prosecution of "qualify of life" crimes, including some state offenses.[3] His counterpart George Gascón in Los Angeles has directed line prosecutors to decline charges for state crimes including drug possession, public intoxication, loitering to commit prostitution, and (outside of limited circumstances) trespassing, resisting arrest, and making criminal threats.[4]

Such policies may be valid in some states. As I discuss in a draft article on *Faithful*

Execution in the Fifty States, the states vary widely in the degree of autonomy they afford to local prosecutors, and state laws in some places seem designed to enable local disregard for locally disfavored state laws. The Hawaii Supreme Court, for example, has held that Hawaii's attorney general may displace local prosecutors only in exceptional circumstances, such as "where the [local] public prosecutor has refused to act and such refusal amounts to a serious dereliction of duty on his part, or where, in the unusual case, it would be highly improper for the public prosecutor and his deputies to act."[5] And in Mississippi, the "[i]ntervention of the attorney general into the independent discretion of a local district attorney regarding whether or not to prosecute a criminal case constitutes an impermissible diminution of the statutory power of the district attorney."[6]

California's constitution, however, is different.[7] It specifically limits local district attorney discretion by imposing an affirmative duty on California's attorney general "to see that the laws of the State are uniformly and adequately enforced."[8] And although state law provides for elected district attorneys in each county and obligates them to "attend the courts, and within his or her discretion . . . initiate and conduct on behalf of the people all prosecutions for public offenses," the state constitution requires supersession of local prosecutorial functions when the attorney general determines that local enforcement is inadequate.[9]

"Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county," California's constitution provides, "it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney."[10] State statutes further give the attorney general the authority to convene grand juries, exercise "direct supervision" over district attorneys, and "take full charge of any investigation or prosecution of violations of law of which the superior court has jurisdiction."[11]

In addition, California's governor is responsible for "see[ing] that the law" — presumably including the attorney general's constitutional duty to uphold state law

— "is faithfully executed."[12] The governor may "direct[]" the attorney general to "assist any district attorney in the discharge of the duties of that office,"[13] and the governor further holds statutory duties to "supervise the official conduct of all executive and ministerial officers" and to "see that all offices are filled and their duties performed," applying "such remedy as the law allows" in the case of a default.[14]

In short, despite conferring primary prosecutorial authority on local district attorneys, California law obligates the attorney general to step in and take over local prosecution if state laws are not uniformly and adequately enforced as a result of a particular district attorney's policies — and it further requires the governor to ensure that the attorney general meets this obligation.[15]

Of course, as an earlier article on this blog noted, California attorneys general have limited prosecutorial capacity, and in practice they have rarely exercised these powers to supplant local prosecutorial choices.[16] Unusual conditions like the COVID-19 pandemic might also support temporary allowances. Nevertheless, the manifest purpose of California's legal structure is to foreclose precisely what Boudin, Gascón, and others have claimed the power to do — namely, to disclaim enforcement of state laws for entire categories of offenders. Such categorical policies produce enforcement patterns that are neither "uniform[]" across the state nor "adequate[]" within their particular jurisdictions. Laws, after all, cannot be "adequately enforced" when their enforcement is categorically suspended.

California's attorney general thus bears a constitutional duty to countermand categorical nonenforcement policies, or any other severe shortfall in upholding state criminal laws, by assuming local prosecutorial functions (or at least threatening to do so), and the governor in turn holds a duty to ensure that the attorney general meets that obligation.

History, case law, and California attorney general opinions confirm this understanding

These provisions' history reinforces their plain text, as do relevant judicial decisions

and opinions of past California attorneys general.

Though it was originally codified in a different section, the attorney general's duty to ensure uniform and adequate enforcement became part of the California constitution through a ballot initiative in 1934.[17] In the ballot measure's official explanation, then-district attorney Earl Warren (the future California governor and Chief Justice of the United States) complained that "[t]he vast majority of felonies committed in this country go down into history as unsolved crimes."[18] Warren blamed a law enforcement system that "gave to every county, city and town the right to regulate its own police affairs without supervision or interference from anyone . . . ."[19]

This system, Warren argued "was established centuries ago when our population was small, our colonies separated by wilderness, when there were no repeating firearms and when the fastest mode of transportation was a horse and buggy."[20] His solution was to empower the attorney general to coordinate and supervise county law enforcement agencies and make that state officer "responsible for the uniform and adequate enforcement of law throughout the State."[21] The voters endorsed that view by adopting the proposal, thereby ending any authority that local prosecutors held to suspend disfavored state laws.

A decade and a half later, attorney general (and future California governor) Edmund G. Brown wrote in a 1952 opinion that the "will of the people as expressed in [the state constitution] would be defeated" if local prosecutors could neglect enforcement of state laws.[22] Brown explained: "[A] general system of law enforcement in this state was initiated by the people in the adoption of [this constitutional provision] which makes it the duty of the Attorney General to see that the laws of this state are uniformly and adequately enforced in every county of the state."[23]

As for judicial precedent, courts have observed that although the California constitution "does not contemplate absolute control and direction of the officials subject to the Attorney General's supervision," it does aim "to ease the difficulty of solving crimes, and arresting responsible criminals, by coordinating county law

enforcement agencies and providing the necessary supervision by the Attorney General over them."[24] One decision stressed that the attorney general's duty "was intended to ensure that the laws of the state are enforced rather than to insulate criminal defendants from enforcement of the laws."[25]

For its part, the California Supreme Court has emphasized the plenary character of the attorney general's supervisory authority, noting that "the constitutional and statutory supervisory power accorded the Attorney General is not reasonably susceptible to an interpretation that it is limited to oversight of a district attorney's actions when he or she is prosecuting a particular case."[26] The court has even observed that, given the attorney general's supervisory authority, "it is difficult to imagine how a district attorney's enforcement of state law could be characterized as creating local policy."[27]

In short, California case law and attorney general opinions confirm that the electorate's 1934 amendment to California's constitution means what it says: local prosecutors are subordinate to the state when it comes to enforcing state criminal laws and the state's attorney general is empowered — indeed obligated — to override local prosecutors when they subvert state laws in their jurisdictions.

Prosecutors' charging discretion is no excuse for categorical nonenforcement in California

It is true that California law also presumes that local prosecutors will exercise discretion. As a practical matter, California prosecutors, like their counterparts elsewhere, lack the resources to pursue all offenses and must make judgments of relative importance.

But exercising case-by-case discretion, or even making general judgments of relative priority within an office, is different from suspending enforcement of a whole category of criminal laws. Unlike case-by-case nonenforcement, deciding to ignore a provision in the Penal Code effectively authorizes conduct the legislature has proscribed. It thus replaces the preferred policy of the state legislature with the preferred policy of an individual prosecutor — violating the separation-of-powers

principle that the legislative branch, not the executive, defines crimes and punishments.[28] That is precisely what the California constitution aims to prevent by obligating the state attorney general to supervise local prosecutors and ensure uniform law enforcement.

It is also true that these constitutional responsibilities of the attorney general and governor might not be judicially enforceable (a point I do not address in depth here).[29] To the extent that is so, the only remedy when state elected leaders ignore their constitutional duties would be at the ballot box. But voters should at least be aware that more than a policy question is at stake. By allowing practices at odds with the state constitution to take hold, the state's top law enforcement officials are weakening constitutional restraints on themselves and their successors in office — successors who might well have different views about what laws should and should not be enforced.

Conclusion

California prides itself on its progressive approach to many issues, including criminal justice. But the state's constitution — like all constitutions — limits the avenues through which particular reforms may be pursued. With respect to criminal justice, if the state's laws are misguided, inequitable, or unduly harsh, the state's voters and legislators can change them, as indeed they have done in recent years. In the meantime, California's constitution obligates its prosecutors to give those laws effect.

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1. Swan & Moench, *Mayor Breed Is Leaning Into a Crackdown on Crime and Drugs. What Happens if She Can't Deliver on Her Promises?*, S.F. Chronicle (Dec. 18, 2021); Thadani, *Recall of District Attorney Chesa Boudin Heads to San Francisco Voters in June*, S.F. Chronicle (Nov. 9, 2021). ↑
2. Cal. Const., art. XI, § 1 ("The Legislature shall provide for . . . an elected district attorney . . . in each county"); Gov. Code § 26500 ("The district

attorney is the public prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses"). Alaska, Connecticut, Delaware, New Jersey, and Rhode Island have appointed or centralized prosecutors. All other states have locally elected prosecutors, though their relationship with state officials varies. For a fifty-state survey, see my draft article here. ↑

3. Charnock, *Boudin Will Not Prosecute Prostitution, Public Camping, And Other 'Quality-Of-Life Crimes' Once Sworn In*, SFist (Nov. 16, 2019). ↑
4. L.A. County Dist. Atty.'s off., Special Directive 20-07 (Dec. 7, 2020). ↑
5. *Amemiya v. Sapienza* (1981) at 1129. ↑
6. *Williams v. State* (2014) at 913. ↑
7. For further discussion of this point in other contexts, *see*: California Constitution Center, *A Governor Can Probably Stop Capital Cases by Executive Order*, SCOCAblog (June 4, 2019); Kaiser, *A Coming Executive Branch Civil War Over the Death Penalty?*, SCOCAblog (June 10, 2019); McCoy & Stracener, *The Attorney General's Supervisory Power: Theory and Reality*, SCOCAblog (Sept. 16, 2019); Weiscovitz, *The California Attorney General's Constitutional Authority Over Criminal Justice Reform During the COVID-19 Pandemic*, SCOCAblog (Apr. 21, 2020). ↑
8. Cal. Const., art. V, § 13. ↑
9. Cal. Const., art. XI, § 1(b); Gov. Code § 26500. ↑
10. Cal. Const., art. V, § 13. ↑
11. Gov. Code §§ 12550, 12552; Pen. Code § 923(a). ↑
12. Cal. Const., art. V, § 1. ↑
13. Cal. Const., art. V, § 13. ↑
14. Gov. Code §§ 12010, 12011. ↑
15. Cal. Const., art. V, § 13. ↑
16. McCoy & Stracener, *The Attorney General's Supervisory Power: Theory and Reality*, SCOCAblog (Sept. 16, 2019). ↑
17. *See Pitts v. County of Kern* (1998) at 356–57 n.4 (discussing the provision's history). ↑
18. Ballot Pamp., Gen. Elec. (Nov. 6, 1934), argument in favor of Prop. 4 at 9. ↑
19. *Ibid.* ↑

20. Ballot Pamp., Gen. Elec. (Nov. 6, 1934), argument in favor of Prop. 4 at 9. ↑
21. *Ibid.* ↑
22. *See* 20 Ops.Cal.Atty.Gen. 234, 237 (1952). ↑
23. *Ibid.* ↑
24. *Brewster v. Shasta County* (2001) at 809; *Pitts* at 356–57 n.4. ↑
25. *People v. Honig* (1996) at 354. ↑
26. *Pitts* at 363. ↑
27. *Id.* at 360; *see also Abbott Laboratories v. Superior Court* (2020) at 659 (discussing the legislature's authority to structure district attorneys' authority, indicating that district attorneys act "in a state rather than a local capacity" when "prosecut[ing] criminal violations of state law," and noting "the Attorney General's constitutional role as California's chief law enforcement officer"). ↑
28. *See, e.g.*, *Steen v. Appellate Division of Superior Court* (2014) at 1053 (indicating that California's doctrine of separation of powers "is violated when the actions of one branch defeat or materially impair the inherent functions of another"); *People v. Wilkinson* (2004) at 433 ("'The Legislature is responsible for determining which class of crimes deserves certain punishments and which crimes should be distinguished from others'" (quoting *People v. Flores* (1986) at 88)); *cf. People v. Raybon* (2021) at 1084 (indicating that legislative action would be required to change state law forbidding possession of cannabis on prison grounds despite also recognizing that "prosecutors of course retain discretion whether a person found in possession of a small quantity of cannabis on prison grounds warrants felony treatment"). ↑
29. *See, e.g.*, *Honig* at 354–55 (noting the attorney general's "broad discretion" and emphasizing "the separation of powers doctrine that precludes courts from interfering with the executive decisions of prosecutorial authorities"). ↑