

Exploring the Separation of Powers Doctrine in Oklahoma: A Case Study of the Lack of Enforcement of the Adultery Statute

J. Harrison Watts

Prosecutorial discretion allows Oklahoma district attorneys to repeal de facto criminal statutes passed by the state legislature; however, such action could create a violation of the separation of powers doctrine contained in the state constitution. This research analyzed the discretionary power of district attorneys as it applies to the Oklahoma adultery statute that defines adultery as a felony crime. Despite the statute, this crime has not been prosecuted by a district attorney in more than 50 years. Analysis of research data derived from interviews and surveys of district attorneys, law enforcement officers, and district court records led to an understanding of the internal and external influences that drive prosecutorial discretion. It was found that district attorneys are not specifically using prosecutorial discretion to repeal the adultery statute. Consequently, there was no violation of the state constitution by the district attorneys' offices. The lack of prosecution was due to insufficient reporting of the crime from law enforcement agencies. Because the law is not serving its original purpose, the Oklahoma state legislature should act to repeal the state statute related to adultery.

Key Words: Balance of power • prosecutorial discretion • adultery • non-enforcement of laws

The authority vested in the government of the United States at the local, state, and national levels is carefully spread among diverse departments to encourage democracy and balanced governance. Disputes among the branches of government materialize when one branch of government interferes with, avoids, or discounts another branch's authority as described in its jurisdictional document, usually a constitution. Infringement of the planned allowance of legislative, judicial, or executive powers challenges democratic principles by overlooking a non-ratified reapportionment of power (Benedict, 2007). In some cases, the discretionary public policy made

Harrison Watts is an assistant professor of criminal justice at Washburn University in Topeka, Kansas. He is a member of the Academy of Criminal Justice Sciences and the Southwestern Association of Criminal Justice.

by the executive branch contradicts the intent of the legislative branch of government's passage of state statutes. The harmful influence of this assertion of power may occur from the increased possibility that legal ratification of law may be postponed or never enforced. When the law-making process is at risk, the general public could lose its most representative authority, as the legislature's power is to pass laws that protect and regulate a civil, moral, and ethical society (Benedict, 2007).

In government, district attorneys have the ability to change the public policy set by the state legislature through non-enforcement of particular state statutes. A lack of enforcement is clear in the case of the Oklahoma Adultery Statute.

According to Oklahoma state statute title 21, chapter 33, section 871:

Adultery is the unlawful voluntary sexual intercourse of a married person with one of the opposite sex; and when the crime is between persons, only one of whom is married, both are guilty of adultery. Prosecution for adultery can be commenced and carried on against either of the parties to the crime only by his or her own husband or wife as the case may be, or by the husband or wife of the other party to the crime: Provided that any person may make complaint when persons are living together in open and notorious adultery.

The state statute was passed in 1910 and was enforced by district attorneys for the first 50 years the law was in effect. However, something changed, causing the statute not to be enforced over the past 50 years. What caused this change in enforcement? One popular theory revolves around changes in how society views morality crimes. With the passage of time and changing social conditions, many previously sanctioned acts have gained a measure of social acceptance, or at least tolerance, and have been removed from the purview of criminal law.

When passed, the Oklahoma state statute on adultery was not based on evidence that it would actually serve the purpose of deterring adultery. Conversely, the state statute was based on the hope of the legislature that identifying adultery as a serious crime would deter individuals from committing the act and thus protect the sanctity of marriage. Although no statistical data to assess the effectiveness was collected before or after the passage of the statute, it is obvious on face value that the statute has not reduced adultery nor protected the sanctity of marriage as the original intent. Consequently, district attorneys across the state of Oklahoma have unanimously, though perhaps informally and individually, agreed to exercise

prosecutorial discretion not to enforce this particular state statute. The extraordinary phenomenon is that the same decision to ignore the statute was made by all district attorneys.

Discretionary measures taken by district attorneys are considered informal administrative acts, even if these measures may be within district attorneys' formal authority. These administrative measures or lack of action on the part of district attorneys can influence public policy. According to Davis (1969), an authoritative source on discretionary powers, a public official has policy discretion whenever his power provides him the ability to make choices among possible courses of action. In Oklahoma, district attorneys have the discretion to initiate cases into the criminal court system. Although district attorneys must follow a set of formal rules and regulations found in the state's code of criminal procedure, the district attorneys in Oklahoma, like district attorneys across the United States, enjoy wide use of discretionary policy making as related to the prosecution of criminal cases. The state constitution clearly defines the powers of the legislature as making, revising, and repealing state law. Consequently, when the district attorneys across the state of Oklahoma fail purposefully to enforce the state law, they essentially violate the separation of powers clause in the state constitution. This violation of the state constitution, if not corrected, could lead to non-enforcement of other state statutes that the district attorneys do not believe should be enforced. This collective omission to enforce the state law—even though each district attorney has been acting on his or her own authority and has simply acted similarly—is dangerous to the citizens of the state of Oklahoma and was the problem that led this research. The separation of governmental powers along functional lines has been a core concept of American constitutional law ever since the Revolution (Casper, 1989). James Madison (1788) addressed this issue in the *Federalists Papers* and referred to the unbalance of government branches as one of the greatest objections.

The lack of enforcement of the adultery law and the public policy implications that surround this lack of enforcement in Oklahoma have not been researched in-depth regarding the prosecution of offenders who violate the state statute. This research was conducted to examine the problem of apparent lack of enforcement and informal discretionary powers possessed by the district attorneys' offices. Further, this study revealed what drives the non-enforcement and thus the public policy of the district attorneys.

In analyzing the informal discretion of district attorneys who formulate public policy decisions that result in lack of prosecution of the law, one area of research the principal investigator built on was the attitudes of prosecutors as they relate to the criminalization of a non-violent consensual sexual conduct to include adultery. Lyle Shook (1982) studied the attitudes of police officers on this very topic. His conclusion was that police officers believed that non-violent consensual sexual contact between adults should not be criminalized as long as it did not take place in public. Although the Shook research was a study of police officers, and the subject of this study was the district attorney's office, this study exposed similar attitudes of district attorneys to those of the police officers related to the crime of adultery. In addition, the results of the study indicate that societal demands on the district attorney's office somewhat drive the prosecutorial discretion to go forward with an adultery case.

Literature Review

The intent of this study was to find out why the district attorneys across the state of Oklahoma have not enforced the adultery statute. The district attorneys in Oklahoma represent the executive branch of government. The executive branch of government is charged with the enforcement of laws. The legislative branch of government is charged with the right to propose or pass any law and the right to repeal any law, which may be consistent with the constitution of the state and the Constitution of the United States (§V-7). A review of the literature was conducted to provide background for the qualitative case study.

Prosecutorial Discretion

The dominance of discretion and related informal procedures in criminal justice case processing has been well documented in prior research, particularly regarding police behavior (Bittner, 1967; Black, 1971; Goldstein, 1978; President's Commission, 1967). When a case enters the prosecutor's office, it is considered one of the major points within the court process where such discretion occurs and which centers upon the prosecutor's domain (Littrell, 1979; McDonald, 1979; Miller, 1969; President's Commission, 1967). In the position of chief authority over the gatekeeping for the criminal court, the prosecutor and his or her decisions have influence from the moment a case first enters into the court process through final adjudication and disposition.

According to Davis (1969), a public administrator has discretion whenever the actual limits on his authority leave him free to make a selection among potential courses of action or inaction. Although prosecutors may exercise their discretion over a case at virtually any point in the criminal court process, prior work has emphasized two major forms of discretionary decision making: case attrition and plea bargaining. The major decision points where prosecutors are most likely to exercise attrition are at the time of initial case screening, at the time of arraignment, and early on in the trial process. Case attrition and non-prosecution typically involve decisions to drop or reject, dismiss, or *nolle prosequi* (not to prosecute) a case (Mac Murray, 1988).

Admittedly, many instances in the law justify using discretion with the intent—and sound judgment required—to mold an array of legal authorities into the solution of a particular dispute (Fletcher, 1984). One of these instances is the prosecutor's decision to proceed with a criminal charge. Prior research has been conducted with regard to federal prosecutors and the decision to initiate cases: Findings indicate that the seriousness of the crime and the evidentiary strength of the case exert a substantial effect on the prosecutor's decision (Albonetti, 1987).

The enormous power of prosecutors not to prosecute is almost completely uncontrolled. In theory, the voters hold the prosecutors accountable for their decisions. However, because of the current diffusion of accountability, voters cannot easily examine the decisions of any one particular prosecutor or hold that prosecutor answerable separately for the accomplishments or failures of the entire system (Misner, 1996). Consequently, prosecutions are often withheld, sometimes on the basis of political, personal, or other ulterior influence, without meaningful standards stemming from either legislative bodies or from prosecutors themselves (Davis, 1969).

Michael Lipsky (1980) gives a great example of prosecutorial discretion that contradicts public policy in his text *Street Level Bureaucracy*. Lipsky details then-governor of New York Nelson Rockefeller's imposition of mandatory, severe jail sentences for drug dealers, while providing relatively minor penalties for those caught with small amounts of drugs. According to Lipsky, the rationale for the law was to deter drug trafficking. Some of those arrested on drug trafficking were actually drug addicts who sold a small amount of their personal supply to maintain their habit. The law presented a dilemma for the prosecutors, who believed that the mandatory minimum sentence was too severe for the offense. In these particular cases, New York District Attorney Richard Kuh began to charge the alleged offenders not with the crimes for which they committed but rather crimes where punishments were more

comparable with what he conceived to be the severity of the offense. In this way, the district attorney attempted to provide the discretion demanded by a just court system in the face of legislation designed precisely to eliminate the discretion. Public policy was made at the local level by the prosecutors, which was in direct contradiction with the public policy set forth by the chief executive of the state.

Separation of Powers

The American political legacy displays a steadfast practice of organizing governments that put into practice the doctrine of separation of powers. The rewards of this arrangement, acknowledged by the founding fathers of our country and by their successors, transcend the checking function most often linked with this principle. The configuration, in which distinct branches of government employ their specific delegated powers while working within the limitations of their particularized authority, was also chosen as the one most advantageous to good governance (Benedict, 2007).

The founding fathers put forward two main categories of advantages of the structure of divided government: one predominantly admonitory and one more effectual (Benedict, 2007). Initially, by dividing government processes into split functional branches, supporters argued that consolidation of power would be discouraged institutionally. Subsequently, improved efficiencies and more diverse electorate representation could be attained through practical specialization and compartmentalized institutional responsibilities (Benedict, 2007).

The doctrine of separation of powers is not an end in itself, but the method to make certain the best, most diplomatic government possible is achieved. Governmental officials can properly improve this objective only by refraining from infringement upon the other branches of government. The restraints on authority do not leave governmental branches incapable of influencing the other branches of government; they may engage in both legal and political courses of advocacy and redress. However, any measures that violate the established limits on power, as set forth in constitutional documents, are considered offensive to democratic principles (Benedict, 2007).

The separation of powers was addressed in New York State when the mayor of New York City, Michael Bloomberg, was sued by the New York City Council for not enforcing state statute Administrative Code § 6-126 related to equal benefits. The appellant city council challenged a decision from the Supreme Court, Appellate Division in New York, which dismissed a New York Civil Practice Law Rules

(N.Y.C.P.L.R.) art. 78 proceeding filed against the mayor and the city to compel enforcement of the New York City Equal Benefits Law (6 N.Y. 3d. 380, 2006). Justice Rosenblatt in a dissenting court opinion submitted that by declining to impose a properly enacted statute of New York City's legislative branch, the mayor assumes a legislative power he did not hold by statute. When the executive branch acts contradictorily with the legislature or assumes its undivided powers, the doctrine of separation of powers is violated. This is very similar to what is taking place in Oklahoma as the district attorneys across the state have not prosecuted adultery cases.

Adultery Statute

Adultery cases have been prosecuted in the United States (a most recent case, *Virginia v. Bushey*, was prosecuted in Virginia in 2004). These cases are a rarity for although 23 states have adultery laws, very few, if any, have witnessed prosecutions. There is relatively little consistency between states in the wording of the state statutes that criminalize adultery. Furthermore, there is little agreement on punishment, as some state statutes call for fine only and others mandate felony punishment to include prison time.

Methods

The problem this study addressed was the lack of enforcement of a criminal state statute by district attorneys. Case attrition is viewed as an important area for the investigation of prosecutorial discretion; considerable disagreement and variability in definition and conceptualization are the rule rather than the exception in prior research in this area (Mac Murray, 1988). For the purposes of the study, the focus on case attrition is confined to the decision not to prosecute made at the point of initial case screening. The decision not to prosecute a state statute collectively by district attorneys state-wide presents an issue with the separation of powers and the balance of power in state government.

To assess why district attorneys are not enforcing the adultery law, the principal researcher analyzed the relationship of the Oklahoma adultery statute and the frequency with which the crime is reported as well as the frequency of the prosecution of this crime. The primary investigator used the descriptive case study qualitative research methodology in conducting in-depth interviews with a non-probability sampling of the district attorneys in Oklahoma. A qualitative case study methodology was selected as the best research method in which to conduct this study because a

case study method is defined by its special features, which are particularistic, descriptive, and heuristic (Merriam, 1998). Moreover, the view of the district attorneys collectively as an institution of the executive branch of government lends itself to the case study research design.

The target population for this study consisted of eight district attorneys' offices throughout the state of Oklahoma. Purposeful sampling of available subjects is best used when a researcher would like to find specific types of participants for in-depth examination (Maxwell, 2005). In this case, district attorneys were identified as the subjects that would have insight into why prosecutorial discretion was being exercised state-wide with regards to non-enforcement of the adultery law.

Interviews were selected as the best method to collect data from the district attorneys. The interviews were conducted with the district attorneys after gaining consent. Triangulation in this study included comparing the district court records with the number of cases reported by the police and the district attorneys. In addition, police departments were surveyed to gain insight into how many reports of adultery have been filed and whether the police department had a policy directing the reporting of this crime. To ensure a valid and reliable study, checks of reliability and validity were built into the research method. This study used member-checking as a tool of internal validity.

The major research question findings were derived from two sources: (a) district attorneys in Oklahoma and (b) representatives from police departments in Oklahoma. The findings were based on information received from both sources of information. The district courts were surveyed over the telephone to ensure accuracy of both the district attorneys and the police departments in the reporting of adultery cases.

Findings

The following questions were used to guide the theoretical framework of the study. The major question driving the study was: Why has the state statute related to adultery (Oklahoma Criminal Statute, Title 21, Chapter 33, Section 871) not been enforced by the district attorneys? Further investigation of this question provided understanding of additional questions. These questions include:

1. What are the internal and external influences that shape the prosecutorial discretion and public policy within the district attorney's office?

2. What effect does prosecutorial discretion have on the intent of the adultery law?
3. How might prosecutorial discretion affect the balance of power between the executive branch and the legislative branch of government?

The answers to the aforementioned questions shed light on the reporting of and decision making regarding prosecution of adulterers in Oklahoma. Once a criminal case has been brought to the district attorney, the district attorney makes a charging decision. The district attorney has the sole discretion to charge or not to charge or to change the alleged offense. Criminal cases are reviewed by the actual district attorney or by an assistant district attorney, who apply a number of factors that may influence the decision to charge an offender with a crime.

District attorneys were asked whether they received any cases of adultery for the 2008 calendar year and, if so, what the disposition was. A sampling of their responses follows:

In two years we have not received any cases of adultery.

We have not received one case in two long years.

In three and one half years we have not received any reports of adultery.

In twenty something years we have not received an official report of adultery. On occasion people have called about the crime. We referred them to local law enforcement but then heard nothing back.

In seven years that I have been with this office, we have not received a report of adultery.

District attorneys were asked why they thought the adultery statute was not prosecuted statewide. Their responses included the following:

The law may be on the books but law enforcement does not investigate it.

I have no idea why it is not being enforced.

In part because the statute is archaic. The statute does not serve the same purpose as it did when it was written. It is sad but today's morals are much different than that of year's past.

There are multiple laws on the books that are active but not prosecuted.

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The legislature may not have time to review these laws and thus they stay on the books but are no longer enforced.

The crime is extremely hard to prosecute.

District attorneys were asked whether something was taking place within the district attorney's office that prevented the prosecution of the adultery statute. A sampling of their responses follows:

Divorce court is where this type of crime is handled.

The way that the statute is written, it is one of the few crimes for which the state cannot initiate an investigation. Only the victim can bring this charge forward and must have some reliable and creditable evidence. This obviously is not happening.

Nothing is happening in the district attorney's office to prevent the prosecution of this statute. Except that we do not receive reports from law enforcement.

Nothing is taking place to prevent the enforcement of this crime.

The district attorneys responded to the following question: Do you feel that non-enforcement of this statute creates an imbalance of power between the executive and legislative branches of government? Their responses included the following:

No, the district attorneys follow the procedure of what they are supposed to do. The law is clear.

District attorneys have the use of discretion.

Not precisely, checks and balances is what I would say instead of imbalance of power. The district attorneys have prosecutorial discretion as a balance of power.

By refusing to enforce the law it may.

The district attorneys responded to the following question: Could this [refusing to enforce the statute] create constitutional issues? A sampling of their responses follows:

If it were an organized effort by all the district attorneys, then yes.

No, in reality legislatures don't even care.

No.

To prosecute crimes in Oklahoma, the district attorney's office has to receive a report from either a citizen or a law enforcement agency. The protocol is to receive the reports from the law enforcement agency, and if a citizen attempts to report a crime to the district attorney's office, the citizen is referred to the law enforcement agency that has jurisdiction in the area where the crime took place to make the report.

Twelve law enforcement agencies throughout the state of Oklahoma were surveyed. Out of the 12 police agencies surveyed, the police took no reports for adultery in the calendar year 2008. An emerging theme was that the incidence of no reports was not unique to the year under study (2008). Not one agency had received a report of adultery as far back as anyone surveyed could remember; one respondent noted he had worked for the same law enforcement agency for 27 years and he did not know of a single reported case. The findings indicate that law enforcement is not taking official reports for adultery thus is not forwarding any cases for prosecution to the district attorneys' offices.

Furthermore, the findings indicate that of the eight district attorneys' offices studied, none has received a report of adultery from local law enforcement agencies. The findings further indicate that the district clerks' offices within these same judicial districts have not had any adultery cases filed for prosecution in the calendar year 2008 or any other previous year that any of the clerks could recall. Consequently, the district attorneys could not exercise prosecutorial discretion if they did not receive any reports of adultery.

Major Research Question

Why has the state statute related to adultery not been enforced by the district attorneys? Several themes emerged to answer this question. First, the district attorneys are not prosecuting adultery crimes in Oklahoma because they do not receive reports of the criminal activity. Law enforcement is responsible for taking reports, and of the 12 law enforcement agencies surveyed, not one had taken a report for adultery in the calendar year 2008.

Second, had the district attorneys received a report for adultery, budget constraints, case selection, lack of interest from the public, and the difficulty prosecuting

this particular crime would probably have led them not to prosecute the crime. There is a belief among the district attorneys' offices that the morality of the state has changed from when the statute was first passed and it no longer serves its purpose.

Summary of Findings

The findings of the interviews clearly indicate that the adultery statute is not being enforced by district attorneys because the crime is not being reported to their office by the police. The law enforcement agencies surveyed did not forward cases to the district attorney's office because they had not received official reports from citizens.

However, if the district attorneys had received reports, they would use their prosecutorial discretion not to go forward with prosecutions due to internal and external factors that include difficulty in prosecuting these types of cases, low priority, lack of staff resources, and no pressure by the public to prosecute. The strength of the case may influence the district attorney's decision to charge an offender. Ronald Sievert (2002) who prosecuted cases in Texas, suggests that civil lawyers, law students, and others who have not been well informed or are not thoroughly familiar with criminal prosecution often have no idea of the complexities of establishing guilt in a criminal trial or how much agency debate could take place over the courtroom merits of a particular prosecution. Similarly in Oklahoma, complicating the prosecution of an adultery case is proving the actual elements of the crime of committing a sexual intimacy with a married person. Prosecutors in Oklahoma receive no legal training specific to prosecuting adultery crimes, although they do receive training related to domestic violence prosecutions. Proving criminal intent in an adultery case may be one of the toughest tasks a district attorney faces.

The Oklahoma state statutes clearly define that only an affected party of the adultery may report the crime. This may also play a part in the actual reporting of the crime to either the police departments and or the district attorneys' offices in the first place. Interested third parties may not make an official police report according to state law.

The caseload of a district attorney's office may also play a role in the decision not to take on an adultery case. Furthermore, having the latitude to divert the case to a civil court and thus remove criminal sanctions from the equation may also play a role in the district attorney not charging individuals with a crime.

Next, if the district attorneys had adultery cases to prosecute and they decided not to proceed with prosecutions, they believe the decision not to prosecute would

not be an act of usurpation of power from the legislative branch of government. Furthermore, the district attorneys believe that prosecutorial discretion is essential in the balance of power. They do not think that not prosecuting adultery crimes violates the state constitution. Moreover, the district attorneys believe that the legislative branch should revisit the statute because it is no longer applicable.

Conclusion

It was concluded that although adultery occurs in the state of Oklahoma in violation of the criminal law, the offenses are not being reported to either police departments or district attorneys' offices. Without reports of adultery, the executive branch (district attorneys) is not collectively deciding against filing these particular cases and, thereby, is not usurping the power of the legislative branch of government. However, if the cases were reported, it is concluded that due to internal and external influences, the cases would still not be prosecuted in criminal court. The following conclusions of the study's research questions are reiterated and addressed separately.

It was concluded that the district attorneys in Oklahoma are not prosecuting adultery crimes because they do not receive reports of the criminal activity. Law enforcement is responsible for fielding criminal reports of adultery, and law enforcement did not accept, investigate, or forward any adultery cases to the district attorneys' offices for the calendar year 2008.

Secondly, it was concluded that had the district attorneys received reports of adultery, budget restraints, case selection, lack of public interest, and difficulty in prosecuting the crime would have prevented them from seeing the cases through. There is a consensus among the district attorneys' offices that the morality of the state has changed since the statute was first passed and the statute no longer serves its purpose.

The implication of the findings within this study should move the state legislature to repeal the statute related to adultery. In its present form, the adultery statute is unenforceable by the district attorneys. Moreover, future research should be conducted in the area of local law enforcement and how police and sheriffs' offices handle the official reporting of allegations of adultery. Law enforcement is the first contact with the justice system, and such agencies could be diverting the official reporting of this crime.

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