

City University of New York (CUNY)

CUNY Academic Works

Publications and Research

CUNY School of Law

2014

Prosecutorial Discretion The Duty to Seek Justice in an Overburdened Criminal Justice System

K. Babe Howell
CUNY School of Law

[How does access to this work benefit you? Let us know!](#)

More information about this work at: https://academicworks.cuny.edu/cl_pubs/114

Discover additional works at: <https://academicworks.cuny.edu>

This work is made publicly available by the City University of New York (CUNY).
Contact: AcademicWorks@cuny.edu

Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System

K. BABE HOWELL*

INTRODUCTION	286
I. THE FAILURE OF JUSTICE IN THE LOWER CRIMINAL COURTS	290
A. OVERBURDENED PROSECUTORS, DEFENDERS AND PLEA-BARGAINING IN LOWER CRIMINAL COURTS	290
B. DISPARITIES IN LOWER COURTS: UNEQUAL JUSTICE THROUGH UNEQUAL POLICING.	296
II. THE FAILURE TO CONSIDER PROSECUTORS AS A POTENTIAL ALLY IN ADDRESSING RACIAL DISPARITIES AND THE LACK OF PROCEDURAL JUSTICE IN LOWER CRIMINAL COURTS	300
III. PROSECUTORIAL DISCRETION AND THE ETHICAL DUTY TO DO JUSTICE	305
A. THE DUTY TO SEEK JUSTICE	306
1. THE PROSECUTOR’S DUTY TO JUSTICE UNDER THE MCPR	308
2. THE PROSECUTOR’S DUTY TO JUSTICE UNDER THE MRPC	310
B. THE DUTY TO SEEK JUSTICE AND THE EXERCISE OF CHARGING DISCRETION UNDER THE NDAA AND ABA STANDARDS FOR PROSECUTORS.	311
1. THE DUTY TO EXERCISE DISCRETION	312
2. FACTORS GOVERNING THE EXERCISE OF DISCRETION IN THE PUBLIC INTEREST	313

* Associate Professor, CUNY School of Law. Thanks to Michelle Anderson, Rebecca Bratspies, Frank Rudy Cooper, Jeffrey Kirchmeier, Sarah Lamdan, Jennifer Laurin, Ion Meyn, Palma Paciocco Jenny Roberts, Naree Sinhusek, Nicole Smith-Futrell, Yasmin Sokkar Harker, and Steve Zeidman for their comments and suggestions, and to Sabina Khan, Anthony Posada, and Matt Grill for their excellent research assistance. The paper was presented in draft form at Suffolk Law School and the 2013 Law and Society Conference and benefitted from feedback and questions from attendees at these sessions. © 2014, K. Babe Howell.

IV. DECLINING TO PROSECUTE MARIJUANA CASES IN NEW YORK CITY 321

V. BENEFITS AND CHALLENGES OF EXERCISING DISCRETION TO DECLINE TO PROSECUTE CLASSES OF MINOR OFFENSES 326

CONCLUSION 334

INTRODUCTION

Two of the most significant problems in the criminal justice system are caused by over-policing of minor offenses¹ under zero-tolerance policing policies.² First, substantial racial disparities arise because zero-tolerance policing is primarily pursued in poor urban neighborhoods of color. The result is that black and Latino people are routinely and aggressively prosecuted under statutes and local ordinances that go largely unenforced in white and wealthy areas. Second, procedural justice is undermined because over-policing increases the number of cases in lower criminal courts, overwhelming prosecutors, defenders, and judges. Thus, the prosecution of individuals arrested due to zero-tolerance policing both increases racial disparities in the system and undermines individualized adjudication of culpability.

It is well known that prosecutors possess nearly unfettered discretion to charge or to decline to charge, and thus are the most powerful actors in the criminal justice system.³ It is equally well known that the prosecutor’s duty is to do justice, not to obtain convictions. Given this power and this duty, prosecutors can be the key to addressing the lack of justice and racial disparities that are the result of the over-enforcement of minor offenses.

1. Examples of “minor offenses” are possession of small amounts of marijuana, selling goods (flowers, umbrellas, water) without a vendor’s license, consumption of alcohol in public, riding a bike on the sidewalk, taking two seats on a subway, and being in public parks after dark. See ROBERT C. BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS 15 (2009).

2. Zero-tolerance policing was adopted in the mid-nineties in New York and is now practiced in many jurisdictions. Tim Newburn, *Atlantic Crossings: ‘Policy Transfer’ and Crime Control in the USA and Britain*, 4 PUNISHMENT & SOC’Y 165, 167 (2002); Bill Dixon, *Zero-Tolerance: The Hard Edge of Community Policing* (2000) (tracing the global phenomenon of zero tolerance policing and its use in South Africa), available at <http://www.issafrica.org/pubs/ASR/9No3/zerotoler.html>. Under zero-tolerance policies, police are expected to arrest individuals taking them into custody for minor offenses rather than issuing warnings, summonses, or ignoring victimless offenses. Arrest processing may vary from jurisdiction to jurisdiction taking hours in some jurisdictions and days in others. In New York City, arrest processing typically involves approximately 24 hours of incarceration in local jails and central booking. BARRY A. KAMINS & JUSTIN A. BARRY, CRIMINAL COURT OF THE CITY OF N.Y., ANNUAL REPORT 2011, 21 (Justin Barry ed., 2012) [hereinafter ANNUAL REPORT 2011], available at www.nycourts.gov/courts/nyc/criminal/AnnualReport2011.pdf.

3. See generally ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007); JAMES B. STEWART, THE PROSECUTORS: INSIDE THE OFFICES OF THE GOVERNMENT’S MOST POWERFUL LAWYERS 9-10 (1987); Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision And The Innocence Revolution*, 31 CARDOZO L. REV. 2187 (2010).

This paper calls upon chief prosecutors⁴ to exercise their discretion to decline to prosecute minor offenses where arrest patterns show a disparate impact on racial minorities or where overburdened prosecutors and courts cannot provide procedural justice. Exercising discretion to ensure equal application of the law and procedural justice is consistent with the prosecutor's ethical duty to seek justice.⁵ Declining to prosecute minor offenses will reduce the substantial burden that is placed on historically disadvantaged communities by zero-tolerance policing. In addition to serving justice by encouraging equal application of the laws regardless of race or class, declining to prosecute minor offenses would reduce procedural failures that plague the lower courts of this country due to overcrowding.

Scholars have suggested any number of responses to reduce the harms that flow from the massive processing of minor cases through the criminal courts, including roles for the legislature, the police, the courts, defense counsel, and even jurors. Professor Jenny Roberts has focused on the defense function, suggesting that defendants and defense counsel should fight charges when possible in an attempt to "crash the system"⁶ and advocating for misdemeanor defense standards of practice that reflect the serious consequences of misdemeanor convictions.⁷ Others have suggested that jurors can restore a measure of justice to the misdemeanor cases. Professor Paul Butler has argued that jurors should refuse to convict those charged with drug cases because of racial disparities.⁸ Professor Josh Bowers has suggested that jurors should also be given a role in the charging decision so that they can decline to prosecute "normatively innocent" individuals, because individual prosecutors are not declining prosecution in appropriate cases.⁹ In an earlier article, I have suggested ways in which various actors can alleviate the problems associated with the zero-tolerance policing and over-burdened lower criminal courts. Legislators could decriminalize offenses, reduce collateral consequences, and change arrest powers for minor

4. Typically junior prosecutors handle minor offenses. However, they generally lack the power and will to defy institutional expectations or compromise relations with law enforcement by acting independently to decline prosecutions. PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* 114-20 (2009) (discussing the failure of progressive prosecutors to advance justice because of the pressures of the adversarial model).

5. MODEL RULES OF PROF'L CONDUCT R. 3.8 Cmt. 1 (2009) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

6. Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089 ____ (2013); Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES, Mar. 11, 2012.

7. Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 322 (2013).

8. See generally Paul Butler, *Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L. J. 677 (1995).

9. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1680-84 (2010) (A "normatively innocent" individual may be factually guilty, e.g. he violated vending laws by selling water outside a ballpark without a license, but not morally blameworthy or deserving of the stigma of criminality).

offenses.¹⁰ Alternatively, the police could exercise their discretion differently, recognizing that over-policing compromises their legitimacy and ability to pursue serious crime.¹¹ The courts should streamline appearances so that individuals who want to assert their right to trial need not make dozens of unnecessary court appearances.¹²

However, until now, one key institutional actor—the prosecutor—has not been called upon to take a leading role to address the racial disparities and procedural failures of overburdened lower criminal courts. This is not to suggest that the prosecutor’s role in the realm of zero-tolerance policing has been entirely unexplored¹³ or that the interplay between prosecutorial discretion and racial disparities has never been addressed.¹⁴ Indeed, with the assistance of the Vera Institute of Justice, prosecutors themselves have begun to dedicate resources to examining internal data in order to identify and correct racial disparities in case charging and processing.¹⁵ These articles and projects have focused on how prosecutors exercise discretion (or fail to exercise discretion) as an internal matter. This article goes beyond these internal assessments of discretionary power and looks to prosecutors’ offices to respond to and ameliorate the disparate impact and failure of the justice system caused by policing of minor offenses.

This article calls on the prosecutor, the most powerful actor in the criminal justice system, to decline to prosecute individuals for minor offenses where racial inequities or failures of procedural justice flow from aggressive policing of minor misconduct. Under this proposal, the chief prosecutor would decline to prosecute entire classes of minor offenses where policing of these offenses are marked by racial disparities or overburden the criminal justice system and compromise procedural justice.

10. K. Babe Howell, *Broken Lives From Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 316-22 (2009) (Although, the Supreme Court has held that the police can make arrests even for offenses that are not crimes and carry no potential jail sentence, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), states can limit the authority to arrest (as opposed to issuing summonses) to offenses of a particular severity).

11. See Benjamin W. Wells, *The Truce on Drugs: What Happens Now that the War has Failed*, NEW YORK MAGAZINE, Dec. 3, 2012, at 30, 105 available at nymag.com/news/features/war-on-drugs-2012-12 (Commission Bealefeld of Baltimore Maryland, decided to deemphasize minor crimes and focus on gun predicates with simultaneous 40% drop in total arrests and 30% drop in homicides).

12. See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 161, 239-40 (1979); Howell, *supra* note 10 at 297.

13. Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85, 87 (2007) (describing systemic prosecutorial approaches to plea bargaining of minor offenses due to zero-tolerance policing as a means of gaining “communal acquiescence to enforcement policies that otherwise lack public support”).

14. Angela Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 203, 205 (2007) (noting that “[u]nwarranted racial disparities cannot be eliminated without the active participation of prosecutors” and examining how prosecutors contribute to racial disparities by “unsystematic exercise of discretion” in charging and plea bargaining).

15. Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008-09).

This call is based on the prosecutor's duty to seek justice. This paper specifically analyzes this duty to seek justice in the framework of relevant ethical and professional standards for prosecutors: the *Model Code of Professional Responsibility* and *Model Rules for Professional Conduct*, *American Bar Association Standards for Criminal Justice*, and the *National District Attorneys' Association Standards*. Because our criminal codes are so broad, it is not possible to prosecute all criminal conduct.¹⁶ It is the prosecutor's responsibility to exercise discretion to determine what offenses to pursue.¹⁷ The prosecutor may not abdicate this discretion by simply prosecuting every individual brought in by the police.¹⁸ Instead, "the prosecutor may, in some circumstances, and *for good cause consistent with the public interest* decline to prosecute, notwithstanding that sufficient evidence may exist that would support a conviction."¹⁹

The approach proposed by this paper will serve justice in two critical ways. First, declining to prosecute individuals where policing choices create unequal application of the law will reduce racial disparities and increase the legitimacy of the criminal justice system. Second, declining to prosecute minor offenses will alleviate overburdened lower courts and free resources²⁰ (of prosecutors, defenders, and courts) that could be used to afford the remaining defendants in lower courts procedural justice.²¹

In Part I, I examine the failures of the overburdened criminal justice system to do justice and the racial disparities that flow from these failures. In Part II, I discuss why prosecutors have been overlooked as a potential ally in the quest to address the problems of overburdened lower courts and the evidence that some prosecutors might be willing to take on this role. In Part III, I lay out the standards that guide the discretion not to charge certain crimes and argue that these standards permit prosecutors to decline to prosecute offenses when laws are applied unequally or individuals cannot be assured procedural justice in the courts. In Part IV, I provide a concrete example of the proposal in the context of marijuana prosecutions. In Part V, I address the benefits and challenges of the proposal that prosecutors exercise discretion to decline to prosecute minor offenses that create and reinforce racial disparities.

16. DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 30 (2008).

17. AMERICAN BAR ASSOCIATION, *ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION* § 3-3.4(a) (3d ed. 1993) [hereinafter *STANDARDS FOR CRIMINAL JUSTICE*], available at http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf; NATIONAL DISTRICT ATTORNEYS ASSOCIATION, *NATIONAL PROSECUTION STANDARDS* § 4-4.1 (3d ed. 2009) [hereinafter *NDAA STANDARDS*].

18. *Id.*

19. *STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION*, *supra* note 17, § 3-3.9(b) (emphasis added).

20. I am assuming that the police will not respond by increasing arrests of whites and maintaining the same level of arrests for other races. If they respond in this way, then the procedural justice problem would not be alleviated but the unequal application of the law would be.

21. A third potential benefit may be police reforms that promote the equal application of the laws.

I. THE FAILURE OF JUSTICE IN THE LOWER CRIMINAL COURTS

To understand the importance of this proposal and how the ethical exercise of discretion is consistent with a decision to decline to prosecute classes of offenses in the lower criminal courts, I first examine the failure of justice in misdemeanor²² cases and then turn to the racial disparities caused by policing choices that flood the lower criminal courts.

A. OVERBURDENED PROSECUTORS, DEFENDERS AND PLEA-BARGAINING IN LOWER CRIMINAL COURTS

During the last decade, a body of scholarship has developed addressing the shortcomings that mar this country's lower criminal courts.²³ The observation that what happens in the lower criminal courts has little to do with justice is not new.²⁴ Nonetheless, changes in policing strategies and the expanding collateral consequences of minor convictions have given great urgency to the concern about this dysfunction. The "zero-tolerance policing" approach to minor offenses has increased the number of individuals subjected to lower criminal courts to over thirteen million per year.²⁵ These policing strategy is focused disproportionately on poor communities of color,²⁶ despite the fact that more privileged people

22. I use the term "misdemeanor" as a synonym for minor offenses; some cases processed in the lower courts may be violations or infractions. For a discussion of the various meanings of misdemeanors see Roberts, *supra* note 7, at 290-92.

23. By lower criminal courts, I refer to courts with jurisdiction over misdemeanors and lesser offenses.

24. Feeley, *supra* note 12 at 246-247 (pointing to the "lack of adversarial practices in lower criminal courts," the impact of heavy caseloads on the "quality of the proceedings at all other stages of the process," "the pressure . . . to circumvent the complication of an elaborate adversarial process," and the ways in which "[d]efendants in high-volume courts are shuffled through . . . without ever comprehending what is happening to them [or] anyone caring about their confusion," in order to illustrate how "justice," as well as the "appearance of justice" are denied in lower criminal courts).

25. In 2010, there were more than 13.1 million arrests reported to the U.S. Department of Justice Federal Bureau of Investigation. Only one in twenty four of these arrests (552,000) were for violent crimes. There were more arrests for "disorderly conduct" (615,000) or "drunkenness" (560,000) than for all violent crimes. Fed. Bureau Of Investigation, U.S. Dep't Of Justice, *Estimated Number of Arrests: United States, 2010*, tbl.29 (2010), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl29.xls> [hereinafter FBI, Table 29]; For information on the increase in filings in specific jurisdictions see Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 271-73 (2011). In New York City, the number of misdemeanor arrests has increased by approximately five hundred percent (from 48,434 to 242,085) from 1990 to 2011. New York State Division of Criminal Justice Services (DCJS), *Adult Arrests in New York City: 2003-2012* (Mar. 20, 2013), <http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/NewYorkCity.pdf> (only the statistics on misdemeanor arrests between 2003-2011 are made available online by DCJS; statistics between 1990-2011 are on file with the author).

26. HUSAK, *supra* note 16 at 30 (explaining racial disparities exist because "[o]ur system of law practices 'justice by geography'"); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 506, 575-576 (2001).

and white people often engage in the same conduct.²⁷ The imposition of severe collateral consequences (ineligibility for certain work licenses, public assistance, guaranteed student loans, as well as deportation, and loss of housing, among others) burden not only the individuals arrested, but also their families and the communities where policing is concentrated.²⁸ The ready accessibility of electronic records²⁹ can make any arrest, even without a conviction, an effective bar to gainful employment.³⁰ Whether and how minor offenses are prosecuted has a significant impact on vulnerable communities. Thus, decisions about whether and how to prosecute minor offenses should be aligned with the prosecutor's overarching duty to serve justice.

Among the many troublesome issues is the failure of the lower criminal courts to respond to claims of actual innocence.³¹ Even prosecutors acknowledge that the likelihood of innocent individuals pleading guilty is substantial.³² This risk is inherent in a system of substantial prosecutorial discretion and limited discovery.³³ As one former prosecutor has observed, the innocent are particularly vulnerable to the pressure to plead guilty in an overburdened and underfinanced system:

27. BUTLER, *supra* note 4, at 36-37; Harry G. Levine & Deborah Peterson Small, *The Marijuana Arrest Crusade: Racial Bias and Police Policy in New York City 1997-2007*, N.Y. CIVIL LIBERTIES UNION 12-13 (2008), http://www.nyclu.org/files/MARIJUANA-ARREST-CRUSADE_Final.pdf; Harry G. Levine, *New York City's Marijuana Arrest Crusade . . . Continues*, 4-6 (Sept. 2009), <http://marijuana-arrests.com/docs/NYC-MARIJUANA-ARREST-CRUSADE-CONTINUES-SEPT-2009.pdf>.

28. See Andrew E. Taslitz, *Judging Jena's D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. L. REV. 393, 447 (2009) (noting that in prosecutions "where race is salient, the communities most harmed by crime can suffer from the state's efforts to punish it, and may suffer entirely undeserved group-based disesteem."); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1277 (2004); Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1009-1010 (2001); M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding "Zero-Tolerance" Policing as a Form of Collective Punishment and Human Rights Violation*, 3 DREXEL L. REV. 373, 407 (2011); Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory*, 36 CRIMINOLOGY 441, 467 (1998) ("High incarceration rates . . . contribute to such social problems as inequality, family life deterioration, economic and political alienation, and social disorganization.").

29. James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 178 (2008).

30. Michelle Natividad Rodriguez & Maurice Emsellem, 65 *Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment*, The National Employment Law Project, 6, 14 (Mar. 2011), http://nelp.3cdn.net/e9231d3aee1d058c9e_55im6wopc.pdf ("[A] 2010 survey of employers indicated that over 30 percent consider an arrest that did not lead to conviction to be at least 'somewhat influential' in a decision to withhold a job offer.").

31. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1319 (2012).

32. See Gershowitz & Killinger, *supra* note 25, at 291; Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2506 (2004).

33. See *id.* at 2528.

The result of inadequate discovery is that the parties bargain blindfolded . . . Prosecutorial bluffing is more likely to work particularly well against innocent defendants, who are on average more risk averse than guilty defendants.³⁴

Nor is this injustice fully alleviated when discovery is available. When prosecutors are overburdened, trials are delayed and innocent people, particularly those who are incarcerated, are likely to plead guilty in exchange for their freedom.³⁵ Even non-incarcerated individuals faced with substantial delays may give up their right to trial and consent to a plea or a disposition rather than return to court repeatedly and risk possible incarceration.³⁶ Finally, those who do try to exercise their right to trial may “win” by receiving a speedy trial dismissal, rather than getting the opportunity to confront their accuser.³⁷ While this may appear to be a favorable outcome to an outsider, for an individual who is wrongfully accused or illegally stopped and returns to court again and again to challenge this illegality, a silent dismissal based on speedy trial grounds adds insult to injury. In most jurisdictions, over 95% of all cases are resolved without trial (by dismissal or guilty plea).³⁸ In misdemeanor courts, this percentage often exceeds 99%.³⁹

Josh Bowers has pointed to the additional problem of “normative innocence” in today’s world of zero-tolerance order-maintenance policing. Bowers defines normative innocence as follows: “A criminal is normatively innocent where his conduct is undeserving of communal condemnation, even if it is contrary to law.”⁴⁰ In cases of normative innocence, Bowers points out that blameworthiness may be an open question.⁴¹ Fairly typical examples of cases in which a fact finder might consider an arrestee normatively innocent include:

34. *Id.* at 2495.

35. Gershowitz & Killinger, *supra* note 25, at 263-64.

36. See ALISA SMITH & SEAN MADDAN, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA’S MISDEMEANOR COURTS 15, 18 (2011); see also John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, CORNELL LEGAL STUDIES RESEARCH PAPER, Jul. 11, 2012, available at <http://ssrn.com/abstract=2103787> (noting that “many innocent defendants charged with relatively minor crimes plead guilty in order [to] . . . avoid spending additional time in jail”).

37. See William Glaberson, *In Misdemeanor Cases, Long Waits for Elusive Trials*, N.Y. TIMES (Apr. 30, 2013), http://www.nytimes.com/2013/05/01/nyregion/justice-denied-for-misdemeanor-cases-trials-are-elusive.html?_r=0 (discussing a collaboration between Bronx Defenders and Cleary Gottlieb aimed at seeking hearings and trials in Bronx marijuana possession cases that stemmed from illegal stop-and-frisks, “[e]ventually, the effort by the Bronx Defenders, done in partnership with the Wall Street law firm Cleary Gottlieb Steen & Hamilton, was scrapped. The grim conclusion was that the borough’s courts were incapable of giving defendants the hearings that people expect. Of the 54 cases, not one ended in a trial.”); Roberts, *supra* note 7, at 350 (“[M]isdemeanors are dismissed in New York City under the state’s speedy trial statute but normally only after a defendant has appeared numerous times on the case.”).

38. Bibas, *supra* note 32, at 2466, n.9.

39. See ANNUAL REPORT 2011, *supra* note 2, at 29-31.

40. Bowers, *supra* note 9, at 1678.

41. *Id.* at 1658.

A sixteen-year-old runaway [] arrested for prostitution; a mother [] arrested for leaving her eleven-year-old home alone for the afternoon; an indigent man [] arrested for hopping a turnstile to get to his first day of work; an elderly man [] arrested for selling ice pops without a license on a hot summer day.⁴²

Although most problems in the lower criminal courts are not new, the scenario Bowers highlights of normative innocence is, if not new, at least substantially more common today than it was before zero-tolerance policing was adopted.⁴³ The pressure on police to exercise discretion to make arrests for minor offenses, such as enjoying a beer on one's own stoop on a summer evening, has significantly increased the number of individuals in the lower criminal courts that the public might deem to be normatively innocent.⁴⁴

Unlike defense lawyers, prosecutors and former prosecutors have not focused exclusively on the lower courts when discussing the harms that flow from an overburdened system. Nonetheless, they catalog many of the same shortcomings throughout the criminal justice system, which Attorney General Eric Holder recently described as “in too many respects broken.”⁴⁵ Regarding the quality of justice available in the overburdened system, he noted the failure to meet the promise of *Gideon v. Wainwright* to provide defense counsel to the indigent. Like scholars who focus on the lower criminal courts, the Attorney General addressed “unwise and counterproductive collateral consequences,” noting that the Department had supported the ABA in cataloguing tens of thousands of statutes and regulations imposing collateral consequences. He also bemoaned the unjustified racial disparities (including the fact that black defendants serve sentences twenty percent longer than white defendants). He expressed concern for the legitimacy of the system, noting that unfairly harsh sentences “breed disrespect for the system.” Most importantly, he commented that the impact of enforcement decisions, long sentences, and collateral consequences were not limited to defendants but “have a destabilizing effect on particular communities, largely

42. *Id.*

43. See generally WILLIAM BRATTON WITH PETER KNOBLER, TURNAROUND: HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC 228-29 (1998) (describing the NYPD's zero-tolerance policy under Police Strategy #5 which adopted a policy of arresting individuals rather than ticketing or warning people for offenses such as public consumption of alcohol, panhandling, trespass and fare evasion.)

44. See, e.g., Vivian Lee, *A Legal Fight Over Sipping Beer on a Stoop*, N.Y. TIMES (Jul. 10, 2012, 4:04 PM), <http://cityroom.blogs.nytimes.com/2012/07/10/a-legal-fight-over-sipping-beer-on-a-stoop/> (quoting Steven Banks, the chief lawyer for the Legal Aid Society, as stating that the summoning of individuals for drinking beer on their stoops “. . . is representative of the kind of over policing that detracts from focusing on real serious problems”); The New York World, *Summons City* <http://www.thenewyorkworld.com/public/2012/sept/nyw-summons-map/index.php> (This interactive map “. . . shows the top 15 categories of “pink slip” summons sent to the city's criminal courts by each precinct of the New York City Police Department during 2011—nearly 380,000 in all”).

45. See Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

poor and of color.” The “broken” criminal justice system, as he described it, exacerbates “a vicious cycle of poverty, criminality, and incarceration [that] traps too many Americans and weakens too many communities.” While these comments are not directed to lower criminal courts alone and the minor offenses that flood them, each flaw he attributes to this broken system has its parallel in the lower criminal courts.

A complement to this overview of the flaws of the overburdened system is provided by Gershowitz and Killinger who, writing from the prosecutor’s perspective, indicate that the prosecutor’s ability to do “justice”—to weigh the actual culpability of a particular defendant and exercise mercy where appropriate—is compromised by excessive caseloads.⁴⁶ Overburdened prosecutors often do not learn of mitigating evidence that might result in a more appropriate disposition or dismissal. Professor Bibas affirms this point, indicating that in a world of plea-bargaining and a presumption of limited discovery, these retributive assessments of actual culpability and accurate punishment are frequently not conducted.⁴⁷ Although these prosecutor-commentators do not limit their concern to misdemeanor courts, each of these problems is exacerbated in the lower courts, which handle many more cases with far fewer resources and fewer experienced attorneys.

Ideally, a defense lawyer might raise actual innocence, normative innocence, suppression issues, or mitigation evidence to the prosecution.⁴⁸ When defense attorneys have the time and the resources to learn about their clients and advocate for them, they are often successful in litigating cases, negotiating more favorable pleas, or obtaining dismissals.⁴⁹ For the most part, prosecutors are willing to give defendants better dispositions if they are able to justify them to their supervisors.⁵⁰ Unfortunately, defense attorneys, when they are provided to defendants, are often more overburdened than prosecutors. Thus, despite ABA practice standards for the defense function that require investigation of law and facts prior to advising a client to take any plea, few defense lawyers even attempt

46. Gershowitz & Killinger, *supra* note 25, at 264.

47. Bibas, *supra* note 32, at 2468.

48. *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972) (extending the Sixth Amendment right to counsel to misdemeanor cases where the defendant was likely to be incarcerated, the Supreme Court recognized the impact of counsel on disposition stating “[t]here is evidence of the prejudice which results to misdemeanor defendants from this ‘assembly-line justice,’” citing a study that found represented misdemeanants were five times as likely to obtain dismissals as unrepresented defendants facing similar charges).

49. *See* Roberts, *supra* note 6, at 1103-04 (discussing the impact of high-quality representation in lower criminal courts); Steven Zeidman, *Sacrificial Lambs or the Chosen Few?: The Impact of Student Defenders on the Rights of the Accused*, 62 BROOK. L. REV. 853, 859-861, 867-890 (1996) (comparing outcomes obtained by clinical students in misdemeanor cases with those of defense attorneys).

50. *See* MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 97-98 (1981) (noting that new prosecutors tend to be harsher than experienced prosecutors); DAVID HEILBRONER, ROUGH JUSTICE: DAYS AND NIGHTS OF A YOUNG D.A. 51 (1990) (describing his practice of preemptively providing justifications for his supervisor “whenever I deliberately violated a policy” by being too lenient).

to handle misdemeanors according to these precepts.⁵¹ Instead, standard practice in many jurisdictions is to resolve a substantial proportion of misdemeanor cases (particularly the less serious public order offenses) without investigation or counseling and sometimes at the first court appearance with no investigation.⁵² Moreover, there are few direct appeals in misdemeanor cases in general and collateral attacks are vanishingly rare. As a result, there is no developed body of case law that defines effective assistance of counsel in the misdemeanor context.⁵³ Thus, though one may hope that defense counsel could serve as a corrective to injustice in an overburdened system, they are generally too overburdened to ferret out claims of innocence, identify and litigate suppression issues, develop mitigation evidence, challenge the constitutionality of overbroad statutes, or identify weak factual cases that make pleading guilty or accepting a disposition unnecessary or unjust.⁵⁴

Harms are not limited to defendants and the quality of justice that is received in particular cases. The failure of overburdened courts imposes costs on the broader community.⁵⁵ Gershowitz and Killinger describe victims as suffering because of unsatisfactory interactions with overburdened prosecutors who may be “rushed for time and seem aloof or uncaring.”⁵⁶ Only a small percentage of cases in the lower criminal courts involve victims, but the deluge of order-maintenance cases certainly compromises the ability of prosecutors to be responsive to complainants. Further, prosecutors who are overburdened with minor victimless offenses may be underprepared for trials on more serious misdemeanors, such as assaults, domestic violence, and driving under the influence, and lose meritorious cases, thereby putting both victims and the general public at risk.⁵⁷

Beyond the impact in individual cases, the criminal justice system as a whole is harmed by the failure to review the facts of over ninety-nine percent of cases flowing through the doors of the lower courts. The failure to conduct adversarial hearings⁵⁸ and trials insulates police conduct from judicial review, leaving the

51. See Roberts, *supra* note 7, at 283.

52. *Id.* at 306-09; Kyung M. Lee, *Reinventing Gideon v. Wainwright: Holistic Defenders, Indigent Defendants, and the Right to Counsel*, 31 AM. J. CRIM. L. 367, 374 (2004).

53. Roberts, *supra* note 7, at 319-320 (noting that the very few misdemeanor ineffective assistance cases typically raise claims under *Padilla v. Kentucky*, 130 S. Ct. 1473, (2010)).

54. See WILLIAM J. STUNTZ, *THE COLLAPSE OF THE AMERICAN CRIMINAL JUSTICE SYSTEM* 121 (2011).

55. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1277 (2004); Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1009-1010 (2001); Andrew E. Taslitz, *Judging Jena's D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. L. REV. 393, 434 (2009).

56. Gershowitz & Killinger, *supra* note 25, at 264-65.

57. *Id.*

58. Like trials, adversarial hearings are held in only a tiny number of cases in lower courts. In New York City for example, less than one percent of all cases in criminal court have any type of hearing. BARRY A. KAMINS & JUSTIN A. BARRY, *CRIMINAL COURT OF THE CITY OF N.Y., ANNUAL REPORT 2011* 54 (Justin Barry ed., 2012) [hereinafter *CRIMINAL COURT ANNUAL REPORT 2011*], available at www.nycourts.gov/courts/nyc/criminal/AnnualReport2011.pdf.

constitutional rights of all people unprotected.⁵⁹ As Professor Steve Zeidman puts it, “[b]y abdicating its critical oversight role, the criminal court effectively shields police behavior from any meaningful external review or accountability and allows and encourages rampant stops-and-frisks to continue unabated.”⁶⁰ Further, abdication of this oversight role “conveys tacit approval” and may encourage unjustified stops.⁶¹

Scholars have suggested a number of ways to improve the quality of the adversarial process within the lower court system⁶² or, alternatively, to dispense with the defense counsel in certain cases in lower courts altogether.⁶³ Among these suggestions, prosecutors and defenders should be better funded,⁶⁴ defenders should adopt and comport with standards for criminal court practice,⁶⁵ jurors should nullify drug offenses in the face of racial disparities⁶⁶ and exercise the initial charging discretion so that normatively innocent individuals need not be charged.⁶⁷ All of these proposals focus on improving or facilitating how existing cases are processed. They may alleviate the lack of procedural justice within the system, but will do nothing to address racial disparities caused by policing choices.

B. DISPARITIES IN LOWER COURTS: UNEQUAL JUSTICE THROUGH UNEQUAL POLICING

Although factual innocence, normative innocence, and the failure of the adversarial system to check constitutional violations have all been addressed by authors elsewhere, this article is also concerned with the disparity in how individuals who commit minor offenses are policed and processed. For example, imagine two teens possess and frequently smoke marijuana. One, a white youth, lives on the wealthy Upper East Side of New York City and then moves to a college campus. The other, a black or Latino male, lives a few blocks to the north in a community of color. The first teen is ignored, has no contact with police and

59. Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L. J. 315, 340 (2005). (“In this day and age, what we actually need to develop is a true, full-scale adversarial system where hearings and trials are the norm.”).

60. Steven Zeidman, *Whither the Criminal Court: Confronting Stops-And-Frisks*, 76 ALB. L. REV. 1187, 1189 (2013).

61. *Id.* at 1203.

62. Bowers, *supra* note 9, at 1658; Howell, *supra*, note 10 at 316-326; Zeidman, *supra* note 59.

63. Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461 (2007) (proposing, based on research in federal courts, that misdemeanor defense counsel do not improve outcomes for defendants and that resources be shifted to fund the defense function to felony and “serious misdemeanor” cases).

64. Gershowitz & Killinger, *supra* note 25, at 300.

65. Roberts, *supra* note 7, at 358.

66. See generally Paul Butler, *Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

67. Bowers, *supra* note 9, at 1658.

enters adulthood with no record. The second teen is repeatedly stopped, frisked,⁶⁸ put through the system, and branded as a criminal for the same conduct. The frequent stops and frisks are due to policing strategies that focus on particular neighborhoods and encourage “proactive policing,”⁶⁹ leading to hundreds of thousands of stops per year, six percent of which result in arrests, many of which are for possession of marijuana.

While some racial and class disparities in the criminal justice system are due to post-arrest decisions,⁷⁰ the greatest race disparities exist before the prosecutor is involved with the case. For example, in New York City, whites use marijuana at slightly higher rates than blacks or Latinos, yet blacks are 8 times more likely to be arrested for possession of marijuana for personal use than whites; Latinos are 4 times more likely to be arrested than whites.⁷¹

These disparities are not limited to New York. In every state and county in the country black people are far more likely to be arrested for possession of marijuana than white people.⁷² This is so even though rates of marijuana use are similar between whites and blacks.⁷³ Both the racial disparities⁷⁴ and the number of arrests under marijuana laws have been growing over time.⁷⁵ Under these circumstances, a prosecutor can reduce the harms caused by unequal enforcement

68. Cites to individuals being frequently stopped.

69. See NYPD Police Operations Order 52, Police Officer Performance Objectives, (Oct. 17, 2011) available at http://www.nyclu.org/files/releases/NYPD_Operations_Order_52_10.27.11.pdf (requiring police officers to perform and report on “proactive enforcement activities” including stop and frisks, summonses, and arrests).

70. Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202 (2007) (discussing how facially neutral factors can contribute to race disparities in prosecutorial charging and pleas bargaining; also proposing racial impact studies within prosecutors’ offices to reduce such disparities); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012); Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in the Criminal Justice Process: Prosecutors, Judges, and the Effects of United States v. Booker* (Univ. of Mich. Program in Law and Econ., Paper No. 12-021, November 2012), available at papers.ssrn.com/sol3/papers.cfm?abstract_id=2170148.

71. Human Rights Watch, *A Red Herring: Marijuana Arrestees Do Not Become Violent Felons*, 12-13 (Nov. HUMAN RIGHTS WATCH, *A RED HERRING: MARIJUANA ARRESTEES DO NOT BECOME VIOLENT FELONS* Human Rights Watch, *A Red Herring: Marijuana Arrestees Do Not Become Violent Felons* 12-13 (Nov. 23, 2012) (“A recent analysis of marijuana arrests from 2004-2008 revealed 48 blacks arrested for marijuana possession for every 1000 in the population, 24 Hispanics arrested per 1,000, and 6 whites per 1,000. That is, blacks were arrested for marijuana possession at eight times the rate of whites.” (citing Amanda Geller & Jeffrey Fagan, *Pot as Pretext: Marijuana, Race and the New Disorder in New York City Street Policing*, 7 J. of Empirical Legal Studies 591, 606 (2010)).

72. AM. CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE*, ACLU 9 (June 2013), available at <http://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel3.pdf>. On average black people are 3.73 times more likely than white people to be arrested for marijuana possession. The lack of statistics on Latinos and other races is due to FBI/UCR reporting categories. The disparities are likely understated because Latino arrests are included in the white category. *Id.*

73. *Id.* at 9, 21. A slightly higher percentage of blacks report having used in the previous year but a lower percentage of blacks between 18-25 use marijuana in the previous year and a higher percentage of blacks have never used marijuana in their lives.

74. *Id.* at 20.

75. *Id.* at 8.

of the law and by overburdened lower criminal courts by simply declining to prosecute all arrests (whether white, black, Latino or other) under marijuana possession statutes.

It is the police who choose what areas to target, who respond to calls, and who make the initial decision whether to make an arrest or issue an informal warning when minor misconduct occurs. The commitment to order-maintenance policing based on the Broken-Windows Theory⁷⁶ has resulted in a tremendous surge in the number of arrests for minor misconduct in many jurisdictions.⁷⁷ Since adopting a zero-tolerance policy requiring arrests for minor quality-of-life offenses in the mid-nineties, the police of New York City, the original “zero-tolerance” testing ground, have gone on to stop and frisk an ever greater number of people,⁷⁸ issue more summonses,⁷⁹ and make more minor arrests⁸⁰ in nearly every year than it has the year before. In each of these categories (those stopped and frisked,⁸¹ those given summonses,⁸² and those arrested for minor offenses⁸³), 85-90% of the affected population was non-white.

As a result of this avalanche of arrests, some prosecutors’ intake units in major

76. Broken windows theory posits that serious criminals are attracted to areas marked by physical and social disorder. According to this theory addressing minor disorder, should reduce serious crime. The article on which the theory is based does not suggest a zero-tolerance strategy to addressing disorder. See George L. Kelling & James Q. Wilson & George L., *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29.

77. BERNARD HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 6 (2005) (“The broken windows theory, aggressive misdemeanor arrests, and intensive stop and frisks have . . . produce[d] a dramatic increase in detentions, arrests, and criminal records. What we are left with today is a system of . . . severe treatment for minor offenders and ordinary citizens especially minorities . . .”); Howell, *supra* note 10 at 280-90.

78. The NYPD Stopped and Frisked over 685,000 in 2011. This represents a 700% increase in stop and frisks of blacks and Latinos from 2002. See New York Civil Liberties Union, *Racial Justice: Stop-and-Frisk Data*, <http://www.nyclu.org/content/stop-and-frisk-data> (last visited Feb. 28, 2013).

79. There were a total of 528,618 summonses filed in 2011. HON. BARRY A. KAMINS & JUSTIN A. BARRY, *Annual Report 2011*, CRIMINAL COURT OF THE CITY OF N.Y., ANNUAL REPORT 2011 6 (Justin Barry ed., 2012), available at www.nycourts.gov/courts/nyc/criminal/AnnualReport2011.pdf [hereinafter CRIMINAL COURT REPORT 2011]. In contrast, there were 282,676 summonses filed in 1995. HON. JUANITA BING NEWTON & WILLIAM H. ETHERIDGE III, *Annual Report 2005*, CRIMINAL COURT OF THE CITY OF N.Y., 38, (Justin Barry, ed., 2005) available at <http://www.courts.state.ny.us/courts/nyc/criminal/annual-report05.pdf>.

80. Misdemeanor arrest numbers rose from 48,434 in 1990 to 242,085 in 2011. New York State Dep’t Criminal Justice Services statistics, on file with author. These figures omit arrests for non-printable minor offenses and therefore undercount the actual increase in misdemeanor arrests.

81. About 90% of those stopped by police are non-white. See NEW YORK CIVIL LIBERTIES UNION, *supra* note 78.

82. While race data for summonses is not readily available, one judge, after noting that he had never seen a white person charged with an open container summons, had his law clerks review all Brooklyn summonses for April 2012 for race information. During that time only 4% of summonses for open alcoholic beverages were given to white people despite the fact that they make up 35.7% of the population of Brooklyn. See *People v. Figueroa*, 36 Misc. 3d 605, 608 (N.Y. Crim. Ct. 2012).

83. Approximately 87% of misdemeanor arrestees are non-white. New York State Dep’t Criminal Justice Services statistics, on file with author.

cities work night and day⁸⁴ to process the arrests of hundreds of thousands of people—predominantly people of color—largely because the police have made decisions to focus on minor misconduct and make arrests in certain areas.⁸⁵

The responsibility for the bulk of race and class disparities in the criminal justice system thus cannot be placed solely or even primarily on prosecutors. They do not choose whom to arrest. They do not arrest black and Latino people for using marijuana while ignoring white people who do the same. They do not set up traffic checkpoints in poor neighborhoods, or stop disproportionate numbers of vehicles driven by people of color. They do not stop and frisk young men and boys on their way to school and work by the hundreds of thousands.

Prosecutors are not responsible for who is arrested, but they do decide whom to prosecute.⁸⁶ And, as one former federal prosecutor put it, “[i]n deciding what crimes to prosecute—and what crimes to ignore—[prosecutors] make vitally important decisions about fundamental values that will be reflected in administration policy.”⁸⁷ The decision about fundamental values sends powerful messages to both the police and the public. Simply accepting and prosecuting these cases communicates to the police that nothing is wrong with the unequal enforcement of the law. Moreover, for those who go to court to observe proceedings, the fact that prosecutors appear to be prosecuting predominantly people of color and that there is little or no attention given to each case may undermine the legitimacy of the entire criminal justice system.

In the next Part, I consider why prosecutors have not been called upon to take a leading role in vindicating the fundamental values of equal enforcement of the law and procedural justice in the courts in the face of overburdened criminal courts.

84. See generally HEILBRONER, *supra* note 50; See BUTLER, *supra* note 4, at 101.

85. See HUSAK, *supra* note 16 at 30 (Stating that “[o]ur system of law practices “justice by geography”); Harry G. Levine, *New York City’s Marijuana Arrest Crusade*, 4 (2009), <http://marijuana-arrests.com/docs/NYC-MARIJUANA-ARREST-CRUSADE-CONTINUES-SEPT-2009.pdf>; Matthew Bloch, et. al, *Stop, Question and Frisk in New York Neighborhoods*, N.Y. TIMES (Jul. 11, 2010), <http://www.nytimes.com/interactive/2010/07/11/nyregion/20100711-stop-and-frisk.html?ref=stopandfrisk> (Map showing the disproportionate number of stops of minorities as a result of racial profiling in New York City, the increase in number of stops, reasons for stops, amount of force used); Mike Sullivan, *Summons City*, THE NEW YORK WORLD, *Summons City available at* <http://www.thenewyorkworld.com/public/2012/sept/nyw-summons-map/index.php> (This interactive map “. . . shows the top 15 categories of “pink slip” summons sent to the city’s criminal courts by each precinct of the New York City Police Department during 2011—nearly 380,000 in all.”). See, e.g., Stuntz, *supra* note 26 at 522.

86. E.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF THE AMERICAN CRIMINAL JUSTICE SYSTEM* 121 (2011).

87. STEWART, *supra* note 3, at 15.

II. THE FAILURE TO CONSIDER PROSECUTORS AS A POTENTIAL ALLY IN ADDRESSING RACIAL DISPARITIES AND THE LACK OF PROCEDURAL JUSTICE IN LOWER CRIMINAL COURTS

Scholars' failure to consider prosecutors as part of the solution to broken lower criminal courts stems from the tendency to see them as part of the problem. In lower criminal courts, *individual* prosecutors seem to benefit from quick pleas. They stand before judges, asking for fines, pleas, community service, or jail time in case after case after case. The job that they have sought out and accepted is one where they will spend days and (sometimes) nights processing minor offenses against defendants of color.

More importantly, the prosecutors one sees in lower criminal courts do not, in fact, seem to have the power to exercise discretion to address these systemic issues. The lower criminal courts are most often staffed by junior attorneys who frequently indicate that their prosecution of minor offenses reflects office policy.⁸⁸ The actual power to set office policy rests with the chief prosecutor, but most chief prosecutors concern themselves with more serious offenses and are content to manage huge misdemeanor caseloads with standard approaches to common victimless offenses.⁸⁹

Nonetheless, those within the criminal justice system have observed a range of individual prosecutors, some of whom are decidedly uncomfortable with their role in prosecuting minor offenses. They have struggled to persuade supervisors to dismiss cases,⁹⁰ quit their jobs abruptly, allowed dismissals by failure to prosecute, or simply been transferred to non-trial division positions.⁹¹ Professor Paul Butler describes some strategies to achieve justice by defying office policies:

[T]he progressive prosecutors I interviewed described some conduct that their employers would have considered seditious. S.W. recalled advising defense attorneys from time to time that rather than accept a plea, their clients should go to trial, because the government's evidence was not strong.

88. See HEILBRONER, *supra* note 50, at 50-51 (describing the Manhattan prosecutor's alleged lack of policies regarding misdemeanor drug offenses); DAVIS, *supra* note 3, at 34 (noting that even where prosecutors are granted maximum discretion, the philosophy of the chief prosecutor will guide the exercise of discretion).

89. HEILBRONER, *supra* note 50 at 50 (describing the bureau chief who trained and set unofficial policy for new prosecutors in criminal court). For example, a standard offer for a first arrest shoplift might be a non-criminal plea to disorderly conduct, one day of community service or a one day "shoplift" program, and court costs. This standard approach would routinely apply whether shoplifted property was worth \$10 or \$200, and whether the defendant was an elderly person on a fixed budget or a wealthy individual who shoplifts for the thrill of it.

90. This observation is based on personal experience. When working as a defender and supervising a clinic, line prosecutors would occasionally indicate that they were trying to persuade supervisors to permit dismissal or more favorable dispositions. They would sometimes request additional documentation, letters, motions, or meetings with defendants and supervisors to advocate for non-standard deals.

91. BUTLER, *supra* note 4, at 119-20.

D.T. remembered working harder for a defendant than his own attorney did to find him a drug treatment program. When A.F. wanted to offer a benefit to a defendant that his office wouldn't allow, he sometimes would tell the defense attorney, "I can't put anything in writing," but would promise to be lenient when they got to court.

Many of the prosecutors recalled ways of missing deadlines, "forgetting" to subpoena witnesses, leaving key sentence enhancing facts out of indictments or pleas—all in an attempt to subvert the dominant "tough on crime" paradigm of their work places.⁹²

Even prosecutors who do not seem overly concerned about the injustices in the system routinely offer very low pleas in a silent (or sometimes explicit) recognition that the cases in the lower courts are not worthy of criminal condemnation.⁹³ Prosecutors who truly seem to believe that the work of the lower criminal courts in responding to victimless offenses is justified by any retributive theory are likely a minority. Some may embrace the "broken-windows" theory, believing that serious crime is deterred by policing minor misconduct.⁹⁴ Others may feel that drugs and disorder harm communities of color and should thus be discouraged by order-maintenance policing and prosecution.⁹⁵ Some may feel (as do some defense attorneys) that if an individual knows he will be frequently stopped and frisked because of his neighborhood, age, and skin color, then he should not tempt fate by carrying marijuana, drinking beer on the stoop, or riding his bike on the sidewalk. Although there are racial disparities in the system, over time a prosecutor may come to believe that a person who ignores the realities of urban policing has only himself to blame. For the most part, assistant district attorneys prosecute minor victimless crimes, not because they want to, but because they are assigned to do so early in their careers and feel that they must do so to advance their careers.⁹⁶

While there is some evidence that the racial disparities and other injustices that

92. *Id.*

93. See Bowers, *supra* note 13, at 87, (discussing how low offers on public disorder offenses are designed to garner "communal acquiescence to enforcement policies that otherwise lack public support").

94. The lack of empirical evidence for the causal claim set forth by under the Broken Windows theory has been addressed elsewhere and is beyond the scope of this paper. Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, The Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998); Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM J. SOCIOLOGY 603 (1999); Stephen W. Raudenbush & Robert J. Sampson, *Ecometrics: Toward a Science of Assessing Ecological Settings, with Application to the Systematic Social Observations of Neighborhoods*, 29 SOCIOLOGICAL METHODOLOGY 1 (1999).

95. James Forman Jr., *Racial Critiques of Mass Incarceration: Beyond The New Jim Crow*, 87 N.Y.U. L. REV. 21, 42 (2012) (African American counterparts at the U.S. Attorney's Office wanted to "protect the community").

96. Cf. Paul Butler, *Gideon's Muted Trumpet*, N.Y. TIMES, March 17, 2013, at A21 (arguing that prosecutors are "power-drunk" and that "prosecutorial policies essentially target the poor and relegate their lawyers to negotiating guilty pleas, rather than mounting a defense.")

flow from our criminal justice system are not of concern to many prosecutors, that evidence may be overstated due to the ease with which we can think of examples of prosecutorial and police misconduct that adversely affected people of color.⁹⁷ We can easily call to mind instances in which prosecutors have defended convictions and prevented exonerations of innocent men.⁹⁸ Prosecutors have also been known to exercise charging discretion in a manner that creates racial disparities, and have fought for and won the right to avoid scrutiny of charging decisions that create those disparities.⁹⁹ They have also fought legislative initiatives that would permit challenges based on race disparities.¹⁰⁰ Finally, there have been cases, such as the Tulia, Texas prosecutions, where prosecutors have been willfully blind to police misconduct that has subjected innocent black citizens to wrongful prosecutions.¹⁰¹

The innocence litigation that has led to the exoneration of hundreds of

97. Geoff Ward, et. al., *Racial Politics of Juvenile Justice Policy Support: Juvenile Court Worker Orientations Toward Disproportionate Minority Confinement*, 1 RACE & JUSTICE 154 (2011) (study on disproportionate minority contact (DMC) found that of all the actors in the juvenile justice system, prosecutors did not see DMC as a problem).

98. *Connick v. Thompson*, 131 S. Ct. 1350 (2011); Philip S. Gutierrez, *You Have The Right To [Plead Guilty]: How We Can Stop Police Interrogators From Inducing False Confessions*, 20 S. CAL. REV. L. & SOC. JUST. 317, 328-329 (2011) (addressing the infamous Central Park jogger case: more than a decade after four youth of color were convicted of raping a jogger in Central Park, solely on false confessions produced after countless hours of interrogation, another man, Matias Reyes, whose DNA was alone was linked to the crime scene, made a detailed confession to committing the rape by himself; despite this, prosecutors continued to “offer[] several theories to explain how the boys might have committed the crime with Reyes.” [They] focused solely on the boys as suspects to obtain a confession, and dismissed any evidence to the contrary.”); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 37, 36 (2009) (arguing that American prosecutors’ concern with obtaining and maintaining convictions contributes to wrongful convictions and makes it “vastly harder for the wrongfully convicted to achieve freedom”); Shaila Dewan, *Prosecutors Block Access to DNA Testing for Inmates*, N.Y. TIMES, May 18, 2009, at A1 (A study of 225 DNA exonerations “found that prosecutors opposed DNA testing in almost one out of five cases.”).

99. *McCleskey v. Kemp*, 481 U.S. 279 (1987) (death penalty decision); *United States v. Armstrong*, 517 U.S. 456 (1996) (crack cocaine prosecutions); *Stephens v. State*, 456 S.E.2d 560 (Ga. 1995) (drug sentence enhancement pursued almost exclusively against African-American defendants); Starr & Rehavi, *supra* note 70, at 19 (finding that prosecutorial “initial charging is an important driver of these sentencing disparities—especially the decision to bring mandatory minimum charges,” and that mandatory minimums explained basically all the disparity).

100. For example, forty-three of forty-four North Carolina state district attorneys persuaded the North Carolina legislature to reverse the Racial Justice Act which “allows death-row inmates and defendants facing the death penalty to use statistics and other evidence to show that racial bias played a significant role either in their sentence or in the prosecutors’ decision to pursue the death penalty.” *Prosecutors Seek Repeal of Racial Justice Act*, WINSTON-SALEM J., (Nov. 16, 2011), http://www.journalnow.com/news/local/article_f32f8bf3-4cf1-5943-9067-ec0510898dcd.html. Despite such pressure, the governor’s veto preserved the Racial Justice Act and in 2012 a judge commuted a death sentence to life imprisonment upon a finding that blacks were systematically excluded from jury service both in Robinson’s case and across the state. *Racial Bias Saves Death Row Man*, BBC NEWS, (Apr. 20, 2012), <http://www.bbc.co.uk/news/world-us-canada-17762035>.

101. DAVIS, *supra* note 3, at 40-41 (describing the lack of evidence in Tulia, Texas prosecutions in which 39 African-Americans were charged and prosecuted based on the largely uncorroborated claims of a police officer).

wrongfully convicted individuals brings myriad examples of prosecutorial indifference to both racial disparities and injustice to mind.¹⁰² Given high-profile instances of prosecutorial misconduct, it is easy to overlook evidence that prosecutors could be potential allies and leaders in addressing the injustices in the lower criminal courts.

However, just as some prosecutors have sought to identify and correct wrongful convictions,¹⁰³ prosecutors could also address the racial disparities that are the product of aggressive policing of minor offenses. There is evidence that some prosecutors might be ready to step up to this challenge. First, there are several prosecutors' offices that have worked with the Vera Institute for Justice to address racial disparities within their offices.¹⁰⁴ Some prosecutors are increasingly aware that implicit bias can affect charging decisions, plea bargaining, jury selection, trials and sentencing recommendations.¹⁰⁵ The growing understanding that fair minded people may nonetheless unintentionally treat similar conduct differently because of implicit race-based associations is encouraging honest self-reflection.

Second, chief prosecutors have shown signs of willingness to consider the wisdom of prosecuting enormous numbers of people for minor offenses. In 2012, all five New York City District Attorneys backed the governor's call for decriminalization of marijuana.¹⁰⁶ After noting that half of those arrested for low-level marijuana possession in 2011 had never been arrested before, Manhattan District Attorney Cyrus Vance said: "This simple and fair change will help us redirect significant resources to the most serious criminals and crime

102. Three leading causes of wrongful conviction are largely within the control of the prosecutor. These include: government misconduct (whether prosecutorial or law enforcement), use of faulty forensic evidence, and the use of jailhouse snitches. Additional leading causes are misidentification, ineffective defense counsel, and false confessions. THE TASK FORCE ON WRONGFUL CONVICTIONS, N.Y. STATE BAR ASS'N, THE FINAL REPORT OF THE NEW YORK STATE BAR ASSOCIATION TASK FORCE ON WRONGFUL CONVICTIONS, 6-7 (2009), available at <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26663>. Moreover, prosecutors have also fought *Model Rules* that create a duty to investigate exculpatory evidence that raises innocence concerns. See, e.g., Stephen Lemons, *Bill Montgomery Opposes Ethics Rule Requiring Prosecutors to Reveal Evidence of Wrongful Convictions*, PHOENIX NEW TIMES (Aug. 1, 2013), http://blogs.phoenixnewtimes.com/bastard/2013/08/bill_montgomery_opposes_propos.php.

103. See, e.g., THE CTR. ON THE ADMIN. OF CRIMINAL LAW, ESTABLISHING CONVICTION INTEGRITY PROGRAMS IN PROSECUTORS' OFFICES (2012), available at http://www.law.nyu.edu/sites/default/files/upload_documents/Establishing_Conviction_Integrity_Programs_FinalReport_ecm_pro_073583.pdf (providing recommendations based on existing prosecutorial efforts to assure conviction integrity); see also Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215 (2010) (stressing the importance of conviction integrity programs).

104. WAYNE MCKENZIE, ET AL., VERA INST. JUST., PROSECUTION AND RACIAL JUSTICE: USING DATA TO ADVANCE FAIRNESS IN CRIMINAL PROSECUTION, VERA INST. (2009), available at <http://www.vera.org/sites/default/files/resources/downloads/Using-data-to-advance-fairness-in-criminal-prosecution.pdf>.

105. Alafair S. Burke, *Unpacking New Policing—Confessions of a Former Neighborhood District Attorney*, 78 WASH. L. REV. 985, 1020 (2003).

106. Thomas Kaplan, *Police and Mayor Back Plan to Curtail Marijuana Arrests*, N.Y. TIMES, June 5, 2012, at A1.

problems . . . And, frankly, it's the right thing to do."¹⁰⁷ Despite this position, these prosecutors have continued to prosecute individuals arrested for possession of marijuana.¹⁰⁸

Third, at least some prosecutors have recognized that the lack of hearings and trials creates conditions under which unlawful arrests are undermining the legitimacy of the criminal justice system. Thus, the Bronx District Attorney's office has "quietly adopted the policy [of not prosecuting trespass cases without first interviewing the arresting officer] in July [of 2012] after discovering that many people arrested on charges of criminal trespass at housing projects were innocent, even though police officers had provided written statements to the contrary."¹⁰⁹ In the contested race for the Brooklyn District Attorney's office, the contenders (both former prosecutors) criticized the current District Attorney for not speaking out against overuse of stop-and-frisk.¹¹⁰ Like the Bronx District Attorney's office, one of the candidates said that in marijuana cases he would "demand that police officers personally swear to arrest complaints to counter an 'excessive' number of criminal cases arising from police use of stop-and-frisk technique."¹¹¹

Finally, there have always been examples across the country of chief prosecutors refusing to prosecute entire classes of cases. Prior to *Lawrence v. Texas*, most prosecutors did not prosecute cases involving consensual sodomy.¹¹² In Los Angeles, the prosecutor refused to prosecute the homeless for sleeping on public streets.¹¹³ Utah prosecutors have declined to prosecute polygamy cases unless there is evidence of abuse or coercion.¹¹⁴ The Bloomington, Indiana, District Attorney recently announced that he would not enforce a concealed weapons law.¹¹⁵ In recent months prosecutors have declined to defend

107. *Id.*

108. Editorial, *The Marijuana Arrest Problem, Continued*, N.Y. TIMES, Jul. 5 2012, at A18.

109. Joseph Goldstein, *Prosecutor Deals Blow to Stop-and-Frisk Tactic*, N.Y. TIMES, Sept. 26, 2012, at A1.

110. Andrew Keshner, *Rivals Argue that Six-Term Brooklyn D.A. Has Lost His Credibility*, N.Y. L.J., March 5, 2013, at 1.

111. *Id.*

112. *Lawrence v. Texas*, 539 U.S. 558, 569-70, 581 (2003)(noting that sodomy statutes were generally unenforced against consenting adults).

113. *Jones v. City of Los Angeles*, 444 F.3d 1118, 1122 (9th Cir. 2006) ("In the late 1980s, James K. Hahn, who served as Los Angeles City Attorney from 1985 to 2001 and subsequently as Mayor, refused to prosecute the homeless for sleeping in public unless the City provided them with an alternative to the streets." Bratton, the architect of NYC's zero-tolerance policing, began to enforce the law, which was subsequently struck down by the Ninth Circuit).

114. Lindsay Whitehurst, *New Utah Attorney General: No Shift on Polygamy Prosecution*, THE SALT LAKE TRIBUNE (Dec. 16, 2012), <http://www.sltrib.com/sltrib/news/55399006-78/state-swallow-utah-polygamy.html.csp> (indicating that the Attorney-General-elect John Swallow, would continue the policy of non-enforcement of polygamy laws as to consenting adults).

115. Debra C. Weiss, *State's Attorney in Illinois Won't Prosecute People Who Carry Weapons with 'No Evil Intent'*, A.B.A. J. (Aug. 22, 2012), http://www.abajournal.com/news/article/states_attorney_in_illinois_wont_prosecute_people_who_carry_weapons_with_no/.

federal¹¹⁶ and state laws that prohibit same sex marriage or to prosecute those who issue marriage licenses in defiance of these laws.¹¹⁷ Most recently, in a speech that echoes many of the themes of this article, Attorney General Eric Holder announced new policies to address the failures in the federal criminal justice system by adopting office-wide policies directing the exercise of discretion to focus on the most serious offenses and to avoid harsh mandatory minimums in appropriate drug cases.¹¹⁸ According to the *New York Times*, this shift has been accomplished by directing line prosecutors not to specify drug quantities that trigger harsh minimum penalties.¹¹⁹ While we may agree or disagree with the decision not to prosecute particular offenses, there can be no disagreement that under current law the prosecutor exercises virtually unreviewable power and authority to make such decisions.¹²⁰ Further, we may or may not agree that prosecutors *should* possess such unreviewable power (and it is beyond the scope of this paper to argue the merits of this allocation of discretionary power), but there can be no doubt that they do possess this power.

In the next Part, I suggest that prosecutors use this power to correct failures in our justice system that are far more momentous than the use of marijuana, unlicensed general vending, or riding bicycles on the sidewalk—the unequal application of the law and the failure of our overburdened lower criminal courts to provide procedural justice.

III. PROSECUTORIAL DISCRETION AND THE ETHICAL DUTY TO DO JUSTICE

Prosecutors exercise near absolute discretion about what and whom to charge. As one former federal prosecutor writes: “The decision to prosecute is one of the most solitary and unfettered exercises of power in the American political system.”¹²¹ The only constraint on prosecutorial discretion is that prosecutors may not exercise their discretion to target individuals based on impermissible criteria such as race.¹²² This constraint, however, does not require prosecutors to

116. See Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507 (2012) (examining the historical evidence that the executive branch is not obliged to defend laws it believes to be unconstitutional).

117. Anna Stolley Perskey, *District Attorneys are Declining to Defend Controversial State and Federal Laws*, A.B.A. J., March 1, 2013 at 15.

118. See Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013), available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

119. Charlie Savage, *Justice Dep’t Seeks to Curtail Stiff Drug Sentences*, N.Y. TIMES, Aug. 12, 2013, at A1.

120. Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, The Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 404 (2008) (characterizing prosecutorial discretion as “lawful lawlessness” in that it is permitted by law but not controlled by law).

121. STEWART, *supra* note 3, at 10.

122. See James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981) (noting that the nineteenth century case of selective prosecution of Chinese laundries was the first and last time the prosecutor’s exercise of discretion has ever been struck down as discriminatory).

affirmatively address the racial disparities described above.¹²³ As long as prosecutors are not responsible for causing racial disparities due to impermissible racial animus, their charging decisions are unreviewable.¹²⁴

The argument that this paper makes is not that prosecutors *must* decline to prosecute cases where policing choices overburden the criminal justice system and create racial disparities, but rather that they *should and can* do so. Addressing unequal application of the law and the lack of procedural justice in the lower courts is uniquely within the prosecutor's ethical role as a minister of justice. Further, this proposal is entirely consistent with and supported by the *Model Rules of Professional Conduct*, the *Model Code of Professional Responsibility*, and the relevant ABA and NDAA standards for exercising prosecutorial discretion. Indeed, the proposal, were it adopted, would advance the criminal justice system's ability to provide procedural justice and equal treatment for all.

The argument that the prosecutor *can* exercise discretion consistent with the standards of the profession is based on the ABA and NDAA standards regarding the exercise of prosecutorial discretion. The normative argument that prosecutors *should* dismiss classes of cases in which policing choices create racial disparities rests in prosecutors' primary duty—the duty to seek justice.¹²⁵ The paper will address the duty to seek justice first, and the standards for exercising prosecutorial discretion second.

A. THE DUTY TO SEEK JUSTICE

Prosecutors, unlike other lawyers in our adversarial system, have a special duty to seek justice, not merely to serve as advocates.¹²⁶ This duty flows from their role as representatives of the sovereign “whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest,

123. Even if the disparities were the result of decisions within prosecutor's offices, case law insulates the decision-making process from review. *McCleskey v. Kemp*, 481 U.S. 279, 287, 297-98 (1987) (rejecting death row defendant's argument that the Baldus study, which, after taking account thirty-nine nonracial variables, shows that black defendants accused of killing white victims are 4.3 times more likely to receive a death sentence as white defendants charged with killing black victims, proved discriminatory purpose in violation of equal protection clause; noting that accused must show that the “decision maker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”); see *United States v. Armstrong*, 517 U.S. 456, 458 (1996) (holding that a defendant is not entitled to discovery where he believes that he is “singled [] out for prosecution on the basis of his race” unless he can show that the “[g]overnment declined to prosecute similarly situated suspects of other races”).

124. See *McCleskey v. Kemp*, 481 U.S. 279, 287, 297-98 (1987).

125. MODEL RULES R. 3.8 cmt. 1; MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1983) [hereinafter MODEL CODE]; see also MODEL CODE EC 7-14 (“A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair.”).

126. See *Berger v. United States*, 295 U.S. 78, 88 (1935).

therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”¹²⁷

The special duty of the prosecutor to do justice, though universally accepted, is nowhere defined.¹²⁸ Nor is the source of the duty clear.¹²⁹ According to Professor Bruce Green, there are two main justifications for the duty, each leading to a different conception of the contours of the duty to seek or do justice.¹³⁰

For those who believe the source of the duty is the great power the prosecutor wields, the prosecutor’s duty to justice is to play by the rules.¹³¹ The rules require no more than that the prosecutor not seek to convict those known or believed to be innocent, and play fairly during trial by making sure that the accused receives procedural justice.¹³²

Alternatively, the duty to seek justice may be justified by the prosecutor’s role as representative of the sovereign—a collective for whom the prosecutor must make decisions about the goal of representation normally reserved to the client.¹³³ This conception of the duty to seek justice results in a broader duty than to fairly try those believed to be guilty.¹³⁴ As a representative of the sovereign, the prosecutor represents the people. Under this construction, the prosecutor’s duty is to undertake prosecutions in the public interest and to provide equal treatment before the law. As Professor Bruce Green writes:

Doing justice comprises various objectives which are, for the most part, implicit in our constitutional and statutory schemes. They derive from our understanding of what it means to govern fairly. Most obviously, these include enforcing the criminal law by convicting and punishing some (but not all) of those who commit crimes; avoiding punishment of those who are innocent of criminal wrongdoing (a goal which, as reflected in the “presumption of innocence,” is paramount in importance); and affording the accused, and others, a lawful, fair process. Additionally, most would agree, the sovereign has at least two other aims. One is to treat individuals with proportionality; that is, to ensure that individuals . . . not be punished more harshly than deserved. The

127. *Id.*; see also Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 *FORDHAM URB. L.J.* 607, 612-18 (1999) (exploring the origin and meaning of the duty to “seek justice”).

128. Kenneth J. Melilli, *Prosecutorial Discretion in an Adversarial System*, 1992 *BYU L. REV.* 669, 679 (1992); Cf. R. MICHAEL CASSIDY, *PROSECUTORIAL ETHICS* 5 (2005) (“At a minimum, the obligation to seek ‘justice’ implies a duty on the part of prosecutors to take steps to insure 1) that the innocent are not punished; 2) that the process that leads to a determination of guilt is fair; and 3) that similarly situated individuals are treated equally in the criminal justice system.”).

129. Green, *supra* note 127, at 608.

130. *See id.* at 625.

131. *See id.* at 625-26 (“One explanation given for prosecutors’ duty to seek justice is to redress the gross imbalance of power between prosecutors and defense lawyers.”).

132. *See* MODEL RULES R. 3.8 cmt. 1.

133. Green, *supra* note 127, at 625-26.

134. *Id.*

other is to treat lawbreakers with rough equality; that is, similarly situated individuals should generally be treated in roughly the same way.¹³⁵

The conception of the duty to justice as a representative of the sovereign goes beyond the requirement of fair process in the context of a particular prosecution and reflects the government's broader commitment to proportionality and equal treatment.

The *Model Rules of Professional Conduct*, promulgated in 1986 by the ABA and adopted by every jurisdiction except California, adopts the narrower conception of the prosecutor's duty to justice, focusing only on fair process. The *Model Code*, which preceded the *Model Rules*, assigns the prosecutor duties consistent with the role of sovereign to exercise restraint and to ensure equal treatment before the law as well as fair process. As will be explained further below, although the *Model Rules* replaced the *Model Code*, there is good reason to believe that the *Model Code*'s articulation of the ethical role of the prosecutor maintains its ethical force.

Under either conception of the prosecutor's role, the proposal that prosecutors decline to prosecute minor offenses where policing choices create racial disparities and overwhelm the lower criminal courts is consistent with the prosecutor's duty to seek or serve justice.

1. THE PROSECUTOR'S DUTY TO JUSTICE UNDER THE MCPR

The *Model Code* was superseded by the *Model Rules* less than a decade after the *Model Code* was promulgated in 1977. Why then should one look to the *Model Code* for additional insight into the prosecutor's role and the duty to seek justice? The answer to this question lies in the very different contents of the *Model Rules* and the *Model Code*. The *Model Code* embodies both the ethical aspirations attorneys should strive for and the minimum requirements under the law. Its three-part structure addresses not just the rules of lawyering, but also the ethics of lawyering. As Professor DiPippa explains, "[t]he Canons and the Ethical Considerations [of the *Model Code*] provided the aspirational content while the Disciplinary Rules provided the disciplinary minimums."¹³⁶ The *Model Code* "calls lawyers to ethical performance, instead of to ethical distance."¹³⁷

Professor DiPippa further explains that the *Model Rules*' "substitution of rules of law for standards of ethics was the end to the naive effort to state aspirational professional standards."¹³⁸ Instead, as Professor Geoffrey Hazard, the final Reporter of the Kutak Commission (the ABA Commission which drafted the *Model Rules*), wrote:

135. Green, *supra* note 127, at 634.

136. John A. DiPippa, *Lon Fuller, The Model Code and the Model Rules*, 37 S. TEX. L. REV. 303, 336 (1996).

137. *Id.* at 374.

138. *Id.* at 349.

[O]n any given subject the *Model Rules* provide a black letter rule and an explanatory comment. The Rules, in other words seek to be rules of the lawyer's legal obligations and not expressions of hope as to what a lawyer ought to do.¹³⁹

Thus, the omission of the “duty to seek justice” language in the *Model Rules* is not a rejection of the “duty to seek justice” as an ethical aspiration of the prosecutor. Rather, it is consistent with the narrow scope of the *Model Rules* themselves. The *Rules* do not seek to explore ethical duties but are limited to enforceable legal duties. This does not mean that legal ethics are irrelevant or unimportant, but instead means that one cannot look to the *Model Rules* (or the commentary to the *Model Rules*) to address ethical questions about what lawyers “ought to do,” but only for rules relating to what they must do.

Accordingly, the *Model Code's* articulation of the duty to seek justice remains a legitimate and persuasive source for an understanding of what the ethical (as distinct from legal) duty of the prosecutor to seek justice means. Turning to that articulation, the Ethical Consideration of the *Model Code* relating to the special role of the prosecutor states that:

The responsibility of the public prosecutor differs from that of the usual advocate; *his duty is to seek justice*, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts.¹⁴⁰

The *Model Code* frames the “duty to seek justice” as one that requires very broad considerations that are not limited to fairness vis-à-vis the particular defendant, but consider whether prosecution of particular charges is consistent with broader governmental goals and the public interest.

The continued vigor of this broad articulation of the ethical duty to seek justice is reflected by relevant professional standards. The ABA Criminal Justice Standards for Prosecution and the National District Attorneys' Association Prosecution Standards¹⁴¹ reflect this broader construction of the duty to “seek justice.” These professional standards explicitly state that the prosecutor's role is

139. *Id.* at 353 (citing Geoffrey C. Hazard, Jr., *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571, 574 (1981)).

140. MODEL CODE EC 7-13(1983) (emphasis added).

141. STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 1-1.1 (Am. Bar Ass'n 3d ed. 1992).

to exercise his discretion in the public interest.¹⁴² Affording a defendant fair procedure is but one aspect of the duty to justice, not its whole.

Under the *Model Code*, the prosecutor should exercise restraint in prosecuting offenses. Decisions should be in the public interest and fair to all. As Professor Angela Davis has observed: “elimination of discrimination is totally consistent with the responsibility of the prosecutor to seek justice, not simply win convictions.”¹⁴³

Additionally, under the *Model Code*'s articulation of the duty to seek justice, the accused should receive the benefit of all reasonable doubts. In a system where prosecutors cannot investigate arrest charges or provide individualized attention to cases, unexplored doubt necessarily exists as to all cases. Prosecutors know that some innocent people will be swept up, prosecuted and criminalized because the overburdened system cannot provide timely fact-finding, effective counsel, and adjudication for huge numbers of minor offenses. The duty to seek justice counsels prosecutors to seek to remedy these failures of the justice system.

2. THE PROSECUTOR'S DUTY TO JUSTICE UNDER THE MRPC

In contrast, the *Model Rules of Professional Conduct* characterize the prosecutor's role more narrowly and with less agency than the *Model Code*; prosecutors have a duty as a “minister of justice” rather than the “duty to seek justice”:¹⁴⁴

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it the specific obligations *to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of specific evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.*¹⁴⁵

The emphasis on procedural justice and the guilt of individual defendants, rather than the duty to exercise discretion in the public interest, reflects the construction of the duty as flowing from the power the prosecutor wields. It also reflects the black letter rule without taking a position on what the prosecutor *ought* to do.¹⁴⁶

142. STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 3-3.9(b) (Am. Bar Ass'n 3d ed. 1992); NDAA STANDARD § 1-1.2 (supporting principle that prosecutors should put the rights and interests of society in a paramount position in exercising discretion); NDAA STANDARD § 4-1.3.

143. Davis, *supra* note 14, at 224.

144. There is no record of debate regarding this shift in vocabulary. The only comment the Kutak Commission received relating to the use of “minister of justice” rather than the “duty to seek justice” language was made by the Philadelphia Bar Association which criticized the language as lacking “any generally accepted meaning.” CENTER FOR PROFESSIONAL RESPONSIBILITY AMERICAN BAR ASSOCIATION, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT 1982-2005, 508-09 (1999).

145. MODEL RULES R. 3.8 cmt. 1 (emphasis added).

146. DiPippa *supra* note 136, at 353 (citing Geoffrey C. Hazard, Jr., *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571, 574 (1981)).

The narrow focus of the *Model Rules*—on procedural justice in particular cases rather than the public interest—provides less support for the argument that the prosecutor’s duty to serve justice requires justice for all. Nonetheless, the *Model Rules’* focus on the prosecutor’s duty as a “minister of justice” does not permit prosecution of charges when the requirements of procedural fairness will not be afforded to the vast majority of defendants. Because the system is so overburdened with minor offenses, the prosecutor cannot, as a practical matter, fulfill the responsibilities of a minister of justice. The prosecutor cannot “*see that the defendant is accorded procedural justice, that guilt is decided upon the basis of specific evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.*”¹⁴⁷ Instead, in processing minor offenses, the criminal justice system relies on quick pleas without reviewing the specific evidence and does not consistently distinguish between the innocent and the guilty. Because the current handling of minor criminal offenses is inconsistent with the responsibilities of the prosecutor as a minister of justice, a triage system that limits the cases that are selected for prosecution is consistent with the *Model Rules*.¹⁴⁸

Neither the *Model Rules* nor the *Model Code* provide specific guidance regarding the exercise of discretion to prosecute or to decline prosecution—the greatest power the prosecutor wields. The NDAA and ABA professional standards for prosecutors fill this gap.

B. THE DUTY TO SEEK JUSTICE AND THE EXERCISE OF CHARGING DISCRETION UNDER THE NDAA AND ABA STANDARDS FOR PROSECUTORS

For purposes of this paper, the duty to exercise charging discretion and the absolute discretion to decline charges are the keys to alleviating the failures of the lower criminal court.¹⁴⁹ The goals, functions, and factors governing prosecutors’ charging decisions support the broad use of charging discretion to achieve greater racial equality under the law and better administration of justice within the courts.

Both the National District Attorney Association’s standards and the ABA Criminal Justice Standards for the Prosecution Function require the prosecutor

147. MODEL RULES R. 3.8 cmt. 1 (emphasis added).

148. The Preamble of the *Model Rules* also imposes the duty on all lawyers to have a “special responsibility for the quality of justice.” MODEL RULES pmb. [1].

149. See Sarat & Clarke, *supra* note 120, at 401 (“When upholding the right of prosecutors to decline prosecution—usually against a petitioner seeking to force prosecution—American courts have explicitly and implicitly drawn on a *nolle prosequi* tradition of absolute discretion to justify their decisions. This line of cases stretches at least as far back as 1927: in *Milliken v. Stone* (1927) the Second Circuit Court of Appeals denied a request for an injunction to force prosecutions over a liquor shipment law—a law that was allegedly being enforced selectively. As the century progressed, courts became vocal and categorical in rejecting attempts to force prosecution.”).

(1) to exercise charging discretion,¹⁵⁰ and (2) do so in a manner consistent with the “public interest.”¹⁵¹ These requirements are critically important.

1. THE DUTY TO EXERCISE DISCRETION

Even when minor offenses flood the system, it is still the prosecutor’s duty to decide whom to charge. Merely processing cases because they are minor is not an option under either set of professional standards.¹⁵² The NDAA standards make it clear that the prosecutor must exercise discretion and cannot simply ratify the decision of law enforcement:

The decision to initiate a criminal prosecution should be made by the prosecutor’s office. Where state law allows criminal charges to be initiated by law enforcement or by other persons or means, prosecutors should, at the earliest practical time, decide whether the charges should be pursued.¹⁵³

Similarly, the ABA Standards for the Prosecutor Function do not permit delegation of charging authority to law enforcement. Instead, “the decision to institute criminal proceedings should be initially and primarily the responsibility of the prosecutor.”¹⁵⁴

Unfortunately, the evidence suggests that the level of prosecutorial review that goes into the decision to pursue minor victimless offenses is *de minimis*.¹⁵⁵ These charges typically rest on the testimony of police officers alone and are therefore easy to “prove” at trial.¹⁵⁶ A prosecutor who chooses to question the accuracy of an arrest or whether a charge merits prosecution risks offending the police with whom prosecutors must work.¹⁵⁷ Further, as Professor Alschuler has observed, the one decision that prosecutors are typically required to document is the

150. NDAA STANDARD § 4-1.1 (2009); STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 3-3.4 (Am. Bar Ass’n 3d ed. 1993).

151. NDAA STANDARD § 4-1.3 (2009); STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 3-3.9 (Am. Bar Ass’n 3d ed. 1993).

152. In contrast to minor offenses, in serious cases and cases involving victims, prosecutors generally review the sufficiency of the evidence with some care before filing charges because dismissing a case is more difficult than not charging at all. See John Caher, *D.A. Must Prosecute Case Against ‘Occupy Albany’ Protesters*, *Judge Says*, NYLJ, April 16, 2013 (describing a fascinating stand-off between a judge and prosecutor over dismissing a charge once filed).

153. NDAA STANDARD § 4-1.1 (2009).

154. STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 3-3.4(a) (Am. Bar Ass’n 3d ed. 1993)

155. Bowers, *supra* note 9, at 1702.

156. This is particularly so when, because of aggressive policing and easy plea dispositions defendants have criminal histories. Blacks and Latinos are “stopped, searched and arrested more frequently, so they are more likely to have an arrest record, even if they are no more involved in criminal activity than their similarly situated white counterparts.” DAVIS, *supra* note 88, at 38 (2007).

157. BUTLER, *supra* note 4, at 13 (“The relationship between the prosecutor and a lying police officers is more complicated than you’d think. On the one hand, you don’t want to sponsor perjurious testimony. On the other hand, you don’t want to get the cop mad at you for believing some defendant over him. So, unless you

decision to dismiss.¹⁵⁸ It is far easier to bring charges in all cases than to engage in individualized assessment or risk alienating police. As Josh Bowers has compellingly illustrated, the rates at which prosecutors decline to charge minor victimless offenses are far lower than the rates at which they decline to charge serious felonies.¹⁵⁹ In an overburdened system, even the most diligent prosecutor will not be able to engage in a multi-factor analysis of minor offenses.¹⁶⁰

Failure to exercise this primary discretionary responsibility improperly delegates charging authority to the police. Police decisions thus determine the demographics and liability of the vast majority of individuals in the criminal justice system.¹⁶¹ Without meaningful review, claims of innocence, normative innocence (lack of blameworthiness), and constitutional issues that merit dismissal remain unaddressed.¹⁶² More importantly, the goals and priorities of the sovereign to govern impartially and in the public interest are not necessarily reflected in charging decisions effectively made by police. Prosecutors have developed professional standards that guide this exercise of discretion.

2. FACTORS GOVERNING THE EXERCISE OF DISCRETION IN THE PUBLIC INTEREST

The overarching concern in exercising charging discretion is not whether a case can be won, or even if an individual committed an offense, but rather whether a prosecution serves the public interest. The NDAA standards charge prosecutors to “screen potential charges to eliminate from the criminal justice system those cases where prosecution is not justified *or not in the public interest*.”¹⁶³ Similarly, the ABA Standards for the Prosecution Function provide that “the prosecutor may in some circumstances for good cause consistent with the *public interest* decline to prosecute, notwithstanding that sufficient evidence

have compelling evidence that the officer is lying, you tend to go along to get along.”); DAVIS, *supra* note 3 at 39-40.

158. Bowers, *supra* note 9, at 1710 n.267 (citing Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 59, 64 n.42 (1968) (“It is easier to lose the case than to go through the bureaucratic obstacles preliminary to dismissal.”)); Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036, 1041 (1972) (U.S. attorneys exercise unreviewed discretion in all parts of criminal cases, except upon decision to dismiss indictment.); NDAA STANDARD § 4-1.7 (2009) (reflects this practice, indicating that “a prosecutor’s office should retain a record of the reasons for declining a prosecution”).

159. Bowers, *supra* note 9, at 1715-19 (using Iowa and New York statistics to demonstrate that prosecutors are far more likely to decline to prosecute a serious felony, than a minor offense to public order).

160. Gershowitz & Killinger, *supra* note 25, at 264-65.

161. Stuntz, *supra* note 26 at 511 (“[the] law does not by itself determine who is and isn’t punished.” Given their arresting power, police [along with prosecutors] “define the law on the street and decide who has violated it.”); HUSAK, *supra* note 16 at 28-29; Bowers, *supra* note 9, at 1692.

162. Bowers, *supra* note 9, at 1716 (comparing declined prosecutions in felony and order maintenance offenses).

163. NDAA STANDARD § 4-1.3 (2009).

may exist which would support a conviction.”¹⁶⁴

The NDAA Prosecution Standards provides a long list of factors to consider in determining whether prosecution is “not in the public interest.” A number of these factors are relevant only to offenses where some harm is done to society or to a victim. Others suggest that declining to prosecute minor victimless offenses would be consistent with the sound exercise of a prosecutor’s discretion. The factors that are most relevant to minor victimless offenses are:

- i. *The charging decisions made for similarly-situated defendants;*
- k. *Undue hardship that would be caused to the accused by the prosecution;*
- l. *A history of non-enforcement of the applicable law;*
- p. *Whether the accused has already suffered substantial loss in connection with the alleged crime;*
- q. *Whether the size of the loss or the extent of the harm caused by the alleged crime is too small to warrant a criminal sanction.*¹⁶⁵

The lack of harm caused by the offense and the disproportion of a criminal sanction to the harm caused are legitimate considerations that mitigate in favor of non-prosecution of minor victimless offenses. Factors k, p, and q capture the concern about the extent of the harm caused by arrest and punishment versus the harm caused by the offense.

164. STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 3-3.9 (Am. Bar Ass’n 3d ed. 1992).

165. The full list of considerations under NDAA standards is as follows:

- a. Doubt about the accused’s guilt;
- b. Insufficiency of admissible evidence to support a conviction;
- c. The negative impact of a prosecution on a victim;
- d. The availability of adequate civil remedies;
- e. The availability of suitable diversion and rehabilitative programs;
- f. Provisions for restitution;
- g. Likelihood of prosecution by another criminal justice authority;
- h. Whether non-prosecution would assist in achieving other legitimate goals, such as the investigation or prosecution of more serious offenses;
- i. The charging decisions made for similarly-situated defendants;
- j. The attitude and mental status of the accused;
- k. Undue hardship that would be caused to the accused by the prosecution;
- l. A history of non-enforcement of the applicable law;
- m. Failure of law enforcement to perform necessary duties or investigations;
- n. The expressed desire of an accused to release potential civil claims against victims, witnesses, law enforcement agencies and their personnel, or the prosecutor and his personnel, where such desire is expressed after having the opportunity to obtain advice of counsel and is knowing and voluntary;
- o. Whether the alleged crime represents a substantial departure from the accused’s history of living a law-abiding life;
- p. Whether the accused has already suffered substantial loss in connection with the alleged crime;
- q. Whether the size of the loss or the extent of the harm caused by the alleged crime is too small to warrant a criminal sanction.

NDAA STANDARD § 4-1.3 (2009).

The NDAA factors highlight that the criminal process—being arrested, or being prosecuted—inflicts harm separate and apart from the criminal conviction. The prosecutor can consider whether the accused “has already suffered substantial loss in connection with the alleged crime.”¹⁶⁶ Where arrest is followed by detention or incarceration, substantial loss of employment, income, or reputation (at least relative to a minor offense) may be experienced in connection with the alleged crime. Similarly, the prosecutor may consider whether prosecution is likely to cause “undue hardship.”¹⁶⁷ Because of the many collateral consequences of minor offenses, undue hardship may result from virtually any prosecution.¹⁶⁸

Other critically important factors that relate to the disparate policing of communities relate to the enforcement, non-enforcement and similar treatment of others for the same conduct. Prosecutors may consider “charging decisions made for other similarly-situated defendants.”¹⁶⁹ They can also consider “a history of non-enforcement of the applicable law.”¹⁷⁰ While these factors are likely in the list so that prosecutors can guard against internal inconsistencies and avoid selective prosecutions based on rarely used statutes, the factors also square neatly when applied to offenses that are widely engaged in but only enforced in certain communities. For example, for someone who smokes or possesses marijuana, who is the similarly situated defendant? Is there a history of non-enforcement? Despite the fact that there are over 50,000 arrests in New York City a year for marijuana possession, there is also a history of non-enforcement. First, until the mid-1990s, there were very few marijuana arrests, with only 300-400 arrests a year before the Giuliani administration began emphasizing minor arrests.¹⁷¹ Put another way, the NYPD currently arrests more people for possession of marijuana in three days than it arrested in all of 1991. There were 125 arrests for marijuana in 2011 for every arrest for the same offense in 1992.¹⁷²

Non-enforcement is not merely a historical fact. Today enforcement or non-enforcement rests on geography and skin color. Even more startling than the

166. *Id.* at § 4-1.3(p).

167. *Id.* at § 4-1.3(k).

168. See Robert M. A. Johnson, *Message from the President: Collateral Consequences*, THE PROSECUTOR, May-June 2001, at 5 (statement of the president of the National District Attorneys’ Association, advising prosecutors to educate themselves about collateral consequences because “[a]t times, the collateral consequences of a conviction are so severe that we are unable to deliver a proportionate penalty in the criminal justice system”).

169. NDAA STANDARD § 4-1.3(i) (2009).

170. *Id.* at § 4-1.3(l).

171. There were 408 marijuana possession arrests in 1990, 375 in 1991, and 405 in 1992. N.Y. State Div. of Crim. Justice Stat., (on file with author) [hereinafter NY DCJS]; see also Jim Dwyer, *Whites Smoke Pot, but Blacks are Arrested*, N.Y. TIMES, Dec. 23, 2009, at A24 (noting that in 2008 alone, there were more arrests for possession of marijuana under Mayor Bloomberg than the eighteen years under former Mayors Koch, Dinkins, and Giuliani).

172. (NYDCJS statistics on file with author).

fact that over the last two decades marijuana arrests have risen by a factor of 125 is the disparity in the number of marijuana arrests between Brownsville in Brooklyn and the Upper East Side of Manhattan. In Brownsville, between 2007 and 2009, there were an average of 3,109 marijuana arrests per 100,000 residents.¹⁷³ On the Upper East Side, there were only 20 arrests per 100,000 residents.¹⁷⁴ Though the neighborhoods are barely ten miles apart, the likelihood of being arrested for possession of marijuana is over 150 times greater in Brownsville.¹⁷⁵

A comparison of those arrested with other similarly-situated *arrested* defendants may reveal relatively consistent treatment.¹⁷⁶ However, a comparison between those arrested for minor conduct, and individuals who engage in precisely the same conduct who will never be arrested by virtue of the color of their skins or the neighborhoods where they live, reveals an enormous disparity.

Which is the correct comparison? Should the prosecutor compare individuals who are arrested for minor victimless offenses with other individuals arrested for the same minor offense? Or can the prosecutor consider those who engage in the same conduct but are not arrested? Where the difference between those charged and those not charged is neighborhood or skin color, should and can the prosecutor consider the history of non-enforcement in privileged enclaves?

As a representative of the sovereign whose duty it is “initially and primarily” to determine whom to charge (consistent with the public interest), prosecutors must consider the broader comparison. If they only exercise discretion to treat similarly situated arrestees equally, then they delegate the lion’s share of the discretion to determine which crimes to prosecute and which to ignore entirely to the police. The duty to exercise discretion requires the prosecution to look beyond the jail cells and to the larger community. To exercise discretion in the public interest means ensuring respect for the law and law enforcement by assuring consistent and equal application of the law outside the courthouse, as well as inside it. It also means making sure that “the punishment fits the

173. See Jim Dwyer, *A Smell of Pot and Privilege in the City*, N.Y. TIMES, July 21, 2010, at A19.

174. *Id.*

175. See *id.* The Upper East Side of New York City is 80-90% white, while the Brownsville neighborhood is less than 10% white. See *Upper East Side (UES) neighborhood in New York, New York (NY), 10021, 10028, 10128 detailed profile*, CITY-DATA.COM, (last visited Oct. 26, 2013); *Brownsville neighborhood in Brooklyn, New York (NY), 11212 detailed profile*, CITY-DATA.COM, (last visited Oct. 26, 2013); *Brownsville neighborhood in Brooklyn, New York (NY), 11212 detailed profile*, CITY-DATA.COM, <http://www.city-data.com/neighborhood/Brownsville-Brooklyn-NY.html> (last visited Nov. 21, 2013).

176. This is not to say that all defendants are treated exactly the same: junior prosecutors tend to be harsher, different prosecutors may have different charging practices, and implicit bias may also affect charging decisions. See Starr & Rehavi, *supra* note 70, at 1 (finding that in federal prosecutions “most of the otherwise unexplained racial disparities in sentencing can be explained by prosecutors’ choices to bring mandatory minimum charges”).

crime.”¹⁷⁷ Under NDAA standards where collateral consequences and excessive enforcement impose enormous burdens on entire communities of already disadvantaged individuals for victimless offenses to order, the discretion not to charge is a critical tool the prosecutor may exercise to ensure that prosecution and policing does not do more harm than good.

Turning to the specific provisions of the ABA Standards, the following are the factors that the prosecutor may consider in exercising the charging discretion “consistent with the public interest”:

- (i) the prosecutor’s reasonable doubt that the accused is in fact guilty;
- (ii) the extent of the harm caused by the offense;
- (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
- (iv) possible improper motives of a complainant;¹⁷⁸

Of these four factors, (ii) harm and (iii) proportionality weigh heavily in favor of declining prosecution for many minor offenses. The relation of harm due to minor offenses—victimless offenses that may create slight public disorder¹⁷⁹—and proportionality of punishment provide a strong normative claim to decline prosecution in most, if not all, arrests for minor disorder. To take a specific example, what is the harm caused by possessing marijuana for personal use? In what way is it proportional to be handcuffed, fingerprinted, locked away from work and family, given an arrest record, and exposed to the stigma of the criminal process?

Factors (i) reasonable doubt as to guilt and (iv) the motives of the complainant also weigh in favor of a decision to decline prosecution in a system where prosecutors do not have the resources and time to engage in independent

177. “The core duty of any prosecutor, the most central mission of our office, is the pursuit of justice. This is not an easy job. We must prosecute the guilty, protect the innocent, and make sure the punishment fits the crime.” Memorandum from District Attorney Jeff Rosen for the Office of the District Attorney, Memo on Collateral Consequences (Sept. 14, 2011) (instructing prosecutors to consider collateral consequences in offenses that are not “serious or violent” because “in general, the less serious the crime, the more likely a collateral consequence will unlikely impact a settlement”), *available at* http://www.ilrc.org/files/documents/unit_7b_4_santa_clara_da_policy.pdf.

178. STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 3-3.9 (Am. Bar Ass’n 3d ed. 1993). I omit the following considerations from the text because they will rarely be relevant in a victimless, low level offense: (v) reluctance of the victim to testify; (vi) cooperation of the accused in the apprehension or conviction of others; and (vii) availability and likelihood of prosecution by another jurisdiction. There will be no victim, sentences are so low that cooperation is rarely sought, and no other jurisdiction would choose to prosecute an individual for such minor offenses.

179. There are, of course, minor offenses that involve harm to persons or property. While prosecutors should exercise discretion in all cases, the categorical approach proposed by this paper is proposed for minor offenses to order.

investigation.¹⁸⁰ This is particularly the case where police are told to follow zero-tolerance or aggressive order-maintenance policies that lead to large numbers of arrests. Where there is pressure to make arrests to show productivity,¹⁸¹ doubtful cases as to both guilt and motive for complaints will necessarily be hidden in the deluge of minor offenses.

While the majority of arrestees likely did possess marijuana, ride a bike on the sidewalk, or sell cold water without a vendor's license, some arrests will be of innocent people or based on entirely unlawful stops and frisks. If there are no resources to provide timely hearings and trials to those who would challenge their arrests or the bases for the stops, and if prosecutors acknowledge (as they have) that innocent people are pleading guilty because of an overburdened system and power and information disparities in the plea-bargaining system, then prosecuting hundreds of thousands of cases must necessarily create a substantial number of wrongful dispositions.¹⁸²

Further, prosecutors have acknowledged concern that police officers under pressure to show "productivity" have not been consistently truthful in making arrests. Because of innocent people charged with trespass, the Bronx District Attorney's office is insisting on interviewing all officers in trespass cases.¹⁸³ Courts have long recognized that police may tailor testimony to circumvent the Fourth Amendment.¹⁸⁴ Recently, the NYPD issued an Operations Order because police were directing individuals to empty their pockets and then arresting them for possession of marijuana under a provision that makes possessing marijuana in public view a misdemeanor.¹⁸⁵ Recent litigation on stop-and-frisk policing shows

180. Because most minor victimless offenses involve only a police witness, prosecutors must engage in independent investigation to check constitutional violations. Such investigation may involve reviewing video and audiotape, visiting the scene, and reviewing other complaints and arrests made by the officer.

181. See *Floyd v. City of New York*, 813 F. Supp. 2d 417, 426-27 (S.D.N.Y. 2011) (marshaling evidence of NYPD "quotas" including (1) testimony of various officers, (2) audio recordings of precinct commanders ordering certain numbers of arrests, stops and frisks, and summonses during roll call, (3) Patrolmen's Benevolent Association labor grievance alleging transfer of six officers and one sergeant for failure to meet quotas, and (4) the labor arbitrator's decision finding that the 75th precinct had imposed quotas); see also NYPD Operations Order 52, *Police Officer Performance Objectives*, (Oct. 17, 2011) (requiring police officers to perform and report on "proactive enforcement activities" including stop and frisks, summonses, and arrests), available at http://www.nyclu.org/files/releases/NYPD_Operations_Order_52_10.27.11.pdf.

182. See Bibas, *supra* note 32, at 2495; Gershowitz & Killinger, *supra* note 25, at 287-91.

183. *Ligon v. City of New York*, 2013 U.S. Dist. LEXIS 2871 (S.D.N.Y. Jan. 8, 2013) (summarizing testimony of ADA Rucker "who concluded that the NYPD frequently made trespass stops outside TAP buildings in the Bronx for no reason other than that the officer had seen someone enter and exit or exit the building").

184. See, e.g., *People v. McMurty*, 314 N.Y.S.2d 194, 197 (Crim. Ct. 1970) (While acknowledging that false testimony in drowsy cases by arresting officers is a problem, Criminal Court Judge Younger stated that the solution "is prosecutors' work. The courts can only deplore. They are ill equipped to persuade the police to change their practices or alter their philosophy.").

185. See NYPD Operations Order No. 49, *Charging Standards for Possession of Marijuana in a Public Place Open to Public View*, (Sept. 19, 2011), available at <http://www.nyc.gov/html/om/pdf/2012/nypd-marijuana-order.pdf> (directing officers not to charge criminal possession of marijuana open to public view when "an

that a substantial number of stops have no lawful basis.¹⁸⁶

Prosecutors have always struggled with the problem of questioning police officers upon whom the vast majority of their cases depend, but the problem is particularly acute in misdemeanor cases.¹⁸⁷ In felonies, a police officer may have to take the stand at a preliminary hearing or testify before a grand jury. This encourages prosecutors to review the basis for stops and the sufficiency of the evidence either at initial screening or at some point prior to hearing or trial. In lower criminal courts, however, hearings and trials are the rare exception, rather than the rule. While the frequency of hearings and trials will vary significantly from jurisdiction to jurisdiction, the greater the emphasis on order-maintenance policing, the rarer hearings and trials are likely to become in overburdened lower criminal courts. Thus, in New York City, the number of hearings in non-felony cases is about 1 for every 275 cases.¹⁸⁸ Trials are even rarer—1 for every 570 cases.¹⁸⁹ Finally, there is only one trial in which jurors (rather than judges) evaluate evidence for every 1800 non-felony arrests.¹⁹⁰ The reflexive processing of the hundreds of thousands of arrests for victimless crimes without any independent review insulates and encourages police misconduct and false accusations.¹⁹¹ The sheer quantity of misdemeanor arrests makes it safe for

individual who is requested or compelled to engage in behavior that results in the public display of marijuana”). Despite this Operations Order, after a brief decline in marijuana arrests they rose to pre-order arrest levels by mid-2012. *See also The Marijuana Arrest Problem*, N.Y. TIMES, July 4, 2012, available at http://www.legal-aid.org/media/157211/06222012_marijuana_complaint.pdf (referencing complaint filed for injunctive relief on marijuana arrests in state court *Juan Gomez-Gonzalez et al v. N.Y.P.D.*, at 16-17).

186. *See Floyd v. City of New York*, 2013 U.S. Dist. LEXIS 113271 (S.D.N.Y. Aug. 12, 2013) (“[S]everal of the uncontested statistics suggest that far more than 6% of stops are ‘apparently unjustified,’ including: the number of UF-250s [stop forms] that do not identify a suspected crime (36% of all forms in 2009), the fact that the two most commonly checked stop factors (Furtive Movements and High Crime Area) are negatively correlated with a summons or arrest, and the fact that only 12% of *all* stops result in an arrest or summons [T]he magnitude of Fourth Amendment violations that have taken place in this case—beyond the rough minimum indicated by Dr. Fagan’s statistics—will almost certainly never be known.”).

187. *See BUTLER*, *supra* note 4, at 157; HEILBRONER, *supra* note 50, at 30 (“It soon became painfully obvious that taking statements would not help cure the dropsy syndrome. Even if the defendants themselves had come to the complaint room to give me their version of the arrests, I would still have to choose between believing the officer or a person whose main interest is in getting out of jail as soon as possible. I was in a position to remedy police misconduct by dismissing unconstitutional arrests outright, but doing so on the basis of a hunch or a defendant’s uncorroborated word was not a realistic alternative. Instead, I accepted the officers’ versions of events at face value and sent complaint after complaint off to the typists. I had the strange sensation of being co-opted by the police.”).

188. BARRY A. KAMINS & JUSTIN A. BARRY, *Criminal Court Of The City Of N.Y., Annual Report 2011* 26, 54 (Justin Barry ed., 2012), available at www.nycourts.gov/courts/nyc/criminal/AnnualReport2011.pdf [hereinafter *Criminal Court Annual Report*, 2011] (there were only 1059 non-felony hearings and 289,816 misdemeanor and violation arraignments).

189. *Id.* at 52.

190. *Id.*

191. Zeidman, *supra* note 59 at 321-24.

police to arrest first and justify the encounter afterwards.¹⁹² Refusing to prosecute classes of minor offenses sidesteps case-by-case assessment regarding whether there is reasonable doubt of the accused guilt or improper motives based on productivity goals for making minor arrests.

Finally, the first ABA comment regarding the duty to exercise discretion suggests that prosecutors should adopt local charging practices to ensure fairness and consistency:

The charging decision is the heart of a prosecutor's function. The broad discretion given to a prosecutor deciding whether to bring charges and in choosing the particular charges to be brought requires the greatest effort be made to see that this power is used *fairly and uniformly* This standard is not intended to substitute for developing appropriate prosecution standards on a local level.¹⁹³

Fair and uniform application of laws cannot begin with whomever the police choose to bring in. If arrestees are not representative of offenders, then prosecutors can and should adopt uniform charging policies that insure fair and equal application of the laws. Adopting office-wide policies to decline prosecution where racial disparities exist will send a strong message discouraging unequal enforcement of the laws.

The ABA standards may yet be revised to more clearly reflect the concerns raised by the huge costs imposed on disadvantaged communities by the over-enforcement of minor offenses. The existing standards were last revised before zero-tolerance policing was adopted in the mid-nineties, at a time when collateral consequences of criminal convictions were less severe. Since then, an ABA Task Force composed of prosecutors, defense attorneys and judges has drafted proposed Standard 3-5.6, "Discretion in Filing and Maintaining Criminal Charges," which would add the following factors, among others, that prosecutors may consider when deciding whether charging an individual is consistent with the public good:

1. law enforcement misconduct;
2. equal treatment of similarly situated persons;
3. consideration of the collateral impact on third parties including witnesses or victims;

192. HEILBRONER, *supra* note 50, at 29-30 (indicating that because police were aware that the case would be resolved with a plea bargain, they did not feel the legality of the search was important: "Besides, you guys are going to bargain the case down to a Dis Con [Disorderly Conduct] with a fine, so who cares").

193. ABA STANDARDS FOR CRIMINAL JUSTICE STANDARDS, PROSECUTION FUNCTION AND DEFENSE FUNCTION, 72 (3d ed. 1993) [hereinafter ABA STANDARDS] (commenting on Standard 3-3.9) (emphasis added).

4. the effect on the public welfare;
5. and the fair and efficient distribution of limited prosecutorial resources¹⁹⁴

This list of additional factors reflects precisely the concerns raised in this paper: unequal treatment, impact of collateral consequences on families and communities, and the inadequacy of prosecutorial resources to provide procedural justice or to ferret out law enforcement misconduct. Although these factors have not yet made their way into the ABA standards for the Prosecutor Function, they are already considered by some prosecutors.¹⁹⁵

In addition to these specific factors, both the duty to do justice and the duty to promote reform¹⁹⁶ are foundational duties of the prosecutor's office and are consistent with the exercise of discretion to exclude broad categories of cases where justice and reform can be promoted more effectively by declining to prosecute cases than by prosecuting cases.

IV. DECLINING TO PROSECUTE MARIJUANA CASES IN NEW YORK CITY

An example of a clear case of racial disparities in the enforcement and non-enforcement of the criminal law is marijuana in New York City.¹⁹⁷ The availability of statistics from the United States Department of Health makes marijuana use a particularly easy case because there is no doubt that white people are statistically more likely to use marijuana during their lifetimes than either blacks or Latinos.¹⁹⁸ Whites between the ages of 18-25 are also more likely to have used marijuana in the previous year than blacks and Latinos in the same age groups and have similar use rates in the last month.¹⁹⁹ The rates reported by the National Survey on Drug Use and Health for this heavily policed age group are shown in the following table:

194. Bennett L. Gershman, *Prosecutorial Decisionmaking and Discretion in the Charging Function*, 62 HASTINGS L.J. 1259, 1265 (2011).

195. *Id.* at 1274-76 ("Moreover, the inclusion in the list of several new factors, as noted below, appears to reflect factors that prosecutors routinely consider in deciding whether to charge.").

196. ABA STANDARDS *supra* note 193 at § 3-1.2(d) ("It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice").

197. Although I consider the specific example of New York, the example is one that is likely to be applicable in most jurisdictions as the number of arrests and racial disparities have risen across the county in all states and most counties. For state and county statistics, see, *The War on Marijuana in Black and White*, ACLU (June 2013), available at <http://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel3.pdf>.

198. SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, U.S. DEP'T OF HEALTH, 2011 TABLES: ILLICIT DRUG USE (2011), available at <http://www.samhsa.gov/data/NSDUH/2011SummNatFindDetTables/NSDUH-DetTabsPDFWHTML2011/2k11DetailedTabs/Web/PDFW/NSDUH-DetTabsSect1peTabs24to28-2011.pdf> [hereinafter SAMHSA] (showing that a higher percentage of white people use marijuana during their lifetime than blacks or Latinos); see also *The War on Marijuana in Black and White*, 21, ACLU (June 2013), available at <http://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel3.pdf>.

199. SAMHSA, *supra* note 198, at Table 1.78A (2011).

TABLE 1.
MARIJUANA USE AMONG PERSONS AGED 18 TO 25,
BY RACE-ETHNICITY 2011²⁰⁰

Demographic	Lifetime	Past Year	Past Month
White	56.4%	33.2%	20.3%
Black	48.2%	31.3%	20.4%
Latino	45.8%	26.5%	16.6%

Despite similar rates of marijuana use, blacks are eight times more likely and Latinos four times more likely to be arrested for marijuana than whites.²⁰¹ Unlike some minor offenses where base offending rates are unknown, there is no doubt that blacks and Latinos are far more likely to be arrested for marijuana possession than whites.

These statistics will undoubtedly be consistent with the experiences of those working in the prosecutor's office. Having gone to high school and college, they will have attended a number of events where marijuana use was common. Turning on the television, they will watch movies where marijuana use is a constant. If they are parents, they may well have children who use marijuana. There is a good possibility that a substantial number of prosecutors have used marijuana themselves at some point in their lives. They know that an arrest on a college campus for marijuana possession or use is a rare thing indeed. They know many people who, having used marijuana at some point in their lives, have gone on to successful careers without being brought into the criminal justice system as a defendant charged with marijuana possession.

Furthermore, marijuana is widely viewed as a minor offense which, prior to the adoption of zero-tolerance policing policies, was rarely enforced in New York City.

Yet today, marijuana cases account for nearly one-fifth of the cases that flood the criminal justice system. They make up an even bigger percentage of the junior assistant district attorney's caseload.

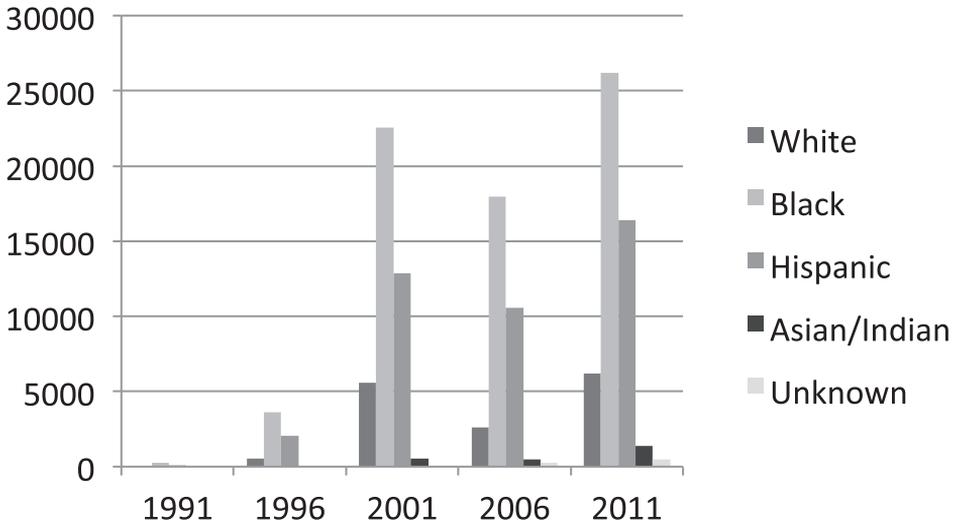
The graph shows both the exponential increase in arrests for misdemeanor possession of marijuana in New York City during the last 20 years, and the racial disparities of those arrested. There were 50,000 more arrests in 2011 for misdemeanor marijuana possession than in 1991, and nearly 90% of these additional

200. *Id.*

201. Human Rights Watch, *A Red Herring: Marijuana Arrestees Do Not Become Violent Felons*, 12-13 (Nov. 23, 2012), available at <http://www.hrw.org/reports/2012/11/23/red-herring-0>; see also Harry G. Levine & Deborah P. Small, *The Marijuana Arrest Crusade: Racial Bias and Police Policy in New York City 1997-2007*, NEW YORK CIVIL LIBERTIES UNION, 4 (2008).

marijuana arrests were of people of color. In 2011, there were more people arrested for marijuana in 3 days than there were in all of 1991.²⁰²

GRAPH 1.
New York City Marijuana Arrests, 1991-2011²⁰³



As the following table shows in New York City, once arrested, black and Latinos are twice as likely to be convicted for marijuana possession.²⁰⁴ However, consistent with complaints that police are engaging in unlawful conduct and making bad arrests to meet quotas in communities of color, prosecutors are more likely to decline to prosecute marijuana arrests for black or Latino arrestees.²⁰⁵ One of the principle complaints is that police, in violation of Operations Order 49, direct individuals to empty their pockets and then arrest them for possession of marijuana under a statute that criminalizes possession only if it's

202. DCJS Computerized Criminal History System 11/12. These arrests are for violation of PL 221.10 (on file with the author).

203. *Id.*

204. The standard disposition for a first arrest for marijuana possession is a “marijuana ACD” which leads to a dismissal after one year rather than an arrest. Thus convictions are rare but most common among groups that are frequently stopped and frisked. Even marijuana ACDs can have serious consequences. *See* Jim Dwyer, *Side Effects of Arrests for Marijuana*, N.Y. TIMES, June 16, 2011 (recounting the experience of a 26-year-old mother who lost her job as a janitor with the New York City Housing Authority after accepting a marijuana ACD).

205. The rate at which prosecutors have declined prosecution in marijuana arrests has risen from approximately 2.5 percent in 1990, to nearly 12 percent in 2011. DCJS Computerized Criminal History System 11/12 (on file with the author). The sharpest rise occurred in 2010-2011 perhaps in response to police officer whistle-blowers’ tapes of precinct commanders instructing them to make stops and arrests first and justify them after. Graham Rayman, *The NYPD Tapes: Inside Bed-Stuy’s 81st Precinct*, THE VILLAGE VOICE BLOGS (May 4, 2010), available at www.villagevoice.com/2010-05-04/news/the-nypd-tapes-inside-bed-stuy-s-81st-precinct/1.

open to public view.²⁰⁶ These arrests, like most minor offenses in New York, bring large numbers of defendants into the criminal justice system and create clear racial disparities. Table 2 shows that only 12.2% of the 50,688 individuals arrested for marijuana possession in 2011 in New York City were white, although 44% of the population is white.²⁰⁷

TABLE 2.
NEW YORK CITY MARIJUANA ARRESTS, CONVICTIONS, AND
DECLINED PROSECUTION BY RACE-ETHNICITY 2011²⁰⁸

Race-Ethnicity	Arrests	% Total	Convicted Sentenced	Percent Convicted	Decline Prosecution	Percentage Declined
White	6206	12.2	1002	16.1%	607	9.8%
Black	26213	51.7	9217	35.2%	2965	11.3%
Hispanic	16416	32.4	5306	32.3%	2118	12.9%
Asian/Indian	1371	2.7	258	18.8%	97	7.1%
Unknown	482	1%	114	23.7%	58	12%
Total	50688		15,897	31.4%	5845	11.5%

If the chief prosecutor adopts the proposal suggested in this paper, he or she would notify the police of the policy to decline to prosecute all cases of marijuana possession. The prosecutor would then release all individuals arrested for marijuana possession without filing charges. Individual line prosecutors would not have to process dozens of these cases in a shift. Nor would they have to struggle to assess the credibility of police officers claiming that marijuana was open to public view in these 50,000 plus arrests annually. They would not have to ignore the real possibility that the marijuana was inside a pocket or purse and became “open to public view” only after an illegal stop or search.²⁰⁹ Nor would they have to worry that they were contributing to racial disparities by prosecuting offenses that are aggressively enforced in disadvantaged communities of color. The chief prosecutor would also send a strong message to the broader community that unequal application of the laws is not acceptable.

206. Wendy Ruderman & Joseph Goldstein, *Lawsuit Accuses Police Officers of Ignoring Directive on Marijuana Arrests*, N.Y. TIMES, City Room, June 22, 2012.

207. For race demographics of New York City, see United States Census Data for 2010, available at <http://quickfacts.census.gov/qfd/states/36/3651000.html>.

208. DCJS Computerized Criminal History System 11/12. These arrests are for violation of PL 221.10, a B misdemeanor which requires that possession be open to public view (on file with the author).

209. See *NYPD*, *supra* note 181; see also Robert C. Boruchowitz, *Diverting and Reclassifying Misdemeanors Could Save \$1 Billion per Year: Reducing the Need for and Cost of Appointed Counsel*, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY, ISSUE BRIEF, 7-10 (Dec. 2010); see also *supra* notes 181, 212.

With 50,000 fewer cases in the system each year, prosecutors, defense attorneys, and judges could all give more time to the remaining cases.

Police could respond in one of three ways. They might continue the same policing strategies undeterred. After all, they have their own measures of productivity and the fact that the prosecutor's office declined to prosecute marijuana cases might not have a great impact on their practices. Alternatively, they might respond by ceasing to make these arrests. Finally, they might begin to arrest more white people, fewer people of color, or both so as to achieve arrests rates that more closely correspond with offense rates.

Whatever the police response, the impact would be to eliminate a major source of racial disparity in the lower criminal courts and, unless law enforcement decides to increase white arrests to address disparities, to free up time and resources to provide procedural justice in other cases.

One obvious concern may be that offense rates will increase where prosecution is declined.²¹⁰ Nonetheless, the duty to seek and do justice requires an assessment of whether prosecution is in the public interest. The harms of pursuing charges include (1) the loss of legitimacy and confidence in the criminal justice system based on unequal application of the law correlated to race and ethnicity; (2) the substantial collateral consequences imposed on large numbers of individuals from disadvantaged communities; and (3) the inability of prosecutors, courts, and defense attorneys to provide procedural and substantive justice because of excessive caseload. The deterrent benefit of pursuing charges is questionable so long as enforcement in some communities is coupled with non-enforcement in others. Certainly, the aggressive policing of marijuana in communities of color does not deter marijuana use in privileged enclaves.

Although New York City is an outlier in terms of the number of arrests it makes for marijuana possession (making more than any other city in the country),²¹¹ there are doubtless other offenses that merit the same scrutiny. Another major category of arrests in lower criminal courts is arrests for driving with a suspended license.²¹² For example, prosecutors could look to the Department of Motor Vehicles to determine if there are racial disparities in the offense versus arrest rates for driving with a suspended license.

210. See *infra* note 237 (As discussed above, in California a decrease in marijuana arrests has been accompanied by a decrease in all categories of violent crimes.).

211. See *The War on Marijuana in Black and White*, ACLU 15 (June 2013), available at <http://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel3.pdf>, at 15. New York State trails only Washington DC in marijuana arrests per capita (545 per 100,000 versus 846). In New York City the per capita marijuana arrest rates are higher than statewide rates and vary by county and especially by race with 208 whites, 999 Latinos, and 1952 Blacks per 100,000 arrested for marijuana possession in New York (Manhattan) County. Cook County made more arrests than any individual county in New York City but fewer than the five boroughs combined. *Id.* at 94, 124.

212. See Robert C. Boruchowitz, *Diverting and Reclassifying Misdemeanors Could Save \$1 Billion per Year: Reducing the Need for and Cost of Appointed Counsel*, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY, ISSUE BRIEF, 7-10 (Dec. 2010), available at <http://www.acslaw.org/sites/default/files/Boruchowitz-Misdemeanors.pdf> (describing alternatives to prosecution for cases of driving with a suspended license).

Like the marijuana example, chief prosecutors must examine minor offenses on an offense-by-offense basis to determine whether racial disparities exist and whether prosecution is consistent with the duty to seek justice.²¹³ Some prosecutors' offices have already begun to use evidence to evaluate the impact of prosecutorial decisions on racial justice.²¹⁴ Although the focus of these projects has been on examining internal charging disparities, the same tools and approach can be directed at examining the impact of policing choices on racial disparities in the criminal justice system.

In addition to recognizing and addressing racial disparities, prosecutors must also acknowledge that limited resources are relevant to deciding what offenses ought to be prosecuted. Are there sufficient resources to assure procedural justice will be done? If prosecution is to be undertaken, are prosecutors in a position to assess actual guilt or innocence, recognize lack of blameworthiness where legal guilt is established, and evaluate the lawfulness of police conduct? If they cannot provide procedural and substantive justice, then the possibility of declining to prosecute minor victimless offenses should be considered on an office-wide level.

V. BENEFITS AND CHALLENGES OF EXERCISING DISCRETION TO DECLINE TO PROSECUTE CLASSES OF MINOR OFFENSES

There are several potential benefits of exercising discretion to decline to prosecute minor offenses. First, of course, declining to prosecute offenses where racial disparities in enforcement exist will reduce the racial disparities in the criminal justice system. Second, declining to prosecute minor offenses that overwhelm the criminal justice system frees resources to improve the quality of justice in lower criminal courts. Third, limiting the number of cases in the system and the stark racial disparities will increase the legitimacy of the criminal justice system. Because legitimacy is associated with willingness to comply with the law, declining to prosecute minor offenses may decrease serious crime.

213. See WAYNE MCKENZIE, ET AL., PROSECUTION AND RACIAL JUSTICE: USING DATA TO ADVANCE FAIRNESS IN CRIMINAL PROSECUTION, VERA INST. JUST. 6 (MARCH 2009), available at <http://www.vera.org/sites/default/files/resources/downloads/Using-data-to-advance-fairness-in-criminal-prosecution.pdf>. For example, a team in Milwaukee County analyzed data where "Milwaukee prosecutors chose not to prosecute 41 percent of whites, charged with possession of drug paraphernalia compared to only 27 percent of non-whites arrested for the same crime After looking at the data, the team considered a number of possible explanations for this disparity. These included policing practices, case screening procedures, and unconscious bias based on the character of the drug paraphernalia involved . . . [and] considered whether police were treating people differently, whether prosecutorial staff had a legally relevant reason to press or decline to press charges differently, and whether the disproportion was based on an unconscious racial bias." *Id.*

214. See Miller & White, *supra* note 15 (describing the work of the New Orleans District Attorney's Office and the Prosecution and Racial Justice Project of the Vera Institute in reviewing data on prosecutorial charging and proposing "transparency as a metric to evaluate the quality of internal regulation of executive agencies"); see also Davis, *supra* note 14 at 221, 234-37 (advocating for racial impact studies and citing examples such as Monroe County, Indiana where the prosecutor's office has risen to this challenge).

Fourth, declining to prosecute minor offenses removes the burden of unintended collateral consequences and costs associated with prosecution. These costs impact entire communities, not just those arrested, and where policing is focused on disadvantaged communities, it may contribute directly to economic and social instability and indirectly to crime. Finally, declining to prosecute minor offenses may affect policing strategies (though it may not) and lead to equal enforcement of the laws on the streets as well as in the courts.

The scale of the impact of this proposal as to racial disparities remains to be seen. Demographic data on drug use is available for a wide range of controlled substances from the United States Department of Health & Human Services. Data on other types of minor offenses may not exist or may not be readily available, but this research should be done. For example, open alcoholic beverages and riding bikes on the sidewalk are minor offenses that are frequently policed by the NYPD. A visit to any of the local criminal courts will lead to the conclusion that the majority of defendants charged with these offenses are black or Latino, however the NYPD does not disclose this data.²¹⁵ If prosecutors take this call seriously, they will collaborate with researchers, the police, and institutes like the Vera Institute to determine whether apparent disparities reflect base rates of offenses or unequal policing. While unjustified racial disparities may result in decisions not to prosecute classes of minor offenses, they could also lead to collaboration with police or communities to address more serious offenses. Thus an elected prosecutor may simply decline to prosecute one offense (marijuana, for example), but seek to improve enforcement in under-policed demographics where an offense is deemed more serious (possession of cocaine or oxycontin for example). Because there are so many misdemeanor arrests for minor victimless offenses in this country, collecting data and addressing racial disparities would likely yield significant improvements in terms of equal enforcement of the law within the criminal justice system.

Prosecuting fewer minor offenses should free limited resources of all actors in criminal courts and permit improved lawyering by both prosecution and defense. Eliminating marijuana arrests *alone* would reduce criminal court caseloads in New York City by close to 20%.²¹⁶ Although these cases are typically resolved quickly, the time and paperwork involved is substantial. Of course, improved procedural justice will not flow automatically from reduced caseloads.²¹⁷ It will take some effort to eliminate habits developed during years of processing

215. See, e.g., *People v. Figueroa*, 36 Misc. 3d 605, 608 (N.Y. Crim. Ct. 2012) (regarding open alcohol summonses).

216. See BARRY A. KAMINS & JUSTIN A. BARRY, CRIMINAL COURT OF THE CITY OF N.Y., ANNUAL REPORT 2011, 26, 30 (Justin Barry ed., 2012) (of 258,000 misdemeanors arraigned in criminal court the top offense was marijuana possession with over 40,000 arraignments).

217. Feeley, *supra* note 12 at 260 (exploring the “myth of a heavy caseload” and observing that less burdened courts simply had shorter days with each court disposing of cases with the same speed and attention).

enormous numbers of cases through plea bargains. Additional safeguards and guidance may be necessary to develop an adversarial system that reflects the importance and impact of minor convictions in today's world of electronic databases and collateral consequences. It is true, however, that current case levels render the actors in the lower criminal courts incapable of delivering individualized justice. Thus, diminished caseloads would create the possibility for the quality of prosecutorial function and defense function that Gershowitz and Killinger seek, without the significantly increased budgets.

A substantial benefit for both prosecutor and defense offices would be an improved ability to recruit and retain attorneys. While these offices are currently deluged with applicants, there are many well-qualified candidates who might follow Monroe Freedman's call to serve as prosecutors²¹⁸ if it did not involve prosecuting people of color for minor public order offenses that are committed equally by white people. More importantly, for those who work at defender or prosecution offices, rather than processing hundreds of cases, junior attorneys could learn professionalism by managing fewer and more serious misdemeanors, interviewing and preparing witnesses, making informed decisions about plea offers, and adjudicating more hearings and trials. Victims, defendants and witnesses could be treated with respect in a less harried system. Dispositions would more likely reflect actual guilt or innocence and mitigating factors. Junior attorneys would learn the importance of discovery deadlines and preparation and would develop the skills of good adversarial attorneys. Assuming that cases were investigated, prepared for litigation, or litigated, the importance of complying with the ethical rules relating to competent representation and disclosure requirements would become clear. Finally, morale would be greatly increased for attorneys on both sides.

Taking a principled stance against unequal enforcement of the laws and approaching each prosecution with an eye to providing procedural justice would enhance the legitimacy of the prosecutor's office and of the criminal justice system. According to social psychologists, greater perceived legitimacy increases willingness to obey the law.²¹⁹ These researchers have determined that compliance and legitimacy are related to perceptions about procedural fairness rather than favorable outcomes. Perceptions of fairness are related to several factors, including an opportunity to be heard (representativeness), consistency, impartiality, accuracy, correctability and respectful treatment (ethicality).²²⁰ In the current,

218. See MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 320 (4th ed. 2010) (arguing that a conscientious prosecutor can do more good than a zealous defense lawyer); see also BUTLER, *supra* note 4, at 101 (noting that applicants for AUSA jobs in Washington D.C. were reportedly asked, "How would you feel about sending so many black men to jail?" Anyone who had a big problem with that presumably was not hired").

219. TOM TYLER, WHY PEOPLE OBEY THE LAW (2006).

220. TOM R. TYLER, ROBERT J. BOECKMANN, HEATHER J. SMITH & YUEN J. HUO, SOCIAL JUSTICE IN A DIVERSE SOCIETY, 90-93 (1997).

overburdened criminal justice system, fair process is unavailable and contact with the system can undermine faith in the law and a willingness to abide by it. Reducing the number of offenses, lessening obvious racial disparities, and attempting to eliminate quick and apparently arbitrary disposition of cases with no fact finding or opportunity for the accused to speak may increase legitimacy and foster a willingness to obey the law.

A benefit that is external to the criminal justice system but critical to a fair society will be the reduction of costs associated with the prosecution of minor offenses. These costs may include lost income due to missed work, loss of employment, bars to employment, ineligibility for professional licenses, suspended drivers licenses, missed school, ineligibility for student loans, loss of housing, deportation and other collateral consequences.²²¹ These costs are not borne by individuals alone, but affect entire communities. The high cost of prosecuting minor offenses against large numbers of individuals in vulnerable communities reinforces and augments historical disadvantages. Imposing costs of criminal prosecution on struggling communities for minor offenses that are not policed or prosecuted in more privileged enclaves is entirely inconsistent with the public interest.

Finally, policing choices may well change if police knew that the prosecutor would not prosecute offenses that were policed in racially disparate manner.²²² Either police would begin to arrest white people for marijuana possession and riding bikes on the sidewalks or they would stop arresting blacks and Latinos for the same conduct. All five New York City District Attorneys supported a move in the legislature last year to decriminalize marijuana for personal use. If this is consistent with the public interest *and* addresses a serious source of continued racial injustice, then exercising discretion in the public interest would likely encourage legislative reform as well. If police policies requiring zero-tolerance changed, morale and professionalism would also improve among the police.²²³ Many police officers resent the pressure to make many stops and arrests for conduct they find unworthy of blame and worry about the impact on community relations.²²⁴ In fact, NYPD officers have filed and won grievances challenging

221. Margaret Colgate Love, *Paying Their Debt to Society, Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOWARD L.J. 753, 770-74 (2011) (outlining the expansion of collateral consequences).

222. For example, Bronx trespass arrests declined by 38.2 percent in the year following the Bronx District Attorney's Office policy requiring police to justify these arrest in personal interviews. Joseph Goldstein, *Prosecutor Deals Blow to Stop-and-Frisk Tactic*, N.Y. TIMES, Sept. 25, 2012.

223. Chris Smith, *Has Ray Kelly Lost His Cops*, NEW YORK MAGAZINE, Apr. 16, 2012 at 24.

224. *Id.* According to one police officer: "Cops say that CompStat sometimes gets warped into numbers for numbers' sake, and it grinds at community relationships. 'I grew up in the South Bronx, and in the summer we'd throw a football in the street at night,' an eighteen-year veteran lieutenant says. 'The cops would roll by and say, 'fellas, just keep it quiet.' Now we need to make the number, so we write all those kids summonses for dis con— disorderly conduct. And they grow up hating cops.'"

arrest and summons quotas.²²⁵

Challenges to this article's proposal may take several forms. The first objection would be that prosecutors would never do this; they lack the will and it would be politically unfeasible. Second, some may argue that declining to prosecute offenses that have been designated crimes by the legislature is anti-democratic. A third likely objection would be that not prosecuting minor offenses would undermine law enforcement goals and compromise the safety of the community. Fourth, prosecutors and courts should provide oversight of police conduct by reviewing searches and seizures, but if prosecutors' offices simply decline to prosecute classes of offenses then that oversight will be lost. Finally, there is the concern that rather than declining to prosecute minor offenses altogether, prosecutors might resort to additional "diversion" programs for minor offenses. While all these concerns are legitimate, none would prevent a prosecutor from exercising discretion to decline minor offenses in furtherance of the duty to seek justice.

The objection that prosecutors lack the will to exercise their charging discretion to decline to prosecute minor offenses is likely accurate as to some prosecutors. The willingness to decline prosecution because of unequal application of laws or inability to provide procedural justice depends upon each prosecutor's conception of what it means to seek justice and the public interest. The standards of the profession and the ethical codes emphasize this special role but as discussed above, do not define it with specificity. For many prosecutors, it is the duty and the opportunity to seek justice and to serve the public interest that attracts them to the profession.²²⁶ As Professor Melilli recounts:

I did not consider myself a lawyer as such; lawyers were people who represented specific clients. I viewed myself as having a very different role, a view shared by many of my prosecutor colleagues. My understanding was that my obligation as a prosecutor was to the public interest, an obligation fundamentally different than that of lawyers to their private clients . . . I regarded the special obligation of prosecutors to "seek justice" as a liberation from the uneasy commitment to private interests inherent in the "ordinary practice of law."²²⁷

225. *Id.* The NYPD union, the Patrolmen's Benevolence Association has challenged quotas as counter-productive and wrong. Joseph Alejandro, *Arbitrator Calls a Quota a Quota*, NEW YORK CITY PATROLMEN'S BENEVOLENCE ASSOCIATION MAGAZINE, Winter 2005-06, available at <http://www.nycpba.org/publications/mag-05-06-winter/alejandro.html> (reporting on successful officer grievance challenging arrest and summons quotas); see also David Murray, *Why Arrest Quotas Are Wrong*, NEW YORK CITY PATROLMEN'S BENEVOLENCE ASSOCIATION MAGAZINE, Spring 2005, available at <http://www.nycpba.org/publications/mag-05-spring/murray.html>.

226. See Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, *BYU L. REV.* 669, 669-70 (1992).

227. *Id.*

A chief prosecutor who, like Professor Melilli, is motivated by the duty to “seek justice” should be open to rooting out racial injustices and failures to provide procedural justice. Many may focus on violent offenses and serious crimes and fail to give sufficient attention to the bulk of the cases the police bring in, but that lack of attention is what this article aims to address. A prosecutor could run on a platform of equal enforcement of the law and procedural justice in the courts. There are former prosecutors, prosecutors who have become defense attorneys, and defense attorneys who could mount such a campaign. There may even be prosecutors in existing District Attorney’s office who have become concerned with these issues. The evidence that some prosecutors have taken up the challenge of examining internal disparities suggests that prosecutors may take on these external disparities as well.

The recent news that Attorney General Eric Holder has adopted a variant of this proposal directed at certain classes of drug cases gives additional cause for optimism that prosecutors may be ready to consider the greater impact of enforcement choices. While Attorney General Holder did not close the door to prosecuting particular classes of drug cases, he has announced a new policy of declining to charge offenses with mandatory minimums in certain cases. After noting that the criminal justice system exacerbates rather than alleviates poverty and criminality, weakening communities, he stated:

This means that federal prosecutors cannot—and should not—bring every charge against every defendant who stands accused of violating federal law. Some issues are best handled at the state or local level. And that’s why I have today directed the United States Attorney community to develop specific, locally tailored guidelines—consistent with our national priorities—for determining when federal charges should be filed and when they should not.

This is why I have today mandated a modification of the Justice Departments charging policies so that certain low-level, nonviolent drug offenders who have no ties to large-scale organizations, gangs, or cartels will no longer be charged with offenses that impose draconian mandatory minimum sentences. They will now be charged with offenses for which the accompanying sentences are better suited to their individual conduct . . .²²⁸

In wrapping up this speech, Attorney General Holder referred to the duty of all lawyers to advance justice in our society. Certainly this broad call to justice may resonate with state and local prosecutors throughout the country.

The next objection would of course be: who would vote for such a prosecutor? This is politically unfeasible in a “tough on crime” society. However, because prosecutors are often local officials, it is not necessarily unfeasible for them to succeed on a platform of equal enforcement of the law. Further, voter

228. Eric Holder, U.S. Attorney General, Remarks at the Annual Meeting of the ABA (Aug. 12, 2013), available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

referendums have shown a turn towards diversion of certain offenses, and decriminalization of others. For example, in California over 60% of voters voted in favor of Proposition 36 in 2000, which favored treatment over incarceration for non-violent drug offenders.²²⁹ In 2012, voter referenda legalizing marijuana for personal use passed in both Washington and Colorado.²³⁰ The notion that a prosecutor could be elected on a platform that took a firm stance on violent crime but advocated for non-criminal justice system approaches to minor offenses reflects democratic developments in favor of harm reduction over criminalization.

Another potential objection is that this prosecutor would act as a super-legislature, exceeding the office's authority by not enforcing laws that are on the books. Certainly, Attorney General Holder's comments drew this criticism from Senator Charles Grassley of Iowa, the top Republican on the Senate Judiciary Committee.²³¹ Other members of the same committee supported the Attorney General's decision, but also continue to work to change the mandatory minimums.²³² In an ideal world, Congress would revise laws that lead to unjust results. However, as discussed above, the discretion of the prosecutor not to charge crimes is a fundamental part of the absolute power of the office. Furthermore, we expect both police and prosecutors not to enforce every law. Some are not enforced because of changing mores, and others because of the lack of harm. More importantly, if the decision not to prosecute is linked to unequal enforcement, prosecutors are not refusing to enforce the law under any circumstances, but only when enforcement would create racial disparities.

An additional concern related to "harm reduction" strategies is that rather than declining to prosecute offenses, diversion approaches will be used that provide "treatment" and remediation within the criminal justice system. Declination and diversion are two different concepts. Subjecting individuals to prolonged supervision in treatment or community courts does not address the unequal application of the law or the failure to provide procedural justice. Half-measures subjecting one portion of society to on-going supervision by the criminal justice system while ignoring other segments of society are not consistent with equal application of the law.

What of the court's role in overseeing police conduct? If prosecutors merely refuse to prosecute whole classes of offenses, won't they fail to discover constitutional violations and unlawful police conduct? Won't the court lose its role in providing this supervision? This is a legitimate concern, but because the

229. Scott Ehlers & Jason Ziederberg, PROPOSITION 36: FIVE YEARS LATER, JUSTICE POLICY INSTITUTE 1 (2006), available at <http://www.prisonpolicy.org/scans/jpi/Prop36-5yearslater%204:19.pdf>.

230. Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES, Nov. 7, 2012.

231. Todd Ruger, *Holder Proposes Systemic Changes to Drug Sentencing Laws*, N.Y. L.J. Aug. 14, 2013.

232. *Id.*

vast majority of minor offenses are resolved with no adjudication whatsoever, significant oversight will not be lost. Further, when police engage in unconstitutional activity, they do not know whether they will uncover a minor offense, a felony, or absolutely nothing. Thus, they presumably would have the same incentives to make lawful searches and seizures as they do now. Declining thousands of minor offenses will free up time to investigate and oversee police action in the remaining cases, whether they be misdemeanors or felonies. Defense attorneys will also have more time to investigate and adjudicate illegalities. Further, prosecutors who decline to prosecute minor offenses due to racial disparities may benefit from collaboration with over-policed communities. Currently, over-policed communities are unlikely to direct complaints of illegality to the prosecutor's office because the prosecutor is seen as complacent about or even complicit with respect to illegal searches and seizures. A public stance against racial disparities may create opportunities for more robust oversight.

Finally, the argument that declining to prosecute minor offenses would contribute to more serious crime would certainly be an objection to this proposal. The belief that aggressive order-maintenance policing is the cause of the crime drop experienced across much of the nation is deep-seated. The research indicating the weak empirical basis for this causal claim exists elsewhere, and its review is beyond the scope of this paper.²³³ Suffice it to say that a number of crime reduction strategies were adopted simultaneously²³⁴ and it is impossible to attribute the crime drop to the arrest of individuals for minor offenses to order.²³⁵

There are, however, two recent developments that throw yet more doubt on the claim that harsh policing of minor offenses is responsible for the crime drop. Recent evidence in Baltimore and California clearly supports the notion that public safety would also be enhanced were there fewer misdemeanor arrests. In 2010, the Baltimore Police Commissioner deemphasized misdemeanor arrests and dedicated officers to biweekly follow ups with those with gun convictions. There were 43,000 fewer people arrested (a 40% drop) *and* a 30% reduction in homicides.²³⁶ Similarly, statistics from California indicate that a 20% decrease in youth arrests in 2011 (due, in large part, to a 61% drop in marijuana possession

233. HARCOURT, *supra* note 77; see also Daniel Greenberg, *Studying New York City's Crime Decline: Methodological Issues*, JUSTICE QUARTERLY (2013) (finding "no evidence that misdemeanor arrests . . . helped to reduce felony crime").

234. WILLIAM BRATTON & PETER KNOBLER, TURNAROUND: HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC 228-29 (1998) (noting that one of the strategies employed was Police Strategy Number 5, "Reclaiming the Public Spaces of New York," also referred to by Bratton as the "linchpin strategy" for quality of life policing of "boom boxes, squeegee people, street prostitutes, public drunks, panhandlers, reckless bicyclists, illegal after-hours joints, graffiti").

235. Greenberg, *supra* note 234.

236. Wallace-Wells, *supra* note 11, at 30.

arrests) was accompanied by drops in *every category of violent crime*.²³⁷ These experiences suggest that declining to prosecute offenses, particularly if the police follow suit and decline to make arrests for these offenses, may reduce violent crime and increase safety.

CONCLUSION

Prosecutors are aware of the injustices caused by racial disparities in policing minor offenses and the failure to do justice in overburdened criminal courts. Some pursue this career choice believing that as prosecutors with the unparalleled discretion to file or dismiss charges as justice requires,²³⁸ they can do more justice in a day than a defense attorney can do in a lifetime.²³⁹ Once in the job, the line prosecutor has little or no ability to affect disparities that exist pre-arrest.²⁴⁰ Other prosecutors regard the initial years of processing minor cases involving minority and poor defendants as an unpleasant prerequisite to graduating to violent crimes and white-collar offenses that cause serious and lasting harm in society. They pay their dues prosecuting quality-of-life offenses and drug cases for a few years, while angling to move into the major crime unit, the sex crimes division, the special victims unit, or the fraud and integrity division.

But prosecutors have a duty, a special duty to serve justice, to assure each defendant procedural justice, and to exercise discretion in the public interest. If chief prosecutors take on the role of insuring equal treatment under the law—both inside and outside the courtroom—by refusing to prosecute classes of minor offenses where there is unequal application of the law, the criminal justice system will be better able to provide procedural justice to all.

237. MIKE MALES, CALIFORNIA YOUTH CRIME PLUNGES TO ALL-TIME LOW, CENTER ON JUVENILE AND CRIMINAL JUSTICE, RESEARCH BRIEF 1 (Oct. 12, 2012), available at http://www.cjcj.org/files/CA_Youth_Crime_2011.pdf (last checked Mar. 2, 2013).

238. Sarat & Clarke, *supra* note 120, at 404 (discussing how prosecutorial discretion brings us to laws limits and draws its legitimacy from theories of sovereignty: “This is the lawful lawlessness that is at the heart of sovereign prerogative in a constitutional democracy.”); see STEWART, *supra* note 3, at 9-10 (“The decision to prosecute is one of the most solitary and unfettered exercises of power in the American political system”).

239. DAVIS, *supra* note 3, at 16 (noting that “most prosecutors join the profession with the goal of doing justice”); FREEDMAN & SMITH, *supra* note 219, at 320 (expressing Freedman’s advice to law students that they “can do more good as a conscientious prosecutors than a zealous criminal defense lawyer”); BUTLER, *supra* note 4, at 101.

240. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?* GEO. J. LEGAL ETHICS 355, 385 (2001) (noting that line prosecutors “have very little discretion” and newer prosecutors have “little autonomy and independence”).