

THE NORMATIVE CASE FOR NORMATIVE GRAND JURIES

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INTRODUCTION

There is a broad swath of cases—perhaps the majority in many jurisdictions—where arrests are based on the allegations and observations of no witnesses except the arresting officers; where there are no concrete victims; where cases are typically resolved with some form of guilty plea at the first appearance or shortly thereafter; where there is almost no practical interval for any kind of discovery, and, in any event, such discovery would consist of little more than the arresting officer’s paperwork; and where there is even less practical opportunity for any kind of formal substantive litigation.¹ When I practiced in New York City, we called these cases “disposables,” because that is precisely what we were expected to do with them. These “disposable” cases are almost always public-order violations and misdemeanors—turnstile hops, public urination, disorderly conduct, loitering, graffiti on public property, prostitution, simple possession of drugs and marijuana, to name just a few of the many low-level offenses that have been the focus of aggressive order-maintenance policing initiatives in urban centers over the past two decades.

From the defendant’s perspective, available process in these disposable cases consists principally of the brief opportunity to

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1. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1705 n.232 (2010) [hereinafter Bowers, *LGNI*] (citing a study that found that approximately half of New York City cases are disposed of at the first court appearance); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1163 n.231 (2008) [hereinafter Bowers, *Punishing*] (citing New York City statistics of high rates of first-appearance pleas); Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1168, 1170–72 (2004) (indicating that approximately half of all non-felony cases in New York City are resolved at the first appearance, typically by plea).

convince the arresting officer to do otherwise and to persuade appointed counsel to push hard for a plea offer below the conventional market rate. From the public's perspective, process is inaccessible and unassessable. The adjudication (and ultimate summary disposition) of these cases is a decidedly professional endeavor.²

The costs of this state of affairs are potentially significant. Specifically, order-maintenance policing and prosecution initiatives inordinately tend to focus on the very communities where disorder is most likely found.³ And this creates something of a paradox. Because disorder correlates with poverty, and poverty correlates with race, normatively and instrumentally defensible efforts to root out disorder may, counterintuitively, generate disorder by cultivating undesirable perceptions of unequal justice.⁴ That is, prosecutors and police may undermine their own efforts by unintentionally promoting destructive "connotations of racial hierarchy and domination."⁵ In this way, order-maintenance enforcement may prove self-defeating.⁶ Significantly, lay and local participation in law enforcement may provide a counterweight to lay perceptions of unfairness and injustice.⁷ Indeed, public participation in criminal justice has the capacity to not just reshape pernicious perceptions of unfairness and injustice, but, perhaps, to promote fairness and justice *in fact*.⁸

2. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 NYU L. REV. 911, 913 (2006) [hereinafter Bibas, *Transparency*] ("Outsiders have few ways to learn about, let alone participate in, the progress of most pending cases . . ."); Bowers, *Punishing*, *supra* note 1, at 1173.

3. See generally BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* (2001); Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85 (2007) [hereinafter Bowers, *Grassroots*]; Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CAL. L. REV. 1513, 1529 (2002) [hereinafter Kahan, *Reciprocity*].

4. See Kahan, *Reciprocity*, *supra* note 3, at 1529–30; see also Bowers, *Grassroots*, *supra* note 3, at 92, 98.

5. Kahan, *Reciprocity*, *supra* note 3, at 1529; see also Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims & Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211 (2012).

6. See generally William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871 (2000).

7. See Kahan, *Reciprocity*, *supra* note 3, at 1533 (observing that community policing efforts enabled the Boston Police Department "to target certain neighborhoods for order-maintenance policing without apparently provoking the resentment that the New York Police Department encountered"). See generally Bowers & Robinson, *supra* note 5; William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1973, 1976, 1994, 2012, 2031–32, 2039 (2007).

8. *Infra* Part IV.A–B.

Such an insight is not new to the literature on community policing and prosecution.⁹ In this vein, community-prosecution advocates have offered a number of radical proposals—neighborhood prosecution programs, community justice counsels, and other problem-solving initiatives—intended to promote local democratic decision making.¹⁰ In theory, I find no fault with such inventive reform, but I think we may have overlooked a more conventional option. Instead of grasping for novel solutions outside the box, the system could do *more with less* by reconceptualizing the box itself.¹¹ What I have in mind is a misdemeanor grand jury that would address the normative—or *extralegal*—question of whether a public-order charge is equitably appropriate in the particular case. In other words, I propose reorienting the grand jury’s focus in two meaningful ways: first, from the technical question of probable cause to the normative question of whether charges are reasonable; and, second, from prospective serious felony prosecutions to low-level *mala prohibita* prosecutions that are likelier to raise tough normative questions and thereby to implicate equitable reasons against charging.¹² In this Article, I posit that such reform effectively could promote goals consistent with the community-prosecution enterprise, which Tony Thompson has identified as decentralization of authority, accountability, and collaboration to promote problem solving.¹³

9. See generally Anthony Alfieri, *Community Prosecutors*, 90 CAL. L. REV. 1465 (2002); Anthony Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321 (2002).

10. Thompson, *supra* note 9, at 354–56. See generally *Community Prosecution*, CTR. FOR COURT INNOVATION, <http://www.courtinnovation.org/topic/community-prosecution> (last visited Mar. 31, 2012).

11. See generally MALCOLM M. FEELEY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL 192 (1983) (“[T]o mobilize public support, reformers must often offer dramatic plans . . . [and] bold strategies But these very strategies that facilitate innovation undercut implementation.”).

12. See Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 23 (2001) (“The true power of the grand jury . . . manifests itself in the marginal cases . . . [where] the defendant has a credible or sympathetic story to tell.”); see also Adriaan Lanni, *Implementing the Neighborhood Grand Jury*, in GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 171, 182 (Roger Fairfax ed., 2011) (observing that the grand jury plays a more robust normative role when it evaluates “more controversial charges—for example, prosecutions for minor drug offenses”). See generally Bowers, *LGNI*, *supra* note 1 (defending the exercise of equitable charging discretion, particularly in petty public-order cases).

13. Thompson, *supra* note 9, at 323, 354–55, 360; see also Anthony C. Thompson & Robert V. Wolf, *The Prosecutor as Problem Solver: An Overview of Community Prosecution*, CTR. FOR CT. INNOVATION, 4 (Oct. 2004), http://www.courtinnovation.org/sites/default/files/prosecutor_as_ps.pdf (“Community prosecution at its core involves three key ingredients: problem-solving, community involvement, and partnerships.”).

Before continuing, I should note that I have my reservations about community-prosecution and community-justice efforts more generally. As critics and even some supporters of such initiatives have recognized, the very notion of community justice is amorphous—perhaps even vacuous and potentially dangerous.¹⁴ The precise boundaries of the relevant community and what counts as community prosecution are close to indefinable.¹⁵ And even if we could divine a precise definition, it might serve only to marginalize those subgroups that fell outside the lines.¹⁶

However, this Article was prepared for a symposium on community justice, and, for present purposes, I intend to operate within that paradigm. If nothing else, I agree with Bob Weisberg, who has observed that the concept of community justice may serve as a useful heuristic—a stand-in for certain ill-defined, but nevertheless worthwhile, aspirations from which contemporary professionalized criminal justice has moved too far away. By Weisberg's reasoning, if we are careful, we may successfully use the "vocabulary" of community without being used by it.¹⁷ Thus, I offer this rough-and-ready proposal not as a one-size-fits-all universal solution, but as a potentially attractive option for prosecution offices

14. See, e.g., Robert Weisberg, *Restorative Justice and the Dangers of "Community,"* 2003 UTAH L. REV. 343, 343, 348, 374 ("[C]ommunity' is a very dangerous concept. It sometimes means very little, or nothing very coherent, and sometimes means so many things as to become useless in legal or social discourse.").

15. See Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329, 331 n.6 (2007) [hereinafter Bibas, *Forgiveness*] (observing that "'community' and 'community members' are nebulous concepts with unclear definitions, particularly in our far-flung, heterogeneous society"); Bibas, *Transparency*, *supra* note 2, at 914 (positing that communities are constituted of multiple overlapping subgroups: "people affected by a particular crime, residents of high-crime neighborhoods, voters, citizens, and aliens"); Thompson, *supra* note 9, at 323, 354 ("It is not at all obvious . . . what the term 'community prosecution' actually means. . . . [T]he concept of 'community prosecution' is not in any way self-defining. As is apparent from the wide range of programs that lay claim to the name 'community prosecution,' one can give this vision of prosecutorial practice virtually any meaning."). My own unsatisfying definition of the relevant community is the same as Stephanos Bibas's: "Locals affected by a particular crime." Bibas, *Transparency*, *supra* note 2, at 914.

16. See Bowers & Robinson, *supra* note 5, at 234 ("[I]t is not clear how to go about coherently narrowing community to some subset of the sovereign whole."); Weisberg, *supra* note 14, at 348 (observing that community justice risks many of the balkanizing pitfalls common to "identity politics" more generally). Moreover, as I previously explored in an article about drug courts, there are reasons to be wary of so-called *problem solving* built against the backstop of conventional criminal justice. Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 830 (2007) [hereinafter Bowers, *Drug Courts*] ("[D]rug courts keep conventional justice—often in its most powerful forms—always in the background and close at hand. Drug courts are not divorced from conventional justice; they are grafted indelibly onto it.").

17. Weisberg, *supra* note 14, at 374.

that are *dedicated already* to the community-justice enterprise.¹⁸ In short, I make no constitutional or even legal claim.¹⁹ Rather, I submit that a district attorney's office committed to community prosecution might advance its objectives effectively by taking the idea of an expressly normative grand jury seriously.

And, significantly, the reform that I have in mind would be no great stretch. Specifically, as I explain in Part I, the grand jury historically served (and, in sub-rosa fashion, continues to serve) as a normative check, notwithstanding its ostensible function as a probable-cause screen. In Part II, I proceed from the descriptive to the normative and make the case for the normative grand jury, offering reasons to believe that the grand jury can provide a more desirable and effective equitable, rather than legal, screen. And in Part III, I offer some ideas about how to construct an efficient screen that minimizes the danger of arbitrary or discriminatory decision making cloaked as equitable discretion. Finally, in Part IV, I observe that the normative grand jury has the capacity to promote discourse, democratic values, and perceptions of systemic legitimacy—again, goals consistent with the community-justice movement.

I. UPSIDE-DOWN GRAND JURIES

The modern grand jury's ostensible function is to test the legal sufficiency of criminal charges only.²⁰ When it comes to this legal determination, the conventional debate has been over whether to describe the grand jury's function as accusatory or adjudicatory in nature.²¹ More recently, however, a number of scholars have

18. See Bibas, *Forgiveness*, *supra* note 15, at 331 n.6 (observing that lay participation in criminal justice probably works best in "homogeneous communities").

19. However, in a separate work in progress, I do claim that Fourth Amendment reasonableness might have been read more expansively—specifically, as a mechanism to review the equities of prosecutorial charging decisions. Josh Bowers, *Equitable Constraints as Rules of Law* (unpublished manuscript) (on file with author).

20. See Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV 703, 708 (2008) ("[T]he modern conception assumes that the grand jury should indict if the government presents enough evidence to establish probable cause that the accused committed the alleged crimes."); *Model Grand Jury Charge*, U.S. COURTS (Mar. 2005), <http://www.uscourts.gov/FederalCourts/JuryService/ModelGrandJuryCharge.aspx> ("The purpose of the Grand Jury is to determine whether there is sufficient evidence to justify a formal accusation against a person—that is, to determine if there is 'probable cause' to believe the person committed a crime.").

21. See, e.g., Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1271–89 (2006). As between the two, the consensus view is the body is more accurately considered an appendage of the executive than the judiciary. *United States v. Williams*, 504 U.S. 36, 51 (1992) (describing the grand jury as an "accusatory"

observed that this binary conception of the grand jury is overly simplistic.²² Instead, the grand jury fairly may be thought of as more of a quasi-legislative body than an executive or judicial body. More to the point, when the grand jury refuses to indict a prospective defendant, it may do so for reasons that have little to do with the lack of probable cause. Rather, the grand jury may base its decision on a determination that the charge is *equitably* unauthorized—that the charge is, on balance, unfair or contrary to community interests or norms. According to Ric Simmons: “[G]rand juries have always done more than simply measure evidence against a given legal standard; frequently they have made discretionary, political judgments about the cases before them.”²³ On this reading, the grand jury is more of a grassroots political “fourth branch” of government—one that serves to reshape the rough edges of the law in a decidedly populist fashion.²⁴ It provides a mechanism for the

not an “adjudicatory” body); *United States v. Cleary*, 265 F.2d 459, 461 (2d Cir. 1959) (observing that the grand jury is “[b]asically . . . a law enforcement agency”); *Fairfax*, *supra* note 20, at 708 n.7 (describing adjudicatory conception as the dominant view); Andrew D. Leipold, *Why Grand Juries Do Not (And Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 271 (1995) (“It is . . . common knowledge that the grand jury . . . is now a tool of the Executive.”).

22. Simmons, *supra* note 12, at 2 (2002) (“In theory, an indicting grand jury is convened to evaluate the sufficiency of the evidence according to a fixed legal standard. In practice, its functions are more subtle and complex.”).

23. *Id.* at 3; *see also Fairfax*, *supra* note 20, at 706 (“Where the grand jury truly adds value is through its ability to exercise robust discretion not to indict where probable cause nevertheless exists”); *Kuckes*, *supra* note 21, at 1269 (discussing the conception of a grand jury as a body that “may properly consider not only the sufficiency of the evidence, but also the wisdom of the prosecution, community priorities, the relative culpability of the accused, and a host of other discretionary factors”).

24. *United States v. Eisenberg*, 711 F.2d 959, 964 (11th Cir. 1983) (“[T]he grand jury is a unique body and is not a part of either the executive or the judicial branch.”); *United States v. Udziela*, 671 F.2d 995, 999 (7th Cir. 1982) (“[T]he grand jury is a constitutional fixture in its own right, belonging to neither the executive nor the judicial branch.”); Simmons, *supra* note 12, at 10. Notably, even the Supreme Court has recognized that the grand jury sometimes plays such a role. *See Williams*, 504 U.S. at 47 (observing that the grand jury functions “as a kind of buffer or referee between the Government and the people”); *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (“The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime The grand jury is not bound to indict in every case where a conviction can be obtained.”); *see also United States v. Ciambrone*, 601 F.2d 616, 629 (2d Cir. 1979) (discussing the “implicit” power of the grand jury to grant mercy to guilty accused); *United States v. Cox*, 342 F.2d 167, 190 (5th Cir. 1965) (Wisdom, J., concurring) (highlighting the “unchallengeable power” of grand juries “to shield the guilty”). Even Chief Justice John Roberts once observed that “a significant role for the grand jury has been not to indict people even though the Government had the evidence to indict them.” Transcript of Oral Argument at 16–17, *United States v. Resendiz-Ponce*, 549 U.S. 102 (2006) (No. 05-998).

intuitive expression of local sentiments that may deviate from general legislative directives or specific executive enforcement decisions.

By way of recent example, consider the decision of a New Orleans grand jury to reject homicide charges against a doctor and two nurses arrested for euthanizing patients in the aftermath of Hurricane Katrina.²⁵ Or consider the decision of a New York City grand jury to reject felony gun possession charges against professional football player Antonio Pierce, who allegedly concealed from police a gun that a teammate had discharged accidentally.²⁶ In both cases, it seems likely that the grand juries had probable cause to file the proposed charges. Nevertheless, the bodies refused to indict, presumably based on what they perceived to be a lack of blameworthiness.²⁷

Significantly, this conception of the grand jury as a “de facto local legislature” is consistent with the institution’s historical role.²⁸ At common law, the grand jury tailored application of the prospective offense to fit the perceived culpability of the prospective offender. Put differently, the early grand jury trafficked in equity, not legal standards and rules. According to Roger Fairfax:

[T]he underlying premise . . . is that the grand jury’s defining purpose is to test the sufficiency of the evidence by determining whether probable cause exists. To the contrary, the grand jury was never designed as a mere sounding board to test the sufficiency of the evidence. . . . Where the grand jury truly adds value is through its ability to exercise robust discretion *not* to indict where probable cause nevertheless exists.²⁹

25. Sheri Fink, *The Deadly Choices at Memorial*, N.Y. TIMES MAG., Aug. 30, 2009, at 28, 30.

26. *Burress Indicted, Pierce Not, in Gun Case*, UNITED PRESS INT’L (Aug. 3, 2009, 3:54 PM), http://www.upi.com/Sports_News/2009/08/03/Burress-indicted-Pierce-not-in-gun-case/UPI-98281249314867 (quoting Pierce’s attorney that “the grand jurors . . . concluded, as they should have, that [Pierce] acted as any reasonable person would have”).

27. Simmons, *supra* note 12, at 49 (summarizing examples of cases in which grand juries may have rejected “borderline” cases).

28. RONALD J. ALLEN, JOSEPH L. HOFFMAN, ANDREW D. LEIPOLD, DEBRA LIVINGSTON & WILLIAM J. STUNTZ, *COMPREHENSIVE CRIMINAL PROCEDURE* 1084 (3d. ed. 2011). *See generally* Stuntz, *Unequal Justice*, *supra* note 7, at 1989 (“[J]uries were exercising powers of moral evaluation—powers the substantive law of the late nineteenth and early twentieth centuries vested in fact finders, not just in legislatures.”).

29. Fairfax, *supra* note 20, at 706. As Ron Wright explained, colonial grand juries “did not refuse to indict because of a lack of proof that the accused had violated a criminal statute” but rather because “they fundamentally disagreed with the government’s decision to enforce these laws at all.” Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 ADMIN. L. REV. 465, 469 (1992); *see*

To put a finer historical point on it, consider this grand jury instruction from 1759, which provided that potential charges “need no Explanation your Good Sense & understanding will Direct ye as to them.”³⁰ Thus, the determination was decidedly normative—an evaluation of “general moral blameworthiness.”³¹ In other words, the common law grand jury served as a tool of community justice—as a popular and localized democratic check on state power plays.

Indeed, almost every seminal and celebrated early case featured a grand jury that took a normative, not legal, stand. For example, in 1681, English grand juries refused to indict Lord Shaftesbury and his confederate Stephen Colledge for treason.³² Likewise, in 1734, two grand juries refused to indict John Peter Zenger for libel against the Royal Governor of New York.³³ Most commentators agree that these defendants were almost certainly legally guilty—or that, at a minimum, probable cause was apparent.³⁴ Nevertheless, the grand jurors declined charges because they “were politically opposed to the prosecutions.”³⁵

Once we come to understand the genuine and longstanding function of the grand jury, it becomes a bit clearer why contemporary grand juries so frequently indict: the body evaluates only the more serious—often *mala in se*—cases that raise relatively little normative disagreement between the prosecutor and grand jury about the wisdom of prospective charges.³⁶ Specifically, in nineteen states and in the federal system, grand jury indictments are required to initiate *felony* charges only.³⁷ Four states only require grand jury indictments for felony charges that carry potential sentences of life imprisonment or death.³⁸ Conversely, almost no jurisdiction extends the grand jury requirement to

also Simmons, *supra* note 12, at 5 (“[F]rom the beginning, the grand jury was a political body.”).

30. WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANCE ON MASSACHUSETTS SOCIETY* 26 (Univ. of Ga. Press 1994) (1975).

31. Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 988 (1932).

32. Simmons, *Re-Examining the Grand Jury*, *supra* note 12, at 10–14.

33. *Id.* at 11.

34. *Id.* at 10–11. Additional historical examples include “no true bills” returned against violators of unpopular colonial tax and sedition acts. SARA SUN BEALE, *GRAND JURY LAW AND PRACTICE* § 1:3 (2d ed. 1997) (“The refusal to indict in these cases appears to have been based on the jurors’ approval of the conduct in question, and not on the finding that the defendants were innocent of the conduct charged against them.”); Fairfax, *supra* note 20, at 722; Leipold, *supra* note 21, at 285 & n.131.

35. Simmons, *supra* note 12, at 11.

36. *Id.* at 31 & n.136 (reporting an indictment rate of 99.6% for federal grand juries in 1984, a 99.5% rate for federal grand juries in 1976, and a consistent indictment rate of more than 99%).

37. BEALE, *supra* note 34, at 8–11.

38. *Id.*

misdemeanor charges.³⁹ Indeed, the misdemeanor indictment is an almost unheard of anomaly.

Thus, there exists something of a disconnect. Most lay and professional stakeholders already agree that suspected murderers, rapists, and robbers almost always *ought* to be charged where probable cause exists to support such charges.⁴⁰ However, reasonable minds may, and often do, disagree about optimal or fair levels of (or strategies for) enforcement of petty public-order offenses.⁴¹ Indeed, the anecdotal (and limited)⁴² empirical evidence indicates that grand juries do, in fact, refuse to indict more frequently in cases involving less blameworthy conduct. Specifically, a Texas study found that grand juries far more frequently disagreed with each other and prosecutors in cases involving drug crimes than cases involving crimes of passion.⁴³ And grand juries reached divided votes one-third of the time in cases

39. *Id.* at 8–13.

40. Paul H. Robinson, *Reply, in* CRIMINAL LAW CONVERSATIONS 61, 62 (Paul H. Robinson et al. eds., 2009) (“[L]ay judgments about core wrongdoing are intuitional.”).

41. Specifically, Paul Robinson has observed that “as a matter of common sense, the law’s moral credibility is not needed to tell a person that murder, rape, or robbery is wrong[,]” but, by contrast, “at the borderline of criminal activity, where there may be some ambiguity as to whether the conduct really is wrong.” Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1865 n.84 (2000) [hereinafter Robinson, *Crime Control*]; see also RICHARD J. BONNIE ET AL., CRIMINAL LAW 215 (3d ed. 2010) (“Modern laws define a great many crimes that are not mala in se but only mala prohibita. . . . [S]uch offenses, [arise out of] no ‘innate sense of right and wrong.’” (quoting *State v. Boyett*, 32 N.C. (10 Ired.) 336, 343–44 (1849))); PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 13 (1995) (arguing that while mala prohibita offenses are “less intuitively improper conduct” there is “significant potential for disagreement . . . between code and community with regard to ‘victimless crimes,’ such as prostitution, gambling, or distribution of certain drugs”); Bowers, *LGNI, supra* note 1, at 1667 & n.45.

42. Simmons, *supra* note 12, at 31 (“Grand jury statistics are notoriously difficult to obtain. Most prosecutors’ offices . . . are reluctant to publicize the fact that grand juries reject any cases at all.”).

43. Robert A. Carp, *The Harris County Grand Jury—A Case Study*, 12 HOUS. L. REV. 90, 111, 115 & tbls. 11, 13 (1974). Specifically, Carp found that Houston grand jurors reported disagreeing with prosecutors two-and-one-half times more frequently in cases involving drug crimes than in cases involving crimes of passion. Remarkably, a Bronx prosecutor reported almost the same statistic: that New York City grand juries are two-and-one-half times more likely to refuse to charge drug felonies than felonies overall. Simmons, *supra* note 12, at 34, 50 (observing that grand juries are likelier to play an equitable role in “cases on the margins”).

involving adult consensual sodomy but less than five percent of the time in all other cases.⁴⁴

This, then, serves as a plausible rejoinder to the witticism that a grand jury readily would indict a ham sandwich.⁴⁵ Simply put, it might be that the grand jury only has an opportunity to evaluate the ham sandwiches that are suspected of having done very bad things. Comparatively, there may be other penny-ante ham sandwiches that are likelier to be normatively innocent, but that end up criminally charged on the prosecutor's initiative alone.⁴⁶ Thus, the institution of the grand jury presents something of an intriguing puzzle: the body is used principally to evaluate the serious cases that are least likely to provoke normative disagreement; and almost not at all to evaluate the borderline petty cases where the *mala prohibita* conduct in question implicates most directly the community's multifaceted conceptions of what constitutes adequate quality of life in public spaces.⁴⁷

Notably, however, the grand jury did not always approach cases in so decidedly an inverted fashion. At common law, the grand jury not only analyzed prospective charges of rape, murder, and the like;

44. Carp, *supra* note 43, at 111 tbl.10; *cf.* Lawrence v. Texas, 539 U.S. 558 (2003) (invalidating a Texas sodomy statute that criminalized adult consensual same-sex sexual activity).

45. The quote is commonly attributed to Sol Wachtler, former Chief Judge of the New York Court of Appeals. United States v. Navarro-Vargas, 408 F.3d 1184, 1195 (9th Cir. 2005). Wachtler learned the power of the grand jury first hand. He was prosecuted, convicted, and sent to prison for harassing his mistress and for threatening to kidnap her daughter. Lawrence Van Gelder, *Ex-Judge Wachtler to Move from Prison to Halfway House*, N.Y. TIMES, Aug. 27, 1994, at 21, available at <http://www.nytimes.com/1994/08/27/nyregion/ex-judge-wachtler-to-move-from-prison-to-halfway-house.html>; see also William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 174 (1973) (“[T]he grand jury is the total captive of the prosecutor.”); Simmons, *supra* note 12, at 29 (“For the last forty years, commentators and practitioners alike have almost uniformly called for the grand jury’s reform or outright abolition, claiming that the institution is no more than a rubber stamp for the prosecutor.”).

46. See generally Bowers, *Punishing*, *supra* note 1 (exploring the concept of normative guilt and innocence).

47. Moreover, there is strong reason to believe that the grand jury is not all that good at fulfilling its ostensible legal function. Specifically, Andrew Leipold has argued persuasively that a trained magistrate—that is, a legal technician—is better equipped to answer the *legal* question of whether the probable-cause standard is met. Leipold, *supra* note 21, at 394; see also Campbell, *supra* note 45, at 178 (arguing that the “laymen who make up the grand jury possess neither the skills nor the training” for the “sophisticated” legal task of measuring probable cause, and, thus, the grand jury “operates as a sounding board for the predetermined [legal] conclusions of the prosecuting official”); Simmons, *supra* note 12, at 45 (“Grand jurors are inherently unqualified to perform this statutory duty . . . [of] evaluat[ing] whether or not there is sufficient evidence to establish reasonable cause that the defendant committed a crime.”).

it also considered whether and how the state should regulate a wide variety of relatively nominal victimless conduct. According to Andrew Leipold: “Early grand juries might accuse individuals of offenses such as disgraceful speech, excessive frivolity, and failing to serve the public. The latter charges could include failing to grind corn properly and ‘giving short measure’ when selling beer.”⁴⁸ Whereas prospective charges like “excessive frivolity” potentially were subject to grand jury oversight at common law, the modern day equivalent—disorderly conduct—is almost never. Rather, it is policed, prosecuted, and processed by professionals acting alone.

II. THE NORMATIVE CASE FOR NORMATIVE GRAND JURIES

The descriptive claim, detailed above, is that the grand jury plays a normative role, but only for some of the cases, and only through a kind of deception. Specifically, I would submit that contemporary grand jury practice is *upside down* and *inside out*. It is upside down because the body has no opportunity to evaluate the very cases that most frequently raise persuasive equitable questions. And it is *inside out* because the body is expressly authorized to evaluate only the legal (and not the equitable) merits of prospective charges.

A fundamental normative question remains, however. Is the grand jury’s normative role normatively desirable (or, at least, defensible)? Put differently, should the system aim to stamp out the grand jury’s covert equitable function, or should it bring that function to the fore? More to the point, is a lay body competent to exercise equitable charging discretion, and, if so, when and how?

In this Part, I claim that the value of the grand jury does not necessarily fall with punishment stakes or evidentiary merit. Rather, I suggest that lay bodies are better able to screen meaningfully criminal cases that are legally easy but normatively challenging. And, significantly, petty order-maintenance cases are particularly likely to fall within this category. These are the cases

48. Leipold, *supra* note 21 at 283 n.120; see also ERNEST S. GRIFFITH, HISTORY OF AMERICAN CITY GOVERNMENT: THE COLONIAL PERIOD 217 (1938) (describing grand jury presentments for illegal tread on wheels of carts and for liquor violations); RICHARD D. YOUNGER, THE PEOPLE’S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634–1941 at 7–8 (1963) (describing colonial grand jury presentments for neglecting a ferry, drunkenness, disgraceful speech, breach of the Sabbath, and idle living). Even as late as 1930, one scholar described grand-jury indictments for violations of “[d]og law,” “[b]awdy house,” “[f]ish law,” “[g]ambling,” “[h]unting without license,” “[c]onducting dance in unlicensed hall,” “[c]ontributing to delinquency of minor,” “[d]riving without lights,” “[i]ndecent conduct,” “[l]ottery tickets (possession of),” “[l]eaving scene of motor accident,” “[n]uisance,” “[p]erverved practice,” “[p]ublic profanity,” “[r]oad nuisance,” “[s]peeding,” and “[v]agrancy.” Wayne L. Morse, *A Survey of the Grand Jury System*, 10 OR. L. REV. 101, 131 tbl.II-A (1931).

that are most prone to selective enforcement.⁴⁹ And, as indicated, these are the cases that are least intrinsically blameworthy.⁵⁰ In such circumstances, police and prosecutors come to use public-order offenses to punish some marginal conduct (but not other conduct) and to arrest and prosecute some borderline offenders (but not other offenders). The consequent fear is real that police and prosecutors may fail to strike adequately the delicate balance between promoting the quality of life on neighborhood streets and minimizing perceived and actual executive overreach.⁵¹

A. *Equitable Discretion & Its Exercise*

In a previous article and book chapter, I made the case for equitable discretion as a complement to the rule of law.⁵² Specifically, I argued that *complete justice* requires law tempered by equity, lest it become, in Blackstone's terms, "hard and disagreeable."⁵³ Moreover, I challenged the entrenched assumption that equitable charging decisions are best left to the unfettered discretion of the professional prosecutor, and I identified a number of reasons why prosecutors may underexercise their considerable discretion to decline "disposable" cases even in the not-uncommon circumstances where it is normatively appropriate for them to do so.⁵⁴ Specifically, I explained that prosecutors are incentivized to charge "disposable" cases reflexively, because: (1) prosecutors know that these charges generate quick and easy convictions; (2) prosecutors are more likely to defer to arrest decisions in police-initiated cases; and (3) prosecutors are ill-equipped—by training and experience—to distinguish between equitably appropriate and

49. Bowers, *supra* note 16, at 806–07 ("Enforcement may be selective simply because drug crime is everywhere, but the police cannot be. Police rationally concentrate on poor and urban—often minority—communities because drug use is more readily discoverable in these areas."); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1810, 1820–22 (1998) ("Looking in poor neighborhoods tends to be both successful and cheap. . . . Street stops can go forward with little or no advance investigation. . . . [T]he stops themselves consume little time, so the police have no strong incentive to ration them carefully.").

50. See *supra* note 45 and accompanying text.

51. See generally Josh Bowers, *Grassroots*, *supra* note 3; Kahan, *Reciprocity*, *supra* note 3; Stuntz, *supra* note 6.

52. Bowers, *LGNI*, *supra* note 1; Josh Bowers, *Mandatory Life and the Death of Equitable Discretion*, in LIFE WITHOUT PAROLE: THE NEW DEATH PENALTY 1, 36–37 (Austin Sarat, ed. forthcoming 2012) (on file with author) [hereinafter Bowers, LWOP].

53. 1 WILLIAM BLACKSTONE, COMMENTARIES, *62; Bowers, *LGNI*, *supra* note 1, at 1672 ("*Complete justice* demands both the *simple* justice that arises from fair and virtuous treatment and the *legal* justice that arises from the application of legal rules."); see also Bowers, LWOP, *supra* note 52 (manuscript at 36–37).

54. See Bowers, *LGNI*, *supra* note 1, at 1655, 1657–58.

inappropriate cases at the point of charge.⁵⁵ That is, legal professionals tend not to particularize adequately, but instead to sort cases into boxes and process them accordingly.⁵⁶ Finally, I offered data that show counterintuitively (but consistent with the institutional incentives and cognitive biases that I identified) that petty nonviolent public-order cases, in fact, are prosecuted at a far higher rate than violent felony cases involving concrete victims.⁵⁷

In this Subpart, I plan to highlight certain arguments in favor of *sharing* equitable discretion between a lay body and the professional executive. I do not intend to say that lay and local intuition is decidedly superior, only that *some* lay and local involvement is better than *none* when it comes to resolving equitable charging questions in normatively borderline cases.⁵⁸ As I explained previously:

It is no simple task to determine how to optimally allocate sentencing discretion, but it is clearer that the answer ought not to be an exclusive grant of decision-making authority to the least transparent and most interested actor. Instead, the objective ought to be a *sharing* of power. Different institutional actors possess different proficiencies, and the criminal justice system ought to allocate discretion to tap respective competencies.⁵⁹

This, then, is where the conventional wisdom goes wrong. It is well established that the prosecutor need give no reason for a decision to charge.⁶⁰ As long as the prosecutor stays within applicable legal limits (that consist of only probable cause and the rarely implicated constitutional doctrines of double jeopardy and selective, vindictive, or retaliatory prosecution), then her reasons for charging are taken to be her own.⁶¹ I do not deny that the prosecutor is most competent to determine office priorities and

55. *See id.* at 1660, 1702.

56. Bowers, LWOP, *supra* note 52 (manuscript at 17) (“[T]he prosecutor is a trained professional, and the trained professional typically develops heuristics that may frustrate adequate contextualization.”). According to Blackstone, such dependence on “established rules and fixed precepts” has the capacity to “destroy [equity’s] very essence” by “reducing it to positive law.” 1 BLACKSTONE, *supra* note 53, at *61–62.

57. Bowers, LGNI, *supra* note 1, at 1716–17.

58. JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 18 (1994) (“[L]ocal knowledge . . . qualifies the juror[s] to understand the facts of the case and to pass judgment in ways that a stranger . . . could not. . . . [T]hey know the conscience of the community and can apply the law in ways that resonate with the community’s moral values and common sense.”).

59. Bowers, LWOP, *supra* note 52 (manuscript at 24).

60. Bowers, LGNI, *supra* note 1, at 1659–60 (describing conventional wisdom).

61. *Id.*

evidentiary strength of cases. That is, she is the *administrative* and *legal* expert and ought to be empowered to exercise significant discretion within these domains. But she has no special claim against lay people to the evaluative art of equitable discretion. To the contrary, her equitable perspective is complicated by her professional position, whereas the lay decision maker is free to make moral judgments with fresh eyes that are unclouded by institutional incentives and biases. This is what one nineteenth century legal scholar referred to as the jury's "downright common sense, unsophisticated by too much learning."⁶² Indeed, even Justice Rehnquist observed that the lay juror's "very inexperience is an asset because it secures a fresh perception . . . , avoiding the stereotypes said to infect the judicial eye."⁶³

As the historical grand-jury instruction detailed above made plain, on moral questions the lay decision maker may trust her "Good Sense & understanding" of right and wrong.⁶⁴ In this way, moral questions are eminently accessible to the layperson and distinctly within her capacity.⁶⁵ Specifically, on the question of whether to charge, the layperson need determine only whether it is appropriate to prosecute the offender, notwithstanding legal guilt. Unlike the legal inquiry, this equitable inquiry demands no specialized or technical training and, accordingly, no instruction from the prosecutor—just an intuitive judgment grounded in

62. Edward R. Wilder, *Trial of Issues of Fact—Jury v. Judges*, 13 W. JURIST 391, 395 (1879).

63. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 355 (1979) (Rehnquist, J., dissenting). As I have written elsewhere:

This is a theme to which lower courts have returned repeatedly: that lay jurors are "not likely to get into the habit of disregarding any circumstances of fact, or of forcing cases into rigid forms and arbitrary classes;" that "the good sense of a jury . . . that take[s] a common-sense view of every question" is sometimes to be preferred to the judgment of the legal professional who "generalizes and reduces everything to an artificial system formed by study." These courts have recognized an Aristotelian insight: that evaluation of just deserts is not mechanistic and technical, but, instead, draws on practical wisdom about "the common concerns of life"—an intuitive kind of wisdom that the layperson consults naturally.

LWOP, *supra* note 52 (manuscript at 21) (quoting *Hamilton v. People*, 29 Mich. 173, 190 (1874); *State v. Williams*, 2 Jones L. (47 N. Car.) 257, 269 (1855); *State v. Schoenwald*, 31 Mo. 147, 155 (1860)).

64. NELSON, *supra* note 30, at 26.

65. As I have written elsewhere:

There are plausible reasons to believe that lay bodies contextualize the retributive inquiry better than legal technicians do. More than the professional, the layperson has the capacity and inclination to cut through the thicket of legal and institutional norms (that are not the layperson's stock in trade) to the equitable question of blameworthiness that is and ought to be central.

LWOP, *supra* note 52 (manuscript at 20–21).

experiential wisdom.⁶⁶ And because a lay body—by its very nature—brings a deinstitutionalized perspective to the charging decision, there may be value to a normative grand jury independent of the question of whether it is genuinely representative of the relevant community. Concretely, a grand jury may better exercise equitable discretion not only because it is local but also because it is lay.

But, of course, from a community-prosecution standpoint, it is critical that the body represent the relevant community (in whatever way that community may be defined). And, notably, studies demonstrate that perspectives on blameworthiness and on the optimal balance between order and liberty tend to vary across communities. Thus, the problem with contemporary criminal justice is not just that it is *professionalized* but also that it is *centralized*, and that it thereby privileges one culturally constructed perspective above all others—specifically, the perspective of the professional law-enforcement community.

Even if this is not the wrong perspective, it is an incomplete perspective. Bill Stuntz recognized this, terming this lack of local perspective in criminal justice a “governance problem”: “[For t]he detached managers of urban criminal justice systems . . . criminal justice policies are mostly political symbols or legal abstractions, not questions the answers to which define neighborhood life. Decisionmakers who neither reap the benefit of good decisions nor bear the cost of bad ones tend to make bad ones.”⁶⁷

By contrast, the historically disadvantaged communities that are the inordinate focus of both public-order crime and its enforcement have opportunities to observe firsthand the effects of order-maintenance policing and prosecution. Thus, they are well situated to evaluate whether enforcement efforts do more harm than good within the particular context of the particular case.

66. Josh Bowers, *Blame by Proxy: Political Retributivism & Its Problems, A Response to Dan Markel*, 1 VA. J. CRIM. L. (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1945743 [hereinafter Bowers, *Blame by Proxy*] (“[T]he full measure of moral blameworthiness is to be found in neither code nor casebook—court nor classroom. It is the product of neither executive nor judicial pronouncement. To the contrary, it arises out of the exercise of human intuition and practical reason, applied concretely to the particular offender and his act.”); Bowers, *LGNI*, *supra* note 1 at 1725–26 (“[P]rofessionals are not so uniquely competent to reach normative determinations, and lay bodies are not so obviously inept. Accordingly, the criminal justice system should experiment with charging decisions to find some interval for lay participation in the [inculpation of another.]”) (internal quotation marks omitted).

67. Stuntz, *Unequal Justice*, *supra* note 7, at 1974; WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 7–8 (2011) [hereinafter, STUNTZ, *COLLAPSE*] (“If criminal justice is to grow more just, those who bear the costs of crime and punishment alike must exercise more power over those who enforce the law and dole out punishment.”).

On this score, I do not claim on original insight. Rather, Stuntz explored previously this balance:

[R]esidents of *all* neighborhoods have two warring incentives. On the one hand, they want safe streets. . . . On the other hand, they are loath to incarcerate their sons and brothers, neighbors and friends. . . . The balance between those warring incentives looks quite different . . . to [those] outside the communities where crimes happen and punishment is imposed.⁶⁸

And, Tracey Meares and Dan Kahan offered a similar argument: “[Members of communities affected by order-maintenance policing] are excruciatingly sensitive to the individual and societal costs of invasive policing, there’s no basis for court[] [actors] to presume that they are better situated than the members of these communities to determine . . . a reasonable trade off between liberty and order.”⁶⁹

The value of lay and local participation in criminal justice cannot be overstated (even as it has been underused by the contemporary justice system). It is “the judgment of community condemnation” that justifies imposition of the criminal sanction.⁷⁰ But the more criminal justice is refracted through a professional prism, the less it comes to reflect its justificatory source. Nowhere is local control more critical than in the order-maintenance context, but, unfortunately, nowhere is case-specific lay oversight more absent.

As I hinted in the last Subpart, this was not always the case. At common law, “keeping the peace” (or what we might call order-maintenance enforcement today) was not a professional enterprise; it “was not about applying a particular set of rules” but was about public involvement in “a communal legal culture” that “depended on the presence and participation of people in local communities.”⁷¹

68. Stuntz, *Unequal Justice*, *supra* note 67, at 1981–82; *see also id.* at 2040 (“From the perspective of those who pay for the never-ending battle against crime in the coin of safety and freedom, criminal justice is no longer an exercise in self-government—not something that residents of high-crime neighborhoods do for themselves, but something people who live elsewhere do to them.”).

69. Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crises of Criminal Procedure*, 86 GEO. L.J. 1153, 1168 (1998) (arguing in favor of deferring to inner-city judgments about the balance of liberty and order).

70. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958).

71. Jessica K. Lowe, *A Separate Peace? The Politics of Localized Law in the Post-Revolutionary Era*, 36 LAW & SOC. INQUIRY 788, 793 (2011) (discussing and quoting LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* 65 (2009)); *see also* STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012). In his brilliant article, Bill Stuntz attributes to the influence of local democracy the relative egalitarian nature of urban criminal justice in the Gilded Age, and

Of course, there are valid reasons—readily illustrated by the historical record—to worry that such unfiltered expressions of community condemnation could undermine ordered and evenhanded justice. But recognition of the limits of public participation does not entail its wholesale rejection. To the contrary, the elusive answer to the question of how to allocate discretionary authority is to find the right balance.⁷² In striking that balance, the system ought to consider which decision makers' judgments "are most fully amenable to public scrutiny."⁷³

This, then, is why the need is so great for some kind of normative screen in petty public-order cases. It is in this domain that the criminal justice system has moved furthest away from its roots as a lay "exercise in self-government," yet it is in this very domain that local input from the residents of high-crime neighborhoods is integral to the balance between the costs of order-maintenance crime and the positive and negative effects of enforcement efforts to maintain order.⁷⁴

B. *The Limits of Legal Limits*

At the point of charge (and even at the point of disposition), legal hurdles—like evidentiary sufficiency—are relatively inconsequential to the processing of order-maintenance cases. First, legal checks do little to constrain prosecutorial discretion, because prosecutors lack the information to identify legally weak cases.⁷⁵ Specifically, order-maintenance cases appear legally fungible to prosecutors because these prosecutors have access to only skeletal police paperwork that tends to mask evidentiary shortcomings or other legal problems.⁷⁶ And prosecutors are unlikely to learn much new in the days or mere hours between initial charge and final plea.⁷⁷ Indeed, as I have previously explored, when it comes to petty

"[n]owhere was the power of local democracy more evident than in battles over vice." Stuntz, *supra* note 7, at 1975, 1996.

72. Bowers, *LGNI*, *supra* note 1, at 1725; Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1104, 1145 (2005) (arguing that granting local minorities the authority to decide may serve as a "counterweight" to the prevailing dominant "influence model"); Douglas E. Litowitz, *Kafka's Outsider Jurisprudence*, 27 LAW & SOC. INQUIRY 103, 132–33 (2002) ("[B]oth insider and outsider perspectives have an important role to play in any comprehensive account of law [O]utsider and insider perspectives can mediate each other The goal is to play multiple perspectives against each other in a kind of hermeneutic conversation").

73. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 362–64 (1996).

74. Stuntz, *supra* note 7, at 2040.

75. Bowers, *LGNI*, *supra* note 1, at 1701–02.

76. *Id.* at 1702.

77. *Id.* at 1705–06.

cases, all parties tend to bargain in the shadow of process costs, not in the undeveloped shadow of trial prospects.⁷⁸

Second, legal checks do little to constrain prosecutorial discretion because prosecutors enjoy so many substantive options to lawfully—even if inequitably—pursue charges. That is, most police observations of public disorder are sufficient to demonstrate violation of multiple criminal statutes. Here, I need not rehearse the by-now unoriginal, but almost certainly accurate, over-criminalization literature.⁷⁹ Suffice it to say, modern criminal codes cover a breathtaking amount of conduct that is not quite intrinsically bad but that is nevertheless contrary to the conventional order. Moreover, even after the criminal-procedure revolution of the 1960s, the Court continues to provide significant discretionary authority to both police and prosecutors.⁸⁰ Put simply, criminal codes and even constitutional search and seizure law serve less to impose limits and more to create opportunities—opportunities for police to discover evidence and make arrests and, thereafter, for prosecutors to charge.

Comparatively, when it comes to order-maintenance prosecutions, *extralegal* considerations carry potentially greater weight.⁸¹ In a world where so many people are subject to arrest and prosecution, authorities must *pick and choose* between the technically guilty offenders.⁸² Such discretionary justice is not *per se* problematic—indeed, it may be desirable—as long as discretion is exercised appropriately. But, of course, whether discretion is exercised appropriately is the big question—perhaps the biggest question in all of criminal law and procedure. My hope is not to solve that puzzle (were it even solvable). Rather, I intend only to spotlight that legal limits—standing alone—are incapable of adequately promoting desirable discretion while constraining arbitrary actions or outright oppression.

78. Bowers, *Punishing*, *supra* note 1, at 1134 (“In low-stakes cases, process costs dominate . . .”).

79. Bibas, *Transparency*, *supra* note 2, at 932–34 (“[C]riminal laws do not create binding obligations but rather a menu of options for [professional] insiders.”); *see also* Bowers, *Blame by Proxy*, *supra* note 67, at 1; Bowers, *LGNI*, *supra* note 1, at 1693–96, 1698, 1700–04; ; William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2554, 2557–58 (2004)[hereinafter Stuntz, *Plea Bargaining*]; Stuntz, *Unequal Justice*, *supra* note 7, at 2001 (“Laws like these give prosecutors more cards to play . . .”).

80. *Hartman v. Moore*, 547 U.S. 250, 265–66 (2006); *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001); *Whren v. United States*, 517 U.S. 806, 813, 818–19 (1996); *Bordenkircher v. Hayes*, 434 U.S. 357, 358, 364–65 (1978); *People v. Robinson*, 767 N.E.2d 638, 642 (N.Y. 2001).

81. Bowers, *LGNI*, *supra* note 1, at 1693–96, 1700–04, 1708; *see also supra* notes 49–50, 52 and accompanying text.

82. Stuntz, *Self-Defeating Crimes*, *supra* note 6, at 1892; Stuntz, *Race, Class, and Drugs*, *supra* note 49, at 1795, 1831.

In this vein, the normative grand jury—with its *extralegal* focus—could provide a valuable alternative check on the prosecutor’s ability to make the criminal case. More importantly, the normative grand jury would provide a *thin check* only. That is, the normative grand jury would not touch the prosecutor’s *legal* discretion. This is critical because it may be that police and prosecutors appropriately require significant *legal* discretion to make arrests and *initiate* charges. (I am skeptical that they need the almost plenary grants of arrest and charge authority that they possess, but I am willing to concede the point for present purposes.) Thus, the normative grand jury would leave undisturbed these legal rules and standards intended to facilitate effective policing and prosecution. The body would merely provide a buffer between the police and the prosecutor and between the prosecutor and her desired charge—a buffer analogous to the “circuitbreaker . . . in the state’s machinery of justice” that Justice Scalia envisioned for the petit jury in *Blakely*.⁸³

By way of example, consider pretextual stops, arrests, and prosecutions. Currently, police and prosecutors have unfettered authority to investigate and enforce a lesser offense as a proxy for a suspected serious offense.⁸⁴ As a *legal* matter, this may be the right approach. Generally, we may want to allow police and prosecutors to exploit traffic offenses and low-level regulatory crimes as a means to effectively fight the wars on drugs and terrorism. But it does not follow that we consider all pretextual stops, arrests, and prosecutions to be equitable—that is, to be fair exercises of legal authority. The normative grand jury would have the power only to evaluate the *equitable* reasonableness of the pretextual criminal charge separate from the legal grant of authority—that is, separate from the rule that pretextual investigations and prosecutions are *constitutionally* permissible. In short, the normative grand jury would be able only to short-circuit a normatively problematic use of pretext. It would be unable to undo the legality of pretext in the first instance. The prosecutor could still seek the charge. She just might fail to win it. Thus, the grand jury would ask and answer the narrow question of whether *this* offender should be charged with *this* offense, whereas a subsequent grand jury would assess a subsequent case on its own contextualized terms.

83. *Blakely v. Washington*, 542 U.S. 296, 306–07 (2004); *see also* *Williams v. Florida*, 399 U.S. 78, 100 (1970) (observing that the value of the jury “lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen”); Jenia Iontcheva Turner, *Implementing Blakely*, 17 FED. SENT’G REP. 106, 111 (2004) (noting that the Court’s reasoning in the *Blakely* line of cases extends also to “moral . . . decision-making”).

84. *See, e.g., Whren*, 517 U.S. at 813 (permitting pretextual traffic stops by narcotics officers); *Costello v. United States*, 350 U.S. 359, 359–61 (1956) (involving pretextual tax-evasion prosecution of suspected mobster).

In this way, the normative grand jury sidesteps a principal and persuasive objection to the conventional exercise of jury nullification: that jury nullification renders law a subjective manifestation of what the community believes it to be.⁸⁵ In the case of petit jury nullification, the objection holds true, because the trial jury is tasked appropriately with a determination that is decidedly *legalistic*—that is, the bottom-line determination of legal guilt. But, as indicated, the *charging* decision descriptively and properly involves more than legal analysis, and, therefore, a decision to decline prosecution affects the *shape* of the law less directly, if at all. Thus, the grand jury's exercise of equitable power is qualitatively different than impermissible jury nullification. The grand jury is merely sharing equitable authority with another actor to whom such authority is already lawfully entrusted. On this score, Roger Fairfax has argued that a grand jury's "robust" exercise of discretion is wholly consistent with its "intended constitutional role" as more than "a mere probable cause filter."⁸⁶ According to Fairfax: "The term 'grand jury nullification' is somewhat of a misnomer [T]he term has pejorative connotations, . . . does not capture the essence of the enterprise of the grand jury's exercise of discretion, . . . and unfairly yokes grand jury discretion with petit jury nullification without careful consideration."⁸⁷ Grand jury discretion operates as a one-off check on the equities, but leaves the applicable law firmly in place.

This all highlights a critical insight: when it comes to concerns over the abuse of discretion, it is often not law that fails but equity and its lack of exercise.⁸⁸ Or, rather, as I intend to argue in a separate article, it is the law's failure to accommodate opportunities for the transparent and honest expression of equity by actors willing and able to make normative judgments unclouded by institutional

85. See generally Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996).

86. Fairfax, *supra* note 20, at 720.

87. *Id.* at 708 n.10; see also *id.* at 717 (discussing the "long shadow cast by petit jury nullification" and how "deep skepticism" toward this type of nullification animates much of the scholarship and law); Kuckes, *supra* note 21, at 1269 n.19 ("[J]ury nullification . . . criticisms do not readily apply to grand juries, which have the valid power to decline prosecution even on meritorious criminal charges."); Simmons, *supra* note 12, at 48 ("The term 'grand jury nullification' is . . . a misnomer because it equates the grand juror's *proper* exercise of discretionary judgment with a trial juror's *improper* decision to acquit those whom have been proven guilty."). I must concede that, several years ago, when I first considered the normative function of the grand jury, I too used the term "grand jury nullification." Josh Bowers, *Grand Jury Nullification: Black Power in the Charging Decision*, in CRIMINAL LAW CONVERSATIONS, *supra* note 40, at 578, 578. However, I have since come to the conclusion that nullification is the wrong label.

88. Bowers, *Equitable Constraints as Rules of Law*, *supra* note 19.

incentive and cognitive bias.⁸⁹ Unfortunately, but predictably, lawyers and legal academics have tended to focus reform energies on legal fixes and have largely ignored potential fixes that lie *beyond* law (or at least beyond what is conventionally considered to be law). But legal constraints on discretion effectively may carry only so far. Legal grants of authority may be over-inclusive but, if narrowed, they may underperform. Aristotle understood this:

[T]he law takes account of the majority of cases, though not unaware that in this way errors are made. *And the law is none the less right; because the error lies not in the law nor in the legislator but in the nature of the case; for the raw material of human behavior is essentially of this kind.*⁹⁰

Legal professionals understand this as well, but by dint of training or perhaps even self-interest they have concluded that there are no limits beyond the limits of law—save for electoral politics that can provide almost no case-specific oversight. This professionalized and technocratic conception is misguided, however. Equitable oversight offers a supplemental and almost untapped reservoir for the effective regulation of executive exercises of discretion.

There is nothing new to this insight. Aristotle recognized it, as have modern philosophers and historians. For example, Laura Edwards has argued that an overdependence on legal limits in the slaveholding South vindicated the “absolute” discretionary “power of the master” within those domains that fell without law.⁹¹ By contrast, the interests of marginalized groups—like slaves, women, and the poor—were better protected by “localized” efforts that “eschewed systemization,” that “valued personalized justice,” and that focused “more on people and their problems than on statutes and legal rules.”⁹²

Still, what of the objection that localized efforts—here, a lay normative charging screen—risk arbitrariness or, worse still,

89. *Id.*; see also Kahan & Nussbaum, *supra* note 73, at 374 (“It is when the law refuses to take responsibility for its most contentious choices that its decisionmakers are spared the need to be principled, and the public the opportunity to see correctable injustice.”).

90. ARISTOTLE, *THE NICOMACHEAN ETHICS*, at 1137b 14–20 (J.A.K. Thomson & Hugh Tredennick trans., Penguin Classics rev. ed. 2004) (c. 384 B.C.E.).

91. LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* 239–40 (2009) (quoting *State v. Mann*, 13 N.C. (2 Dev.) 263, 266 (1829)).

92. Lowe, *supra* note 71, at 790 (describing, but not fully subscribing to, Edwards’ perspective); cf. Stuntz, *Unequal Justice*, *supra* note 7, at 2031–32 (discussing criminal justice in the Gilded Age and concluding that “moderation and equality” depend upon putting equitable discretion “in the hands of residents of those neighborhoods where the most criminals and crime victims live.”).

discrimination or majoritarian tyranny?⁹³ The pithy response is that the concern applies also to the current charging paradigm. Indeed, bias and discrimination are endemic to any discretionary system.⁹⁴ And, as indicated, it is already well established that the prosecutor freely may decline equitably to pursue any legally sufficient charge.⁹⁵ Thus, the immediate choice is not between a proposed discretionary regime and a preexisting determinate charging regime; it is the choice about who may exercise equitable discretion and whether it should remain within the prosecutor's exclusive domain.

There are powerful arguments that leaving such decisions to prosecutors promotes consistency and minimizes caprice. But the arguments are not unassailable. On the one hand, prosecutorial charging decisions may be constrained by office-wide policies and practices.⁹⁶ On the other hand, as indicated, prosecutorial charging decisions may be shaped by institutional incentives and biases that do not correlate with normative blameworthiness or particularized justice. Indeed, Bill Stuntz has attributed partially the lack of equal treatment in the criminal justice system to the decline of local democracy in law enforcement.⁹⁷ Moreover, the lay body may

93. YOUNGER, *supra* note 48, at 128–29 (noting grand jury refusals to charge members of the Ku Klux Klan); Simmons, *supra* note 12, at 14 (discussing grand jury refusals to charge whites with violence against African-Americans in the reconstruction south); Fairfax, *supra* note 20, at 722.

94. Bibas, *Forgiveness*, *supra* note 15, at 347 (“[A]ll of these concerns are legitimate but far from fatal. Discrimination, arbitrariness, and variations in temperament, eloquence, and attractiveness are endemic problems in criminal justice. Remorse, apology, and forgiveness are at least neutral metrics and criteria to structure and guide discretion.”); *cf.* KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 21 (1969) (“[T]he conception of equity that discretion is needed as an escape from rigid rules [is] a far cry from the proposition that where law ends tyranny begins.”).

95. Courts have indicated that it is appropriate for prosecutors to exercise such equitable discretion. *Pugach v. Klein*, 193 F. Supp. 630, 634 (S.D.N.Y. 1961) (“[The prosecutor never has a] duty to prosecute [because] problems are not solved by the strict application of an inflexible formula. Rather, their solution calls for the exercise of judgment.”). For an argument that equitable charging discretion is inevitable, desirable, and ultimately under-exercised, see generally Bowers, *LGNI*, *supra* note 1.

96. However, it should also be noted that such policies and practices constrain not only arbitrary decision making, but also decision making that is appropriately sensitive to the equities of the particular case.

97. Stuntz, *Unequal Justice*, *supra* note 7, at 1973, 1976, 1995, 2012, 2031–33, 2039 (arguing that “equality and local democracy go hand in hand” and that public and locally accountable exercises of equitable discretion “promot[e] consistency, not arbitrariness”); *see also* Bowers, *LGNI*, *supra* note 1, at 1676 (“By embracing case-specific equitable valuation, the system is not any less consistent per se (even if the inevitable inconsistencies are more apparent); in fact, such a system may even be more consistent and less arbitrary, especially where normative judgments are made by locally responsive and comparatively more transparent lay collectives.”).

promote consistency by virtue of the simple fact that it is a *collective* body that requires a majority to act.⁹⁸ In other words, an idiosyncratic prosecutor may derail a pending charge; an idiosyncratic grand juror may not.⁹⁹

In any event, the question is not whether a lay body—acting alone—could exercise charging discretion more consistently than the professional prosecutor, because the immediate proposal does not seek to allow the lay body to act on its own. Rather, the proposal is to *share power*—to provide an interval for both groups to participate *collaboratively*. Again, the prosecutor would retain the power to initiate charges—perhaps even to resubmit rejected charges to a separate normative grand jury.¹⁰⁰ In this way, the prosecutor would have the first (and perhaps middle) word, but the normative grand jury would have the last. Such cooperation is at the core of what counts for community-prosecution advocates.¹⁰¹

More importantly, such cooperation is at the core of what constitutes moderate and evenhanded exercises of discretion.¹⁰² The

98. Fairfax, *supra* note 20, at 715 n.49 (indicating that, unlike a petit jury, a single holdout cannot derail a prospective charge).

99. See Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 485 (1997) (“The jury may be a superior institution to fill the factfinding role if for no other reason than that it is a group decisionmaking body rather than a single individual.”); see also Laura Appleman, *The Plea Jury*, 85 IND. L.J. 731, 753 (2010) (“There is an undeniable advantage [to] having a group, instead of a single actor . . . since the breadth of a group’s experience is necessarily much wider than just one, regardless of expertise.”).

100. Double jeopardy would not apply to the rejected charges. BEALE, *supra* note 34, § 8:6 (“Double jeopardy imposes no bar to resubmission because the grand jury has determined only that the evidence presented did not establish probable cause to indict the accused.”); see *Crist v. Bretz*, 437 U.S. 28, 29 (1978) (“[J]eopardy attaches when the jury is empanelled and sworn.”). However, if the normative grand jury is to be more than toothless, I would think there would need to be some reasonable limits on resubmission. See Simmons, *supra* note 12, at 19 (“[A]llowing re-submissions prevents the grand jury from acting as an effective check on the prosecutor . . . since the state effectively can ignore any action the grand jury takes without legal repercussions.”); *id.* at 9 (“Of course this defiance did not help Colledge in the end. . . . [T]his second grand jury dutifully indicted Colledge, and he was immediately tried and executed.”); see also Leipold, *supra* note 21, at 281–82. Perhaps, the prosecutor would be permitted to resubmit upon a showing of probable jury bias or other improper motivation. Significantly, a minority of states do limit statutorily the authority of prosecutors to resubmit charges. BEALE, *supra* note 34, at § 8:6.

101. Alfieri, *supra* note 9, at 1469 (“Community-prosecution programs . . . affor[d] opportunities for citizen-state collaboration and . . . encourag[e] grassroots justice initiatives.”); Thompson, *supra* note 9, at 354–55, 360 (noting the decentralization, accountability, and collaboration involved in contemporary community prosecution programs).

102. Margareth Etienne, *In Need of a Theory of Mitigation*, in CRIMINAL LAW CONVERSATIONS, *supra* note 40, at 630, 631 (“[T]o leave these hard questions in the hand of any one institutional actor—the judge, jury (or commonly, the

normative grand jury would demand a kind of “reason giving” that would limit the discretion of the prosecutor even as it provided discretion to the lay body. In this way, the body would not serve obviously to undermine consistency and other rule of law values, and could very well promote them, as highlighted by the expansive literature on the virtues of “reason giving.”¹⁰³ As Stuntz explained: “[W]hen prosecutors have enormous discretionary power, giving other decisionmakers discretion promotes consistency, not arbitrariness. *Discretion limits discretion*; institutional competition curbs excess and abuse.”¹⁰⁴ Both sets of actors—the lay and the professional—have constructive roles to play in making discretionary judgments and constraining the discretion of others.¹⁰⁵

At the risk of repetition, it is worth revisiting an earlier point: the contemporary criminal justice system operates according to the sometimes-misguided assumption that normative evaluation is secondary to mechanistic legal determinations. In fact, as explored, the assumption is flat wrong in some contexts. Specifically, when it comes to the enforcement of public-order crimes, equitable evaluation plays the more robust role. The legal limits are so spartan that the prosecutor’s capacity (if not her will) to exercise discretion may be considered closer to a kind of sovereign grace.¹⁰⁶ This fact, however, remains largely unappreciated precisely because the premise that legal limits matter serves to mask the operative principle of equitable discretion. The cost of this state of affairs is not just a lack of transparency and honesty, but a systemic tendency to consistently shuttle evaluative authority to the least transparent

prosecutor)—is to leave that group susceptible to accusations of caprice and lawlessness.”).

103. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 657 (1995) (“[W]hen institutional designers have grounds for believing that decisions will systematically be the product of bias, self-interest, insufficient reflection, or simply excess haste, requiring decisionmakers to give reasons may counteract some of these tendencies.”); Mathilde Cohen, *Comparing Reason Giving* (unpublished manuscript) (on file with author) (observing that reason giving may “encourag[e] consistency . . . and promot[e] the rule of law . . . [because] [t]he practice of reason-giving limits the scope of available discretion over time by encouraging judges to treat similarly situated cases alike and to treat differently situated cases differently”).

104. Stuntz, *supra* note 7, at 2039 (emphasis added).

105. As I observed previously:

[T]he risk of abuse of equitable discretion is endemic—as is the risk of abuse across human endeavors. But this endeavor ought not to be abandoned just because unchecked equitable discretion paradoxically may empower decision-makers to behave inequitably by, for example, exacerbating the oppressive treatment of traditionally subjugated groups. The risk of abuse merely underscores the need for conscientious institutional and legal design intended to express and cabin equitable discretion optimally.

Bowers, LWOP, *supra* note 52, (manuscript at 15–16).

106. *Id.*; Bowers, *Equitable Constraints as Rules of Law*, *supra* note 19.

actors—the professional prosecutors and police. Martha Nussbaum and Dan Kahan have made this point:

[R]ecognizing the evaluative conception of emotion in criminal law . . . can actually make it better, particularly if responsibility . . . is properly allocated among different decisionmakers. . . . [By contrast,] mechanistic doctrines will not stop . . . inappropriate . . . motivations. They only drive those assessments underground.¹⁰⁷

This perception serves not only “to disguise contentious moral issues,” but to promote autocratic decision making that, in the long run, promotes (or at least readily allows) arbitrariness and caprice.¹⁰⁸

Nevertheless, I concede that arbitrariness and caprice are intractable concerns—concerns that are not incontrovertibly allayed by my proposal to share equitable discretion. However, as I noted in the introduction, the immediate proposal is not intended for all jurisdictions, but principally only for those majority-minority jurisdictions that are committed to the community-prosecution enterprise already (and that are also most affected by public-order crime and its enforcement). In these relatively homogenous jurisdictions, there is some hope that the most problematic forms of arbitrariness and discrimination may be minimized, albeit not eliminated.¹⁰⁹ Indeed, as I detail in Part IV, one of the chief ancillary benefits of importing such a community-prosecution model is that it may counteract, as opposed to propagate, local perceptions of unequal justice, which, in turn, may promote normative and instrumental rule-of-law values and goals.

III. BRASS TACKS

How ought we structure a normative grand jury such that it could ensure both a robust and efficient screen over cases for which a necessary premium is put on speed? An unfortunate byproduct of the Warren Court’s constitutional procedural revolution is a perceived false choice between formal procedures and unfettered

107. Kahan & Nussbaum, *supra* note 73, at 360, 362–64 (indicating that efforts to strip or conceal exercises of equitable discretion may lead only to their arbitrary, “clumsy and offhand” expression).

108. *Id.* at 274; Dan M. Kahan, *Ignorance of Law is an Excuse— But Only for the Virtuous*, 96 MICH. L. REV. 127, 154 (1997) (“The moralizing that occurs with [the] criminal law . . . [is] on balance a good thing, and [is] probably inevitable in any event, but [it] ought at least to be made openly.”); *cf.* Schauer, *supra* note 103, at 658 (noting that when an official “announc[es] an outcome without giving a reason” she engages in an “exercise of authority.”).

109. Bibas, *Forgiveness*, *supra* note 15, at 331 n.6 (observing that lay participation in criminal justice probably works best in “homogenous communities”).

discretion. A separate option is informal procedure.¹¹⁰ It is an option that is ill suited to certain questions, like the bottom-line determination of legal guilt, but it may be ideally situated for a normative charging determination that is otherwise left to the unfettered discretion of the professional prosecutor.

Already, the historical grand jury provides an object lesson in (almost) workable informality. According to the Supreme Court, the early grand jury was an “institution [] in which laymen conduct[ed] their inquiries unfettered by technical legal rules.”¹¹¹ Indeed, to this day, the grand jury operates free of the evidentiary rules that typify trials and even pretrial hearings.¹¹² Thus, the grand jury may consider hearsay evidence, illegally obtained evidence, and otherwise incompetent evidence.¹¹³ In this way, the prosecutor is able to paint a complete picture for the grand jury and not just the picture to which she will be limited at trial.

The problem is that the prosecutor is typically *unwilling* to paint a complete picture. Thus, the grand jury provides an insufficient screen, not because it lacks *formality*, but because it lacks *inclusivity*. Specifically, the prosecutor’s *ex parte* presentation is unlikely to include the kinds of contextual arguments that auger in favor of charge mitigation or outright declination. This, then, is the most radical component of my proposal. If the normative grand jury is to be an effective community-prosecution tool, the defendant must be permitted to state his moral claim.¹¹⁴

It may seem odd to open the grand jury to the defendant and his attorney, and I concede that it is no small structural reform. However, it should be noted that a fraction of states already provide the defendant a right to testify before the grand jury.¹¹⁵ In any event, there is nothing sacrosanct about the prevailing structure of the grand jury. Indeed, it is inaccurate even to speak of a uniform or even dominant grand jury structure. To the contrary, Ric Simmons has observed that there are “over fifty different types of

110. See John Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 21 (1978) (proposing an informal “streamlined . . . procedure” as “a middle path between the impossible system of routine adversary jury trial and the disgraceful nontrial system of plea bargaining”).

111. *Costello v. United States*, 350 U.S. 359, 364 (1956); see also Simmons, *supra* note 12, at 5 (“[E]arly grand juries heard no evidence and did not even need to have firsthand knowledge of the cases that came before them . . .”).

112. FED. R. EVID. 1101(d).

113. See *United States v. Calandra*, 414 U.S. 338, 349–50 (1974) (holding that the grand jury may consider illegally obtained evidence); *Costello*, 350 U.S. at 363 (holding that the grand jury may consider hearsay).

114. See Simmons, *supra* note 12, at 24 (“[G]iving the defendant the right to testify makes sense if the grand jury is actually performing a broader, more political role.”).

115. *Id.* at 23–24 & n.103 (indicating that only four states provide defendant a statutory right to testify before the grand jury).

grand juries, each with its own unique blend of structural rules, procedural constraints, and informal culture.”¹¹⁶ In fact, even the notion of the grand jury as prosecutorial domain is historically dubious. At common law, the grand jury was closed not only to the defendant and his counsel but also typically to the prosecutor.¹¹⁷ Moreover, because the body is not even constitutionally required outside of the federal criminal justice system, jurisdictions are constitutionally free to reconstruct the institution however they may see fit.¹¹⁸ Put simply, a jurisdiction may implement freely an adversarial grand jury proceeding if it wishes.¹¹⁹

But just because an adversarial grand jury is constitutional (and even unoriginal) does not make it feasible. Efficiency concerns remain. And it may seem particularly farfetched that we can somehow expeditiously subject misdemeanor cases to an adversarial normative screen. The efficiency objection is two-fold: in most jurisdictions, there are *many more* misdemeanor than felony cases; and adversarial proceedings require more time and effort than *ex parte* proceedings. Indeed, order-maintenance cases are dubbed “disposables” precisely because they are considered unimportant and are meant to be resolved quickly and cheaply. Again, the objection is sound, but I am not without plausible responses.

A. *Extralegal Arguments*

Because of the unique mission and method of the normative grand jury, its proceedings may be cursory, yet not meaningless—that is to say, adversarial, yet not terrifically involved. Critically, the lawyers’ arguments would not concern *law*. Indeed, the normative grand jury could even be directed to *presume* legal guilt (or, at least, to consider the factual allegations in the light most favorable to the prosecution) in order to expeditiously proceed to the equitable particulars. The advantage of an extralegal screen is that it need not accommodate itself to technical and time-consuming

116. *Id.* at 16.

117. Indeed, remarking on the Colledge trial, King William III’s Solicitor General indicated that the “matter of admitting counsel to a grand-jury hath been . . . a very unjustifiable and unsufferable one.” Sir John Hawles, *Remarks on Colledge’s Trial*, 8 HOWELL’S STATE TRIALS 723, 724 (T. B. Howell ed., 1816). In his opinion, the grand jury “ought to . . . not rely upon the private opinion of counsel, especially of the king’s counsel, who are, or at least behave themselves as if they were parties.” *Id.* Likewise, in 1806, the United States Attorney for Kentucky sought admission to the grand jury that was considering the indictment of Aaron Burr. The request was taken to be “novel and unprecedented” and was denied. Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 734 (1972).

118. *See* *Hurtado v. California*, 110 U.S. 516, 538 (1884).

119. Nor am I the first to propose an adversarial grand jury. *See* Simmons, *supra* note 12, at 23–24 (discussing proposals to provide defendants rights to testify and present evidence and arguments to the grand jury).

legal forms. The lawyers' arguments would be brief and conclusory. That is, like its common-law progenitor, the normative grand jury would hear no evidence. Rather, the prosecutor would have a minutes-long opportunity to present her allegations (which the jury might be instructed to accept) and to provide relevant background information (for example, criminal record) that might weigh in favor of charging. Then, the defense attorney would have a minutes-long opportunity to offer a brief narrative, contextualizing the incident or the offender and illuminating the equitable reasons to forego charges.¹²⁰

Ultimately, equitable judgments are intuitive judgments, and, as social psychologists have demonstrated, intuitive judgments are, by nature, "spontaneous, . . . effortless, and fast."¹²¹ Thus, not only can lawyers be expected to make quick moral arguments to the normative grand jurors, but also the jurors can be expected to reach quick moral conclusions. Notably, then, from an efficiency standpoint, the chief virtues of the normative grand jury are those aspects that make the proceeding look least like a typical rule-bound full-dress criminal trial—that is, the informality of its procedures and the extralegality of its focus.

Again, although such a stripped-down adversarial procedure would be unconventional, it would present no evidentiary problems because no rules constrain what evidence a grand jury may hear or from whom. In any event, the kinds of arguments that I envision are not so unconventional as they might initially seem. Lawyers make extralegal arguments of this nature all the time, albeit in

120. Because the defense attorney would present the normative arguments for the defendant, there is less concern that the defendant would implicate himself. Cf. Simmons, *supra* note 12, at 23 (observing that, given the right, a defendant "will rarely testify" before a grand jury, because he "opens himself up to very real liabilities"). I should add that—at least in the petty-crime context—I find the concern with self-incrimination overblown because these cases so rarely proceed to trial in any event. Nevertheless, I am skeptical whether an efficient normative grand jury could include the presentation of testimony—either from the defendant or anyone else. An additional advantage of allowing the defense attorney to speak for the defendant is that it minimizes the risk that the grand jury would decline charges on the bases of such irrelevant factors as defendant charisma. See, e.g., Bibas, *Forgiveness*, *supra* note 15, at 347 ("Some offenders and some victims are more eloquent and attractive than others, which may increase their ability to win forgiveness and mercy."); Ekow Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 *CARDOZO L. REV.* 1019, 1020–21 (2004) (arguing that people read character signals to conclude—often incorrectly—that an actor is blameworthy in a particular situation).

121. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 *CORNELL L. REV.* 1, 7 (2007); see also Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 *PSYCHOL. REV.* 814, 817 (2001) (claiming that moral judgments are products of quick moral intuitions followed by after-the-fact moral reasoning).

contexts outside of charging. Simply put, there exist already adversarial models for the kinds of short and snappy equitable arguments I have in mind—to wit, bail hearings, plea negotiations, and discretionary sentencing proceedings.

B. Normative Models

Consider plea bargaining in misdemeanor cases. In their classic treatments of the subject, Milton Heumann and Malcolm Feeley both emphasized that plea negotiations have far more to do with “fleshing out . . . the setting and circumstances of the incident . . . [and] the defendant’s background” than the legal merits of the pending charges.¹²² Or take, for example, the typical misdemeanor bail hearing. The prosecutor and defense attorney offer the judge normative claims for and against release and its conditions, and the judge, for her part, reaches a decision that turns less on strength of case than on the persuasive force of the lawyers’ cursory equitable narratives. Thus, the bail determination relies on a holistic understanding of the contextualized factual circumstances of the alleged incident and the contextualized social circumstances of the alleged offender.

The normative grand jury would consider a similarly succinct set of normative arguments but with a different punch line: instead of requesting minimal bail or release on recognizance, the defense attorney would ask the body to decline the charges. This brief normative pitch could happen in the several minutes between counsel’s initial client interview (typically in the courthouse pens), and the defendant’s initial arraignment appearance. Moreover, because the substance of the normative pitch to the grand jury would be largely duplicative of the defense attorney’s normative pitches in favor of a lenient summary disposition or a release on

122. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 179 (1979) (noting that the defense attorney tries to individualize his client and distinguish the incident from the “normal” instance of the charged crime); *see, e.g., id.* at 164 (“You wouldn’t want to louse up this guy’s whole life for this measly prank.”); MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 32 (1977) (“You get . . . a first offender on a drunk driving case, and suppose the guy has got a wife and six kids [Y]ou get a [prosecutor] to say, ‘Hell, how am I going to cost this guy his job, getting him a divorce, blow his family, put his kids on welfare for six months’”); *id.* at 40 (“[H]ere’s a nice kid . . . he’s a college kid.”); *id.* at 109 (“Now look. He’s an old guy. He’s sixty-two years old, how about six months?”); *id.* at 151 (“Army backgrounds, both with tremendous records in the service, all kinds of citations and everything else, fully employed, good family backgrounds, no criminal records These men shouldn’t have felony records for the rest of their lives”); *see also* FEELEY, *supra*, at 162–65 (highlighting normative plea-bargaining arguments based on remorse, clean record, the potential loss of educational and employment opportunities, family and social support, and the bad character of the arresting officer).

favorable conditions, the substance of the initial client interview would adequately prepare the lawyer for all three sets of arguments. Finally, and significantly, because the defense attorney would offer an equitable narrative on behalf of her client, it would even be possible to keep the defendant out of sight in order to shield the defendant's race or ethnicity (or simply just his charm or repellence) from the grand jury, thereby minimizing any risk of arbitrary or discriminatory decision making.¹²³

C. Available Resources

But even a quick proceeding entails costs. And it would be fanciful to suppose that a jurisdiction could implement a normative grand jury without the infusion of additional resources. But it is important to keep perspective on the relevant baseline. As indicated, the immediate proposal is offered only for those jurisdictions that are committed to the community-prosecution project already. Thus, the right comparison is not to the cost of conventional criminal justice, but to the cost of other available community-prosecution initiatives.

In any event, there are reasons to believe that the costs of a normative grand jury could be kept down. First, to the extent the normative screen is effective and the grand jury declines to prosecute in some nontrivial proportion of cases, resources could be diverted to the grand jury from the courtrooms and lawyers' offices that would otherwise be required to process these cases to disposition. Second, and more provocatively, if I am right that conventional grand juries are *upside down*—that is, that they focus on the wrong cases (felony cases over which there is little normative disagreement)—then the system could divert grand jury resources *away* from the types of serious felony cases about which there is little normative disagreement, and toward the petty cases that raise more vexing equitable questions.¹²⁴ Third, there exists already a veritable untapped font of prospective normative jurors. Specifically, among citizens who report for petit grand jury duty, the most pervasive complaint is that time is wasted. Prospective jurors sometimes spend hours or even days waiting to be assigned to trial

123. See *supra* notes 88–99 and accompanying text.

124. For felony cases, courts could employ the cheaper mechanism of a magistrate's preliminary hearing, which—in that context—is also more effective, because a legal technician can be expected to do better assessing the legal determination of probable cause, and that legal determination is comparatively more important in the serious cases where selective enforcement and normative disagreement are less likely concerns. Indeed, a number of states have substituted preliminary hearings for grand jury proceedings in felony cases, and the data indicate that magistrates are somewhat likelier to reject proposed felony charges for lack of probable cause. ALLEN ET AL., *supra* note 28, at 1037.

jury panels.¹²⁵ Courts could make productive use of juror downtime by placing prospective jurors on normative grand juries. As indicated, the normative grand juror would require almost no instruction, because the body would apply no legal standard. The juror would be asked simply to listen to the parties and to decide whether the charge ought to proceed, all things considered.

Finally, even if the normative grand jury were to prove prohibitively costly across the mass of order-maintenance cases, it could be used still in a representative sample. That is to say, some screen is better than no screen when it comes to promoting the goals of community prosecution and constraining executive abuses of equitable discretion.

IV. CORE & ANCILLARY ADVANTAGES

Recall the core community-prosecution values—decentralization of authority, accountability, and collaboration.¹²⁶ The normative grand jury not only could serve these ends, but also a collection of ancillary expressive and instrumental objectives as well. First, the normative grand jury would inject a measure of public participation into a professional executive process where heretofore there is almost none. It would thereby make criminal justice not only more transparent but also more democratic.¹²⁷ Second, by this same measure, it would promote constructive dialogue between local communities and prosecutors (and even indirectly police) over what types of crimes should be charged and in which contexts.¹²⁸ Third, it would promote perceptions of procedural legitimacy, both by providing the defendant an opportunity to state his moral case and by fostering lay and local influence over criminal-justice practice.¹²⁹

A. *Transparency & Participation*

The normative grand jury would inject a measure of public deliberation and meaningful process into the adjudication of cases that are currently fodder for a professional assembly line only. As

125. See James N. Canham, *One Day, One Trial*, 16 JUDGES' J., no. 3, 1977 at 34, 36 ("Extended service leads to frustration and boredom, due often to under-utilization, and the resulting resentment towards the courts is not conducive to the dispensation of justice."); Joanna Sobol, Note: *Hardship Excuses and Occupational Exemptions: The Impairment of the "Fair Cross-Section of the Community"*, 69 S. CAL. L. REV. 155, 223 (1995) (citing studies and stating, "Our failure to use jurors efficiently is the principal reason why, for most citizens, jury duty is synonymous not with a meaningful opportunity to perform an important public service, but rather with aggravation and endless waiting [Jurors'] number one complaint about jury duty is that their time is wasted at almost every opportunity.").

126. See *supra* note 13 and accompanying text.

127. See *infra* Part IV.A.

128. See *infra* Part IV.A.

129. See *infra* Part IV.B.

indicated, petty public-order cases typically terminate with a summary plea after summary decisions to arrest and charge.¹³⁰ Thus, *any* lay oversight is *more* oversight, because almost no such cases currently proceed to trial—jury or otherwise. If nothing else, the normative grand jury would foster a kind of “democratic visibility” by requiring the prosecutor to give persuasive moral reasons for her decision to initiate criminal charges.¹³¹

Beyond cultivating transparency, normative grand juries would provide a mechanism for “distributing *participatory experiences* among citizens.”¹³² Heather Gerken has argued that such participatory experiences are essential to achieve the kind of dynamic and inclusive democracy that transcends mere electoral politics and its incomplete winner-take-all formula.¹³³ This is not to say that electoral politics are less than essential—only that they are incomplete. Electoral politics provide the engine for crime creation and criminal justice policy in the abstract. Jury politics complement electoral politics by providing an interval for contextualized democratic decision making—by bringing democracy down to the ground. Thus, in Gerken’s terms, juries provide “a tool for aggregation [] of community judgments [and] interpretations of the law . . . when we cannot all sit at the same table to hash out such questions.”¹³⁴ In this way, the immediate proposal is consistent with other “new governance” initiatives that endorse “bottom-up” democratic experimentalism controlled—or at least influenced by—the relevant stakeholders, as opposed to their ostensible representatives.¹³⁵

130. *See supra* p. 101.

131. Gerken, *supra* note 72, at 1122; *see also* Cohen, *supra* note 103, at 15 (“[R]eason-giving is fundamental to a democratic regime because free and equal citizens should be treated not merely as objects of rule-application and rule-making, but also as autonomous agents who take part in the law of their own society.”); Kahan & Nussbaum, *supra* note 73, at 363 (observing that professional decision-makers would be compelled “to accept responsibility for their moral assessments and to give reasons for them in a public way.”); Schauer, *supra* note 103, at 658 (“[G]iving reasons becomes a way to bring the subject of the decision into the enterprise . . . and a way of opening a conversation rather than forestalling one.”).

132. Gerken, *supra* note 72, at 1143–44; *see also* Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748 (2005) [hereinafter Gerken, *Dissenting*] (advocating disaggregated democratic institutions—like juries—that provide decision-making authority to conventionally powerless political minorities).

133. *See generally* Gerken, *supra* note 72.

134. *Id.* at 1138; *see id.* at 1106 (arguing that “[d]isaggregated institutions” have the benefit of “facilitating mass participation and aggregating community judgments”).

135. Howard Erlanger et al., *Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 357; *see, e.g.*, STUNTZ, COLLAPSE, *supra* note 67, at 11 (“[T]he more urgent need is for a better brand of politics: one that takes full account of the different harms crime and punishment do to those who suffer them—and one

Importantly, by permitting lay and local bodies to implement centralized legislative commands, the system conveys a “sign of trust” and “an acknowledgement of equal status” to electoral minorities.¹³⁶ These groups are granted the dignity not only to participate but “the *dignity to decide*.”¹³⁷ And, significantly, the more out-groups that are granted the dignity to decide collaboratively with in-groups, the more out-group members are likely to buy into the process—to take active, as opposed to apathetic, roles; to, therefore, “see the law as *theirs*.”¹³⁸ And this, in turn, may serve to meliorate, as opposed to exacerbate, perceived and genuine divisions along lines of race and class.¹³⁹

Moreover, the normative grand jury would facilitate democratic participation and expression *early and often*. The charge is prerequisite to *all* criminal prosecution; by contrast, the jury trial is alienable (and often unavailable in misdemeanor cases).¹⁴⁰ Thus, trial juries provide an anemic, or at least highly infrequent, normative check. By contrast, normative grand juries could review most all petty cases and thus provide participatory experiences to a more significant proportion of the citizenry.¹⁴¹

A related advantage is that the normative grand jury would educate the public about law-enforcement objectives and efforts and would give the public an opportunity to provide feedback on particular or prospective exercises of state power. The interaction would be dialogic in that the state also could learn what its citizenry was willing to tolerate and in what circumstances. For example, the public might approve overwhelmingly of law-enforcement’s order-maintenance initiatives, in which case it would authorize most all public-order charges. Or it might reject what it perceives to be state

that gives those sufferers the power to render their neighborhoods more peaceful, and more just.”). See generally William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004).

136. Gerken, *supra* note 72, at 1143–44; cf. Schauer *supra* note 103, at 658 (“[G]iving reasons may be a sign of respect.”).

137. Gerken, *supra* note 72, at 1143–44.

138. *Id.* at 1147 (“[T]he more poor people and people of color are involved in the decisionmaking process, the more likely it is that members of these groups will take an active role in the process.”); see also Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1070 (1980) (“Power and participation are inextricably linked: a sense of powerlessness tends to produce apathy rather than participation.”); Gerken, *supra* note 72, at 1144–45 (“It may help electoral minorities feel that they have gotten a ‘fair shake’ from the majority, and thus feel more invested in the political process.”).

139. Gerken, *supra* note 72, at 1145 n.120.

140. See generally *Baldwin v. New York*, 399 U.S. 66 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

141. Appelman, *supra* note 99, at 760 (observing that “jury trials are few and far between” and that there is a systemic need for public participation exercised frequently).

overreach in certain order-maintenance domains, in which case it would be less deferential. In either event, the public would learn what professionals were doing, and the professionals would learn what the public was thinking. Moreover, the educative advantages would advance the democratic advantages not only by facilitating “community participation,” but also by promoting a sense of “shared responsibility” in the administration of criminal justice.¹⁴² Previously, I offered a similar argument in a related context:

[A]n equitable sentencing jury not only provides a democratic check on the prosecutor; it forces the jury to take *responsibility* for its punishment decision. It calls on laypersons to consider the potential punishment in light of the specific case, and—upon doing so—members of the sentencing jury are shaped and educated by that punishment decision going forward. Pithily, what they take away from the jury box, they may bring to the ballot box.¹⁴³

Thus, those who serve on normative grand juries could better learn the information necessary to hold politically accountable the district attorney, which, in turn, could provide a political incentive for police and prosecutors to adjust enforcement efforts to better reflect lay perspectives of justice and fairness.

Of course, it could be that police and prosecutors know better than the public what is in the public interest, in which case prosecutors could use normative grand juries (and other community-prosecution initiatives) as tools to emphasize the positive attributes of order-maintenance enforcement and to enlist the public in such enforcement efforts. From a community-justice perspective, this is the right incentive: prosecutors should be encouraged to provide the reasons for state action.

Community prosecution is intended to bridge an almost inevitable gap. Professional police and prosecutors are likely to share sets of beliefs that seem foreign to the lay public, while the public—even victims and offenders—is likely to share sets of beliefs that seem foreign to professional officers. Prevailing institutional design offers no robust channel for sharing information across the divide. On its own, electoral politics—even retail politics—operate at too high a level of abstraction and, in any event, are primarily concerned with the enforcement and adjudication of serious high-

142. *Williams v. Florida*, 399 U.S. 78, 100 (1970) (discussing the value of a lay jury).

143. Bowers, LWOP, *supra* note 52, (manuscript at 30–31) (proposing an equitable sentencing jury and observing that “[u]nder the proposed reforms, the relationship between the politics of crime and the punishment of crime might prove somewhat more dynamic” because “[t]he jury’s equitable decision might serve to bridge” the divide between “abstract litigation and specific incidents of crime”).

profile cases.¹⁴⁴ By contrast, the normative grand jury could cultivate understanding between populations by exposing each group to the respective beliefs of the other.¹⁴⁵ It would serve thereby as a conduit for productive case-specific dialogue between local communities and prosecutors over what types of crimes should be charged and in what contexts.

B. Perceptions of Fairness & Justice

As indicated, the normative grand jury could potentially advance a series of democratic and expressive objectives—that is, the promotion of discourse, public participation, and liberal democratic values. But, critically, by nurturing these intrinsically good objectives, the normative grand jury also could advance instrumental goals. Specifically, as Paul Robinson and I explore in far greater detail elsewhere in this volume, people are likelier to comply with the law and its enforcement when they believe that procedures are fair and that the applied substantive law reflects accurately communal intuitions of normative blameworthiness.¹⁴⁶ Herein lies the potential payoff for police and prosecutors. Law enforcement may advance its objectives by cultivating perceptions of fairness and justice, even in circumstances where the prosecutor's office or police department are unconcerned with these values for

144. Bowers, *Grassroots*, *supra* note 3, at 111 (“[T]he target communities of public-order enforcement are not those that typically wield terrific electoral clout.”); Bowers, *LGNI*, *supra* note 1, at 1714 (“Consequently, district attorneys’ electoral prospects rarely rise or fall on their handling of isolated minor cases.”).

145. James Forman, Jr. & Shaimaa Hussein, Presentation at Faculty Workshop, Georgetown Law: Isolation, Empathy, and the Politics of Crime (Sept. 15, 2009).

146. *See generally* ROBINSON & DARLEY, *supra* note 41, at 6 (“Each time the system is seen to convict in cases in which no community condemnation is appropriate, the system weakens the underlying force of the moral sanction. . . . If the criminal law is seen as unjust in one instance, its moral credibility and its concomitant compliance power are, accordingly, incrementally reduced.”); Bowers, *LWOP*, *supra* note 52, (manuscript at 22–23) (“[F]acilitating visibility and local participation has an added advantage: a criminal-justice system that equitably empowers lay bodies is likelier to be seen as legitimate and morally credible. Specifically, individuals tend to perceive lay decision-making to be more procedurally fair than professional decision-making.”); Bowers & Robinson, *supra* note 5; Robinson, *Crime Control*, *supra* note 41, at 1839 (arguing that punishment in the absence of community condemnation undermines the normative force of the criminal law and thereby undermines crime control); Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 *YALE L.J.* 315, 333 (1984) (“The evidence is all around us that large numbers of people are willing to play the crime game when the threatened punishment no longer communicates moral disapproval.”).

their own sake.¹⁴⁷ Indeed, it is fair to presume that such instrumental benefits are what motivate many district attorneys and police chiefs to pursue community-justice reforms in the first instance.

Critically, the instrumental need is perhaps greatest in the order-maintenance context. As Dan Kahan and others have recognized, the very jurisdictions that are the sensible focus of order-maintenance policing and prosecution are the same jurisdictions that tend to be plagued not just by crime and disorder but also by discordant relations between enforcement personnel and the predominately poor and minority lay citizenry.¹⁴⁸ And such relations may be made worse by the kinds of aggressive tactics that tend to typify order-maintenance policing and prosecution. In Kahan's terms, an unfortunate "side effect" of order-maintenance enforcement is its potential to undermine perceptions of fairness and justice, and, ultimately, deference to the law and its enforcement.¹⁴⁹

Robinson and I also examine the Court's Fourth Amendment doctrine, which has empowered police to engage in such aggressive order-maintenance tactics.¹⁵⁰ I need not rehash our claims here, but I do wish to highlight the degree to which the doctrine tends to bend in favor of law enforcement.¹⁵¹ I have my criticisms of the Court's

147. Kahan, *Reciprocity*, *supra* note 3, at 1533 (observing that when law enforcement cultivates perceptions of legitimacy, "citizens are [more] likely to be more forgiving of isolated instances of police misconduct").

148. *Id.* at 1529–30.

149. Jeffrey Rosen, *Excessive Force: Why Patrick Dorismond Didn't Have to Die*, NEW REPUBLIC, Apr. 10, 2000, at 24, 27 (describing order-maintenance policing as "a drug whose primary effect is that it will reduce crime, and its side effect is that it may exacerbate political tensions"); *see also* Bowers, *Grassroots*, *supra* note 3, at 91–94 (discussing how when police who respond too aggressively to "borderline" behavior, they risk producing sympathy for the rule breakers, creating fear and loathing in law-abiding citizens towards order-maintenance policing); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 461–63 (2000) (documenting legitimacy costs of order-maintenance policing); Kahan, *Reciprocity*, *supra* note 3, at 1529 ("The perception that order-maintenance policing visits unequal burdens on minorities is likely to reinforce . . . disrespect . . .").

150. Bowers & Robinson, *supra* note 5, at 219–226.

151. *See, e.g.*, *Virginia v. Moore*, 553 U.S. 164 (2008) (holding that a misdemeanor arrest supported by probable cause is *per se* reasonable, even if the misdemeanor arrest is contrary to state law); *Illinois v. Caballes*, 543 U.S. 405 (2005) (holding that individuals have no reasonable expectation of privacy against drug-sniffing dogs); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (holding that a misdemeanor arrest supported by probable cause is *per se* constitutionally reasonable, no matter how trivial the criminal incident); *California v. Greenwood*, 486 U.S. 35 (1988) (holding that defendants have no reasonable expectation of privacy in their bagged trash); *Oliver v. United States*, 466 U.S. 170 (1984) (holding that individuals have no reasonable expectation of privacy in open fields); *Smith v. Maryland*, 442 U.S. 735 (1979)

Fourth Amendment jurisprudence.¹⁵² If nothing else, the Court has come to rely too heavily on bright-line rules and thereby to endorse unreasonable claims about the reasonable man.¹⁵³ For present purposes, however, I concede that the Court may be right, as a general matter, to provide police terrific *legal* discretion. After all, effective policing requires the police officer to wear many hats. He is a community caretaker, a public-safety agent, and an enforcer of law.¹⁵⁴ And he often must act fast when determining the appropriate course of action in a given set of circumstances.¹⁵⁵ Consequently, the Constitution can do only so much to regulate police authority without concurrently undermining police effectiveness.¹⁵⁶

This illustrates the Aristotelian point I made earlier: generally applicable legal constraints on executive discretion can be made only so narrow before they unproductively serve to hamstring the

(holding that individuals have no reasonable expectation of privacy in their telephone records); *United States v. Miller*, 425 U.S. 435 (1976) (holding that individuals have no reasonable expectation of privacy in their bank records). *But see, e.g., Kyllo v. United States*, 533 U.S. 27, 40 (2001) (recognizing a reasonable expectation of privacy against the use of a thermal imager to detect heat emanating from a home).

152. *See generally* Bowers, *Equitable Constraints as Rules of Law*, *supra* note 19.

153. Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* *Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 888 (2009) [hereinafter *Cognitive Illiberalism*]; *see also* Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 235–41 (1984); Bowers & Robinson, *supra* note 5, at 227 (“Courts may endorse ostensible reasonable beliefs that the reasonable public does not, in fact, share—that the public, instead, perceives to be either too deferential to the criminal class or, conversely, insufficiently protective of any citizen (save for the very paranoid).”).

154. *Chicago v. Morales*, 527 U.S. 41, 106, 109 (1999) (Thomas, J., dissenting) (“Police officers are not . . . simply enforcers of the criminal law. They wear other hats [Thus,] the police inevitably must exercise discretion That is not to say that the law should not provide objective guidelines for the police, but simply that it cannot rigidly constrain their every action.”).

155. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989) (“The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.”).

156. For these same reasons, I am skeptical about the degree to which we may subject police decision making to popular oversight. Thus, I acknowledge the limits of my own proposal: as a community-justice tool, the normative grand jury would do its work on the prospective prosecutorial charge, not directly on police investigation and arrest decisions. The body’s impact on police decision-making would be tangential, if at all. I welcome sensible community-policing reforms, but I am uncertain how to sensibly craft them, and thus such reforms are not my focus. In short, I see persuasive reasons to conclude that police deserve deference in circumstances where prosecutors may not—reasons that I plan to explore in greater detail in a separate article. Bowers, *Equitable Constraints as a Rule of Law*, *supra* note 19.

sovereign.¹⁵⁷ Nevertheless, even if *legal* deference is owed to executive actors, such deference comes at a potentially high *political* (and therefore an instrumental) cost. Specifically, the law may generate a political imbalance. In the Fourth Amendment context, the Court's rulings have created a kind of community-perspective deficit that risks undermining lay perceptions of systemic legitimacy. That is, the professional law-enforcement community has a particular perspective of reasonable state action. It is, however, but one perspective. There are many others.¹⁵⁸ Yet the Court's jurisprudence has prioritized the professional perspective and has provided law enforcement substantial leeway to act on that perspective. When police and prosecutors exploit such authority, they risk communicating the normatively and instrumentally undesirable message to affected communities that a contrary perception of what constitutes reasonable enforcement is a perspective that "only 'unreasonable' people could hold."¹⁵⁹

Moreover, the presence of a community-perspective deficit may be particularly pronounced in majority-minority neighborhoods where, for culturally constructed reasons, individuals may be likelier to perceive coercion in even polite police requests.¹⁶⁰ Tracey Maclin has made this claim (albeit in perhaps overblown terms):

[F]or most black men, the typical police confrontation is not a consensual encounter. Black men simply do not trust police officers to respect their rights. Although many black men *know* of their right to walk away from a police encounter, I submit that most do not trust the police to respect their decision to do so.¹⁶¹

157. See *supra* text accompanying notes 90–91 (discussing Aristotelian insight about the scope of effective rules). But, as Aristotle understood, equitable constraints may pick up where legal constraints must necessarily leave off. *Id.*; see also Bowers, *LGNI*, *supra* note 1, at 1705–12 (discussing how equitable considerations may offer a greater pool of options than legal remedies).

158. See *supra* text accompanying notes 62–63 (positing the various fresh perspectives of lay decision makers).

159. Kahan et al., *Cognitive Illiberalism*, *supra* note 153, at 842. See generally Bibas, *Transparency*, *supra* note 2, at 916 (observing that professionalized insider-dominated criminal justice "impairs [lay] outsiders' faith in the law's legitimacy and trustworthiness, which undercuts their willingness to comply with it . . . [, thus] imped[ing] the criminal law's moral and expressive goals as well as its instrumental ones.").

160. Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243, 250 (1991) ("[T]he dynamics surrounding an encounter between a police officer and a black man are quite different from those that surround an encounter between an officer and the so-called average, reasonable person.").

161. *Id.* at 272.

But beyond the limits of law, community justice may provide an effective (principally) political antidote to a (principally) political problem. Such initiatives may serve as mechanisms to take account of community perspectives that the law has failed to adequately consider. In particular, the normative grand jury could promote perceptions of systemic legitimacy by accommodating local “understandings of reality” and by “reflect[ing] experiences and social influences peculiar to those subcommunities.”¹⁶² Equally important, an offender might grow more accepting of enforcement and less inclined to recidivate if his accusers were not a perceived occupying force but his own peers with whom he shared “linked fates.”¹⁶³

I recognize, of course, that this vision may be starry eyed. As I wrote at the start, it is hard enough to identify the relevant community on a given question, much less to ensure that a given body adequately (but not excessively) represents the interests of that community.¹⁶⁴ Significantly, however, a normative grand jury could foster perceptions of legitimacy even if the accusers are insufficiently representative of the offender population. That is, from a legitimacy standpoint, there may be advantages to lay participation for its own sake. Specifically, social scientists have found that citizens tend to see lay decision making as more fair and procedurally legitimate than professionalized decision making.¹⁶⁵ Thus, a prospective defendant may derive value from an opportunity to state his moral case and not just to accept a prefabricated plea.¹⁶⁶

162. Kahan et al., *Cognitive Illiberalism*, *supra* note 153, at 884–85.

163. Kahan & Meares, *supra* note 69, at 1176; *see also* Simmons, *supra* note 12, at 55 (observing that “grand juries enhance a perception of justice” among defendants and grand jurors).

164. *See supra* note 14 and accompanying text. *See generally* Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353 (1999).

165. Bowers & Robinson, *supra* note 5, at 226-27; Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens’ Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAV. 333, 338 (1988); Simmons, *supra* note 12, at 61 “[I]n general individuals believe—rightly or wrongly—that a jury of lay people is a fairer and more objective arbiter in a criminal case than is a trained, professional ‘expert’”.

166. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 106 (1988) (“The perception that one has had an opportunity to express oneself and to have one’s views considered by someone in power plays a critical role in fairness judgments.”); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 163 (2006) (observing that “an opportunity to take part in the decision-making process” contributes significantly to perceptions that procedures are fair); Bowers & Robinson, *supra* note 5, at 216 (“[P]rocedures are [perceived to be] legitimate . . . when they provide opportunities for . . . interested parties to be heard.”); Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381, 390 n.37 (2010) (“Research has suggested that the opportunity for participation may be important to individuals even when their participation is unlikely to

And the community may derive value from an opportunity not only to observe the prosecution of particular order-maintenance cases, but also to equitably influence its application.¹⁶⁷

CONCLUSION

In this Article, I have explored one criminal-justice puzzle and two criminal-justice crises. The puzzle is that the criminal justice system reserves for lay actors the mixed determinations of law and fact that they are least equipped to make, and forbids them from considering the commonsense questions of equitable discretion over which they—and not prosecutors—may enjoy potentially superior perspective. The crises are the lack of meaningful and public process in order-maintenance enforcement and the unfettered and nontransparent scope of executive discretion. This unfortunate reality is nothing new to critics of contemporary criminal justice. In response, these critics have tended to respond somewhat in kind: they have endorsed reforms that are principally intended to promote criminal trials—either by banning or limiting the availability of plea bargains, or by streamlining adjudicatory practices.¹⁶⁸

However, I think these efforts may be misguided on balance—at least as they pertain to petty order-maintenance cases. First, plea bans may be ill-suited for the kinds of low-level cases where “the process is the punishment” and where, comparatively, plea bargaining may provide an efficient and sometimes even fair way out.¹⁶⁹ Second, informal trial processes run the risk of sacrificing the spoils of hard-fought constitutional battles. Although it is largely true that the Warren Court’s constitutional criminal-

affect the decision. This suggests that on some occasions, even nonmeaningful voice may lead individuals to assess a process as more fair.”)

167. Bowers & Robinson, *supra* note 5, at 248 (discussing the importance of decision control to perceptions of legitimacy).

168. Albert Alschuler and Stephen Schulhofer have expressed support for the so-called “Philly model” that features stripped-down bench trials to lesser charges. Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652 (1981); Steven J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984); *cf. Is Plea Bargaining a Cop-Out?*, TIME, Aug. 28, 1978, at 44 (“Here we have an elaborate jury trial system, and only 10% of the accused get to use it. That’s like solving America’s transportation problems by giving 10% Cadillacs and making the rest go barefoot.” (quoting Alschuler)). John Langbein has expressed support for the kinds of informal jury trials that typified common-law criminal justice. Langbein, *supra* note 110, at 21 (proposing an inquisitorial “streamlined . . . procedure” as “a middle path between the impossible system of routine adversary jury trial and the disgraceful nontrial system of plea bargaining”); *cf. Steven Zeidman, Perspective: Time to End Violation Pleas*, N.Y.L.J., April 1, 2008, at 2, col. 3 (proposing a ban on first-appearance guilty pleas). *See generally* BIBAS, MACHINERY, *supra* note 71.

169. *See, e.g.,* FEELEY, *supra* note 122; *see also* HEUMANN, *supra* note 122; Bowers, *Punishing*, *supra* note 1, at 1120.

procedure revolution has produced a top-heavy and often unworkable due-process model (especially for low-stakes cases), nevertheless, I remain wary of walking back from its protections in favor of some fictionalized historical summary-process ideal.

What to do then? I do not claim to have the answer. But I hope I have identified a relatively unexplored path: equitable (and not legal) lay (and not professional) oversight over discretionary (and not adjudicatory) decisions. Thus, this Article sketches and defends a model for *extralegal* regulation of normatively misguided prosecutions. Indeed, if there is anything to recommend to the historical justice system that included—in different degrees over different eras—such barbaric practices as mandatory death sentences, torture, and trials by ordeal, it is the fact that the system embraced a robust front-end role for lay grand juries to derail application of these practices. Of course, the system included arbitrariness and discrimination—evils made worse by the unfettered influence lay actors enjoyed over criminal justice. But that is precisely my point. There is a balance to be struck. Whereas professionals played too small of a part in the administration of historical criminal justice, they play too big of a part today. We need a division of labor—that is, some (but not too much) *outsourcing of equitable discretion* from the professional actors who currently possess almost all such power to the lay actors who currently possess almost none.¹⁷⁰

The overwhelming majority of public-order cases are easy *legal* cases. But it does not follow that these easy legal cases provide *equitably* appropriate occasions for criminal prosecution and punishment.¹⁷¹ Prosecutors face challenges in determining which legally easy cases are which and what they *ought* to be worth. And, in the face of cognitive and institutional biases, prosecutors are not well positioned to arrive at the right decisions on their own.

For the district attorney's office that wisely seeks guidance from its constituents, the normative grand jury could represent a tool to advance contemporary community-prosecution goals—a tool that would remain consistent with the institution's centuries-old role as the robust, transparently democratic, and decidedly equitable "*voice of the people*" in the charging process.¹⁷²

170. See generally Bowers, LWOP, *supra* note 52 (making a similar claim about lay equitable sentencing discretion).

171. See generally Bowers, LGNI, *supra* note 1.

172. Simmons, *supra* note 12, at 11.