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# THE NEW PREEMPTION OF PROGRESSIVE PROSECUTORS

*Nicholas Goldrosen*\*

## I. INTRODUCTION

In July 2019, one of many amendments tacked onto Pennsylvania's budget quietly slipped through the state legislature. This provision would grant the attorney general concurrent jurisdiction (with local district attorneys) to prosecute firearms crimes in certain circumstances.<sup>1</sup> The law was a targeted volley from conservative legislators toward Larry Krasner, the first-term, reform-minded district attorney of Philadelphia.<sup>2</sup> Without naming Krasner, its subject was clear as could be. The attorney general's concurrent jurisdiction would apply for only the subsequent two years and only in first-class cities.<sup>3</sup> Pennsylvania has just one first-class city, Philadelphia, and Krasner's term as DA would end in two years. The message sent by the law: Krasner, whose reform-centered platform got him elected by the citizens of Philadelphia, was not prosecuting aggressively enough for the more conservative state legislature.

Since the Pennsylvania statute was passed, a number of similar bills giving attorneys general concurrent jurisdiction over certain crimes have cropped up around the United States. These bills are part of a concerted effort by state legislatures to preempt progressive prosecution and should be understood as part and parcel of the broader "new preemption."<sup>4</sup> Just as state legislatures remove discretion from municipalities to make laws over certain contentious areas, the addition of concurrent criminal jurisdiction undercuts local prosecutors' discretion not to prosecute. Much like with the new preemption, municipalities and prosecutors have little recourse to resist. Hence, the phenomenon of the new preemption and these bills reveal an important structural truth about criminal justice reform: While progressive prosecutors can be powerful means for criminal justice

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\* M.Phil. candidate, Institute of Criminology, University of Cambridge.

1. H.R. 1614, Reg. Sess. 2019-2020 (Pa. 2019). See generally Stephen Caruso, *How a Controversial Gun Crime Provision Passed Under the Noses of Philadelphia's Lawmakers*, PA. CAPITAL-STAR (July 12, 2019), <https://www.penncapital-star.com/criminal-justice/how-a-controversial-gun-crime-provision-passed-under-the-noses-of-philadelphias-lawmakers/> [https://perma.cc/B4A8-PZ5W] (commenting on the passage of the law).

2. See generally Chris Brennan & Aubrey Whelan, *Larry Krasner Wins Race for Philly DA*, THE PHILA. INQUIRER (Nov. 7, 2017), <https://www.inquirer.com/philly/news/politics/city/larry-krasner-wins-race-for-philly-da-20171107.html> [https://perma.cc/U4DP-E6KD] (detailing on Krasner).

3. 18 PA. CONS. STAT. §6105(d)(1) (2019).

4. Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997 (2018).

reform, state legislatures matter just as much, if not more. Reshaping prosecution requires a focus on statehouses.

After providing an overview of these preemptive laws in Section II, I then argue that preemption of district attorneys bears key resemblances to the new preemption in Section III. In Section IV, I assess the very limited means that local prosecutors and defendants have to fight these laws. Finally, in Section V, I argue that these laws ought to spur a new focus on state legislatures if progressive prosecutors are to be effective reformers.

## II. LEGISLATIVE PREEMPTION OF LOCAL PROSECUTORS

The recent district attorney preemption bills fall into two broad categories: those aimed at certain jurisdictions and those aimed at certain crimes.<sup>5</sup> Each type of bill (only Pennsylvania's statute has been signed into law, so far) undercuts the discretion of local prosecutors to decline to file charges—they enable attorneys general to prosecute cases that district attorneys decline. Besides the Pennsylvania law, another prominent jurisdiction-focused preemption bill comes from Missouri. This bill would grant the attorney general concurrent jurisdiction over certain homicide cases in cities that are not part of a county.<sup>6</sup> Like the Pennsylvania bill, it is couched in neutral language, but Missouri has only one independent city, St. Louis, and the bill clearly targets the progressive St. Louis Circuit Attorney, Kimberly Gardner.<sup>7</sup> The bill has similar political and racial dynamics to Pennsylvania's law—a Republican state legislator is aiming to curtail the discretion of a progressive local prosecutor for a plurality-Black city in a much whiter state.<sup>8</sup> In Indiana, a state Senate bill would allow the attorney general to appoint a special prosecutor for the crimes that the district attorney, as a matter of policy, declines to prosecute.<sup>9</sup> This bill does not appear to be aimed at a particular prosecutor, but it does target an increasingly common practice

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5. See generally LOC. SOLS. SUPPORT CTR., PREEMPTION OF LOCAL CONTROL OVER POLICE FUNDING & LAW ENFORCEMENT OVERSIGHT (Oct. 2020), <https://static1.squarespace.com/static/5ce4377cae1ce00013a02fd/t/5fa1b99194632079816ab5c6/1604434322316/LSSC++Bill+Trends++Police+Defunding%2C+Prosecutorial+Discretion+%28Oct.+2020%29.pdf> [<https://perma.cc/DQ36-WJND>] (cataloging these bills and similar bills introduced across the United States).

6. H.R. 2, 100th Gen. Assemb. (Mo. 2020).

7. See *Missouri Senate Passes Amendment Overnight*, NEWS TRIB. (Sept. 4, 2020, 12:05 AM), <https://www.newstribune.com/news/missouri/story/2020/sep/04/missouri-senate-passes-amendment-over-night/840140/> [<https://perma.cc/WP2N-QRUZ>].

8. The bill is sponsored by Republican Representative Barry Hovis. See *100th General Assembly, 1st Extraordinary Session*, MO. H.R., <https://house.mo.gov/MemberDetails.aspx?district=146&year=2020&code=S1> (last visited Apr. 3, 2020) [<https://perma.cc/D2PJ-JSGD>]. Rural areas, which drive much of the growth in mass incarceration, are also less likely to have contested elections for prosecutors, a major roadblock to prosecutorial reform there. Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L.R. 1537, 1546 (2020).

9. S. 436, 121st Gen. Assemb., 2d Reg. Sess. (Ind. 2020).

amongst progressive prosecutors, which is the blanket declination of certain charges.<sup>10</sup>

A number of other states have proposed bills that would give the attorney general concurrent statewide jurisdiction over crimes relating to protest and damage to monuments. Such bills have been proposed in Ohio,<sup>11</sup> Tennessee,<sup>12</sup> and Pennsylvania.<sup>13</sup> If the local district attorney declines prosecution, these bills would grant the attorney general the power to prosecute, with some of the bills limiting that jurisdiction to cases involving state property.<sup>14</sup> These bills were introduced during the summer of 2020, when racial justice protests occurred across the United States following the police killings of George Floyd and Breonna Taylor. The legislators introducing these bills made clear that their intent was to more vigorously prosecute crimes associated with these protests, especially when district attorneys declined to do so.<sup>15</sup> Just like the jurisdiction-specific bills, the protest bills preempt local prosecutors from exercising their discretion to prosecute less aggressively and less often—in this case, in direct response to protests against racism and oppression in the criminal justice system itself.

The discretion-stripping in both types of bills only functions in one direction. None of these proposed laws undercuts a district attorney's ability to bring as many and as harsh charges as legally possible. These states would only give the attorney general power to step in when a local prosecutor declines to prosecute. Put another way, defendants covered by one of these bills must now have two separate prosecutors decline prosecution to avoid being charged; the process to not prosecute is made more difficult while the process to prosecute remains the same. Such laws might also have a chilling effect—prosecutors, fearful of the state legislature someday trying to strip away their discretion, would prosecute more aggressively to avoid attention. Thus, these bills would have spillover implications for prosecutors across those states and potentially in other states too.

### III. THE “NEW PREEMPTION” AND PROSECUTION

While these laws targeting district attorneys are recent, they bear key similarities to the more long-standing phenomenon of the new preemption. Historically, state preemption of local laws was a matter of policy conflict—if state laws made local law impossible or implausible, the latter would be struck down by a court.<sup>16</sup> The new preemption, though, involves states removing, whole cloth, the

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10. See Ronald F. Wright, *Prosecutors and Their State and Local Politics*, 110 J. CRIM. L. & CRIMINOLOGY 823, 824–26 (2020); Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. (forthcoming April 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3542575](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3542575) [<https://perma.cc/2PZY-GGR6>].

11. H.R. 723, 134th Gen. Assemb. (Ohio 2020).

12. H.R. 8004, 111th Gen. Assemb., 2d Extraordinary Sess. (Tenn. 2020).

13. S. 1321, Reg. Sess. 2019–2020 (Pa. 2020).

14. See, e.g., *id.*

15. See Natalie Allison, *Gov. Bill Lee's Office, District Attorneys Raise Issues with House's Proposed Protest Legislation*, TENNESSEAN (Aug. 10, 2020), <https://www.tennessean.com/story/news/politics/2020/08/10/tennessee-legislature-increase-penalties-protesters-camping-capitol-strip-da-authority/3335597001/> [<https://perma.cc/LMT8-X22U>].

16. See Briffault, *supra* note 4, at 2011–14.

ability of municipalities to make laws regarding certain issues.<sup>17</sup> This more expansive type of preemption has exploded in its scope over the past decade or so. In particular, it often takes the shape of preemptive efforts targeting liberal cities within Republican-controlled states; these laws might target areas of progressive reform such as economic regulation, nondiscrimination laws, and environmental protection.<sup>18</sup> State legislative efforts to circumvent the discretion of district attorneys mimic this phenomenon, though they do avoid the worst excesses of “nuclear preemption”—laws that threaten local officials with fines or even prison time for exercising authority over certain issues.<sup>19</sup>

The district attorney preemption bills contain the same core feature of the new preemption, which is the removal of discretion from local policymakers. Many of the state bills do not remove discretion explicitly, but rather augment it by granting concurrent jurisdiction to the state attorney general. Distinguishing this concurrent jurisdiction from the removal of discretion, though, is a distinction without a difference. These bills convey to district attorneys that, while they might have the legal authority to decline prosecution, the attorney general will swoop in to prosecute. This discretion is no discretion at all. The specifically-targeted nature of these jurisdiction bills also matches the political pattern of the new preemption—they take aim at progressive local policy within conservative states. This recent preemption of progressive prosecutors, like the new preemption, is legislative in nature; in this way, it is distinguishable from other attempts to undermine progressive district attorneys, such as lawsuits by line prosecutors or police departments.<sup>20</sup> Like the new preemption, these bills are intrastate in nature; they are also distinct from cases in which the federal government has aimed to send a political message by prosecuting certain crimes federally.<sup>21</sup> The preemption of progressive prosecutors is, in many respects, simply state legislators turning the weaponry of the new preemption toward a new target.

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17. See *id.* at 1997.

18. See Lauren E. Phillips, Note, *Impeding Innovation: State Preemption of Progressive Local Regulations*, 117 COLUM. L. REV. 2225, 2242–43 (2017).

19. Briffault, *supra* note 4, at 2007.

20. See James Queally, *Several of D.A. George Gascon's Reforms Blocked by L.A. County Judge*, L.A. TIMES (Feb. 8, 2021, 5:37 PM), <https://www.latimes.com/california/story/2021-02-08/several-of-d-a-george-gascons-reforms-blocked-by-l-a-county-judge> [<https://perma.cc/MZ3S-3QDD>]; Kaitlin Flanigan, *Police Group Accuses Suffolk DA-Elect of 'Reckless Disregard' for Massachusetts Laws*, NBC BOS. (Dec. 28, 2018, 11:58 AM), <https://www.nbcboston.com/news/local/rachael-rollins-suffolk-district-attorney-elect-national-police-association-bar-complaint/129098/> [<https://perma.cc/Z2CL-QNPQ>].

21. See, e.g., Murtaza Hussain, *Two Brooklyn Lawyers Accused of Throwing Molotov Cocktails Are the Public Face of Trump Administration's Crackdown on Dissent*, THE INTERCEPT (June 19, 2020, 6:30 AM), <https://theintercept.com/2020/06/19/brooklyn-lawyers-molotov-cocktails-trump/> [<https://perma.cc/QYF4-SY58>] (discussing federal prosecution in politically-charged protest cases); Ali Watkins, *In Fight Against Violent Crime, Justice Dept. Targets Low-Level Gun Offenders*, N.Y. TIMES (May 7, 2018), <https://www.nytimes.com/2018/05/07/us/politics/jeff-sessions-gun-charges.html> [<https://perma.cc/S24Q-FNVQ>] (discussing federal prosecution of traditionally state cases to send a political message).

## IV. OPPORTUNITIES TO RESIST THE NEW PROSECUTORIAL PREEMPTION

The legal opportunities for district attorneys to resist this type of preemption are scarce. The architecture of states and localities does not mirror the federal system, where robust powers are reserved to the subsidiary government. Local municipalities enjoy no sovereignty of their own but are subsidiaries of the state, which the state can create, regulate, and destroy as it pleases.<sup>22</sup> Thus, state legislatures enjoy near-absolute power to reconfigure local governments, at least so far as federal law is concerned. Any substantive rights conferred to a municipality to govern for itself would come from home-rule provisions in state constitutions or legislation.<sup>23</sup> The legal architecture for local control of criminal law, however, usually functions only in the direction of more criminalization; municipalities can create additional offenses, through local legislation and regulatory codes, but cannot decriminalize something prohibited by state law.<sup>24</sup> Moreover, while most local prosecutors are elected, which does imbue them with some character as a separate governmental entity from the state,<sup>25</sup> they are not a municipal government and likely would not have home-rule powers. Given the plenary power of states over municipalities, it appears unlikely that district attorneys have recourse under federal or state law to challenge these laws and bills preempting their authority.

The racialized nature of these bills, though, might provide one avenue to challenge them—though this legal approach would still be an uphill battle, and would only be available to individual defendants and not the affected prosecutors. As argued earlier, these bills particularly target local prosecutors in cities with much larger Black populations than the states in which they sit. Furthermore, the protest-related bills arose specifically in response to Black Lives Matter protests. These facts imbue some of these preemption bills with the subtextual, if not explicit, intent to predominantly target Black people for increased prosecution. While one does not have a right not to be prosecuted, one does enjoy a right against racially-motivated selective prosecution.<sup>26</sup> Making a selective prosecution claim under the protest bills would most likely be harder than under the jurisdiction-specific bills—this past years' protests were multiracial in composition, so the bills target not Black people *per se* but rather those who protest in support of their civil rights. Furthermore, both the protest and jurisdiction-specific bills are facially race-neutral.

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22. *Hunter v. Pittsburgh*, 207 U.S. 161, 178–79 (1907).

23. Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1124 (2007).

24. Brenner Frissell, *Against Criminal Law Localism*, MD. L. REV. (forthcoming 2022) (manuscript at 21), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3821023](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3821023) [<https://perma.cc/4QTE-XW4Y>].

25. Toni M. Massaro & Shefali Milczarek-Desai, *Constitutional Cities: Sanctuary Jurisdictions, Local Voice, and Individual Liberty*, 50 COLUM. HUM. RTS. L. REV. 1, 95 (2018).

26. *See, e.g., Oyler v. Boles*, 368 U.S. 448, 456 (1962).

The bar the defendant must clear to make a selective prosecution claim, then, is high. A defendant must prove that similarly situated defendants of different races were not prosecuted.<sup>27</sup> This standard makes a claim of selective prosecution unlikely to succeed based solely upon the text of these bills—the Pennsylvania law, for example, gives the attorney general the same power to prosecute a white person for a gun crime in Philadelphia as to prosecute a Black person for a gun crime in Philadelphia. If these bills, though, are enacted and prove to be discriminatory over time, that might provide some support to a selective prosecution claim. If similarly-situated white defendants are not prosecuted under the attorney general’s jurisdiction, for example, that fact would aid a Black defendant’s claim of selective prosecution. In sum, though, any selective prosecution claim seems a high bar to clear and one that would require more evidence to develop if and when these bills go into effect.

A final strategy for resisting these preemption laws is not legal but political. Indeed, politics makes strange bedfellows—in the case of the proposed Missouri bill, other prosecutors from around the state rallied against the bill.<sup>28</sup> While these prosecutors likely do not share the progressive goals of St. Louis’ Circuit Attorney Gardner, they have a vested interest in preserving their own jurisdiction and discretion. Prosecutors’ associations have a long history of lobbying for criminal justice policies, and they are often successful.<sup>29</sup> They might, therefore, be able to stymie proposed legislation that would undercut progressive prosecution. On the other hand, the highly targeted nature of these laws might make more conservative prosecutors unwilling to spend political capital and resources in opposing them. If other local prosecutors share the legislature’s tacit understanding that the preemption bills target only progressive prosecutors, they are unlikely to fear that the law would someday circumvent their own discretion. Moreover, in states with strong Republican control of the legislature, these conservative prosecutors would have no reason to believe that control of the legislature might switch parties; hence, they would not have to worry about legislators someday targeting them when the political winds blow the other way. While organized groups of prosecutors have challenged this legislation, most local prosecutors do not have much political incentive to lobby against preemption laws targeted at other prosecutors.

## V. CONCLUSION: REORIENTING FROM COURTHOUSES TO STATEHOUSES

The assumption undergirding the progressive prosecution movement is that because prosecutors had a central role in the rise of mass incarceration, they also have a central role to play in its fall. Because prosecutors *had* power, they must *have* power. The former part of this assumption is assuredly true. The massive

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27. *United States v. Armstrong*, 517 U.S. 456, 469–70 (1996).

28. *See, e.g., Missouri Senate Passes Amendment Overnight*, *supra* note 7.

29. *See* Josie Duffy Rice, *Prosecutors Aren’t Just Enforcing the Law—They’re Making It*, THE APPEAL (Apr. 20, 2018), <https://theappeal.org/prosecutors-arent-just-enforcing-the-law-they-re-making-it-d83e6e59f97a/> [<https://perma.cc/QC8A-A593>].

powers prosecutors have to decide what charges to bring, to extract plea bargains, and to pursue sentencing enhancements—amongst others—were central to the United States’ imprisonment spree of the last half-century.<sup>30</sup> Prosecutors hold this power because of the usually unreviewable and usually wide-reaching discretion they wield over what charges and sentences are even on the table in a criminal trial. When deciding whether to seek a charge that would invoke a three-strikes law or a lesser charge, for example, local prosecutors do quite literally hold a life in their hands. Simultaneously, the ambit of the criminal law as a tool for solving social problems has gradually expanded in American society.<sup>31</sup> Hence, prosecutorial power has played a major role in the growth of the American carceral system.

The assumption that this role means that prosecutors will continue to wield power is mistaken, though. The preemption of local prosecutors, as passed into law in Pennsylvania and proposed elsewhere, underscores the conditional nature of prosecutorial discretion. They have it, until they don’t. Prosecutorial power is a series of contingencies. It is contingent upon the state legislature to criminalize some act and upon police to make an arrest for that act.<sup>32</sup> State preemption of local prosecutors reveals another contingency: Discretion is contingent upon state legislatures not taking it away. Put another way, prosecutors are only powerful when the powers of other actors, like the legislature, are held constant.<sup>33</sup> Legislatures, though, do exercise their power — and they do so in political ways. They do not view all prosecutorial discretion as equal. When prosecutors use this discretion in ways that legislators do not approve of, whether by not prosecuting aggressively enough or by supporting protesters, then state legislators will undercut that discretion.

Understanding this phenomenon as part of the new preemption is critical for reform. The prospects for criminal justice reform can be discerned from the reactions of states to progressive local action in other domains. States often act swiftly to curtail local reform via preemptive legislation, and the legal arsenal for resisting this kind of preemption is comparatively minimal. These reforms would be much more secure if implemented on the state level. State legislatures, for example, can produce many of the desired results that progressive prosecutors seek through bail reform, decriminalization, and sentencing reform. The power they wield is legislative, not discretionary. It is absolute, not conditional. Progressive prosecution is an appealing avenue for criminal justice reform because prosecutors are implicated in so many of the worst sins of mass incarceration. Progressive prosecutors do have immense power to lessen the cruelties and inequities of the criminal justice system in the day-to-day decisions they make, especially in the face of legislative inaction. Moreover, the smaller polities they

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30. JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 127–59 (2017).

31. Jordan A. Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 485 (2016).

32. Daniel Fryer, *Race, Reform, and Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769, 780 (2020).

33. Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 203 (2019).

represent are often more willing to elect reform-minded candidates. The structural weakness, though, of local prosecutors is that they can be preempted and stymied by the state legislature, just as municipalities can. The lesson of the new preemption is that the battle for criminal justice reform must be fought not only in the courthouse, but also in the statehouse.