PROSECUTION WITHOUT PROSECUTORS

J.D. King[*]

As the United States debates once again what it wants from its criminal justice system, the role of the American prosecutor is under scrutiny. After the explosion of prosecution and incarceration rates that occurred over the past half-century, most observers agreed that the American criminal justice system had become too large, locking up scores of people too often and for too long. Much of the debate around the construction of the American carceral state has focused on the increased power of the prosecutor and the ever-more aggressive approach to charging decisions and sentencing recommendations. Over the past decade, in response, voters have elected "progressive prosecutors" in many jurisdictions. The results of this phenomenon are mixed.

This Article deals not with traditional prosecutors nor with "progressive prosecutors" but with absent prosecutors. Many states have addressed the dramatically increased size and cost of the system by allowing for low-level offenses to be adjudicated by police officers, with no involvement by any public prosecutor. This practice violates basic principles of due process and the separation of powers. Moreover, it allows for the unchecked and unnecessary expansion of the criminal justice system without forcing that system to internalize the costs of its operations. This Article proposes alternatives to the current system of low-level criminal adjudication that can address public safety while also avoiding the net-widening effects of the current system.

* Professor of Law, Rutgers Law School. I am grateful to Simone Washington for her invaluable research assistance. The Article was greatly improved by feedback from Cynthia Alkon, Amber Baylor, Sanjay Chhablani, Bruce Green, Catherine Hancock, Daniel Harawa, Brooks Holland, Vida Johnson, Carla Laroche, and Donald Tibbs, as well as the participants in the Rutgers Law School Faculty Workshop.

TABLE OF CONTENTS

INTRODUCTION

Over the past decade, the United States has begun to reckon with the excesses of the criminal justice system that have built up over the past fifty years. A broad consensus has emerged that too many people have been locked up for sentences that were too long, and that state, federal, and local systems of policing and adjudication were plagued with racial and class biases.[1] Legislatures began to repeal the most draconian sentencing laws, prosecutors began to tentatively implement conviction integrity units and other policies to examine the possibility of wrongful convictions, and rates of incarceration leveled off and even decreased slightly from their highs in 2008 and 2009. Often, however, the focus of reform efforts, press accounts, and scholarly critique has been on the rarest of criminal cases: serious felonies that carry long potential terms of incarceration. Most Americans who find themselves in a criminal court will find themselves in a misdemeanor court, where over 80% of criminal cases are adjudicated.[2] Any meaningful reconsideration of how America deals with crime must grapple with how we deal with low-level offenses. Addressing the problems of mass incarceration and the uncontrolled expansion of the criminal justice bureaucracy while maintaining the public desire for safe communities will require creativity and a willingness to reconceive the role of courts and prosecutors. Reimagining these institutions gives us space to envision new ways of responding to undesirable behavior without the racist and intrusive aspects of misdemeanor courts that have defined these systems.

Many scholars have documented the remarkable increase in the number of criminal charges brought and the much harsher sentences imposed on those convicted of criminal offenses over the past fifty

1. *But see generally* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018).

2. ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 2 (2018).

years. In the most serious cases, decades-long sentences have become the norm, even if some slight moderation of this trend may have begun in recent years. But the lowest level of the criminal justice system has also expanded enormously during the age of mass incarceration that began with the War on Drugs.[3] More people than ever are swept into the nation's misdemeanor courts, and the consequences—both direct and collateral—are harsher than in the past.[4]

A part of the explanation for the phenomena of hyper-adjudication and hyper-incarceration is the "tough on crime" philosophies championed by Republican and Democratic legislators alike from the 1970s until the 2000s.[5] But another explanation has to do with the exercise of power and discretion by America's prosecutors, who increasingly control the systems of criminal adjudication in this country. Although scholars differ on just how much blame can be attributed to prosecutors for the growth and racial disparities of today's criminal justice system, it is beyond dispute that prosecutors have played a central role in the construction of that system.[6] Despite the cost and harm that has been caused by this phenomenon, there is no clear evidence that the increase in rates of prosecution, conviction, incarceration, and supervision has done anything to make American communities safer.[7] Economist Joseph Stiglitz notes that the

3. *See* JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 163–64 (2017).

4. *See, e.g.*, NATAPOFF, *supra* note 2, at 19–38; ISSA KOHLER-HAUSMANN, MISDEMEANORLAND 42–43 (2018).

5. *See, e.g.*, FORMAN, JR., *supra* note 3, at 163–64.

6. *See generally, e.g.*, JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM (2017); ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007); Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835 (2018); Justin Murray, *Prosecutorial Nonenforcement and Residual Criminalization*, 19 OHIO ST. J. CRIM. L. 391, 392 (2022) ("For much of the past half-century, prosecutors have used their power to help build the largest system of mass incarceration the world has ever seen—a system marked by profound racial inequality and one that has failed to deliver on its assurance that we can make ourselves safe by caging others.").

7. *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1204–07 (2015); Inimai M. Chettiar, *The Many Causes of America's Decline in Crime*, ATLANTIC (Feb. 11, 2015), https://www.theatlantic.com/politics/archive/2015/02/the-many-causes-of-americas-decline-in-crime/385364/; OLIVER ROEDER ET AL., BRENNAN CTR. FOR JUST., WHAT CAUSED THE CRIME DECLINE? 22 (2015), https://perma.cc/KB6H-GMEK. *But see* Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSPS. 163, 176–79 (2004) (arguing that increases in the number of police officers and in the prison population contributed to the reduction in crime during the 1990s).

country's "prodigious rate of incarceration is not only inhumane, it is economic folly."[8]

One under-explored driver of system expansion is the use of "police courts": low-level criminal courts that operate without the involvement of a public prosecutor at all. In the states that allow this practice, law enforcement officers not only perform traditional policing functions like investigating allegations of criminal wrongdoing, gathering evidence, and apprehending the accused, but also prosecutorial functions like drafting the charging document, negotiating with the defendant, and presenting the case in court.[9] Convictions from these "police courts" have been affirmed by appellate courts over challenges that such practices violate due process and principles of the separation of powers.[10]

Higher courts, however, are divided on the constitutional validity of these prosecutions without prosecutors: some federal and state courts have concluded that a conviction without prosecutorial involvement violates due process and is therefore constitutionally invalid.[11] Even in cases involving a prosecutor, courts have found that judicial over-reaching can violate due process and require the reversal of a conviction. In a case involving a trial court's improper appointment of a special prosecutor, Justice Scalia concurred in the reversal of the conviction, arguing that, because the trial court lacked authority to appoint a special prosecutor, the resulting conviction was void: "[S]ince we cannot know whether [the defendants] would have

---

8. Joseph E. Stiglitz, *Foreword* to ROEDER ET AL., *supra* note 7, at 1; *see also* Gideon Parchomovsky & Alex Stein, *Redeemable Fines: Overcoming the Crisis of Overincarceration* 4 (Univ. of Penn. L. Sch. Pub. L. Rsch. Paper, Working Paper No. 24-39, 2024), https://perma.cc/BVM7-KTPL ("Apart from causing unnecessary suffering to and unduly denying the convicted individuals basic freedom, overincarceration breaks families, overcrowds prisons and wastes millions of taxpayer dollars.").

9. *See* Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 1002 (2021) [hereinafter Natapoff, *Criminal Municipal Courts*] ("Fourteen states permit police officers to file and prosecute cases directly in lower courts without an attorney-prosecutor present."). *See generally* Andrew Horwitz, *Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution in Criminal Cases*, 40 ARIZ. L. REV. 1305 (1998).

10. *See infra* pp. 1069–73.

11. *See, e.g.*, Figueroa Ruiz v. Delgado, 359 F.2d 718, 721–22 (1st Cir. 1966) (finding a violation of due process where, in a criminal case, the trial judge called and examined the witnesses against the defendant); Tumey v. Ohio, 273 U.S. 510, 532–35 (1927); Adair v. Bell, No. 93CV132, 1995 WL 1945487, at *5 (N.D. Miss. Jan. 13, 1995); Giles v. City of Prattville, 556 F. Supp. 612, 617 (M.D. Ala. 1983); United States v. James, 440 F. Supp. 1137, 1142 (D. Md. 1977); Wounded Knee v. Andera, 416 F. Supp. 1236, 1240 (D.S.D. 1976); Haley v. Troy, 338 F. Supp. 794, 804 (D. Mass. 1972); State v. Avena, 657 A.2d 883, 888 (N.J. Super. Ct. App. Div. 1995).

been prosecuted had the matter been referred to a proper prosecuting authority, the convictions are likewise void."[12]

Part I of this Article examines state responses to the explosion of volume in misdemeanor courts. One such response is the phenomenon of prosecutions without prosecutors: criminal convictions that take place without the participation of a public prosecutor. This phenomenon has historical antecedents in "police courts" but the practice has long been constitutionally suspect and is difficult to defend either in doctrinal or pragmatic terms. Another response is the development of low-level courts as money generators for municipal governments, the most egregious example of which came to light after the 2014 uprising in Ferguson, Missouri.[13]

Part II analyzes this expansion of criminal courts over the past half-century and the various attempts by state actors to fund this growth. In addition to shifting the costs of low-level courts from the state to the defendant, jurisdictions have attempted to reduce those costs by eliminating procedural safeguards that are generally understood to be necessary components of a fundamentally fair system of adjudication. In addition to paring back the right to trial by jury and the right to the assistance of court-appointed counsel, states ramped up the use of low-level trials without the involvement of a prosecutor. Part II views this practice through a critical lens, arguing that these "prosecutions without prosecutors" violate defendants' fundamental rights and degrade both the quality and the public perception of the criminal justice system.

Part III engages both reformist and abolitionist proposals for changing low-level courts. This important debate, which can seem at times more rhetorical than meaningful, must be considered in any argument concerning how criminal courts should be run. To engage the question of *how* criminal courts should conduct business presupposes that such courts should conduct business at all. Part III concludes that an argument against the most egregiously unfair courts is consistent with a broader reimagining of how we should respond to undesirable behavior. Insisting on a minimum level of procedural justice does not undermine a broader critique of the criminal justice system generally. Indeed, low-level courts may be a more productive initial battleground for abolitionists both because of the size of the system and the relatively lower community stakes in any individual case.[14]

---

12. Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 815 (1987) (Scalia, J., concurring).

13. *See* U.S. DEP'T OF JUST., C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 3 (2015) [hereinafter FERGUSON REPORT], https://perma.cc/QP5W-XFCL.

14. *See* Alexandra Natapoff, Atwater *and the Misdemeanor Carceral State*, 133 HARV. L. REV. F. 147, 152 (2020) ("[M]isdemeanors are currently an active site for decarceral experimentation and thus offer an especially fertile space to

Finally, Part IV proposes alternatives to the current system of low-level adjudication. Now that the first wave of "progressive prosecutors" has been in office for several years, we have seen examples of what has worked and what has not. Voters and other political actors have shown a willingness to vote out elected prosecutors if they find their policies ineffective or counterproductive. This Part analyzes not only policies of non-prosecution but also diversion programs and European-style penal orders. This Part looks at the potential "net-widening" effects of these non-criminal alternatives and asks whether they would just substitute one bad system for another. Finally, this Part explores the positive and negative effects of simple non-prosecution[15] and calls for prosecutors and others to creatively engage responses to policing that avoid the criminal adjudication system altogether.

I. HISTORY OF LOW-LEVEL COURTS AND THE PREVALENCE OF "POLICE COURTS"

In the early 1970s, approximately 200,000 people were locked up in American prisons.[16] By 2009, that number had grown to roughly 1.5 million, with an additional 700,000 locked up in local jails.[17] Although the imprisoned population has decreased slightly since that high-water mark, the United States continues to incarcerate its residents at a far higher rate than it did prior to the 1970s, and at a far higher rate than Western European or other industrialized countries.[18] Alongside these high rates of incarceration, the United States also steadily expanded its system of low-level criminal adjudication. Although reliable statistics are elusive, sources estimate that between 13 million and 16 million criminal misdemeanor cases are filed in United States courts each year.[19] Counting misdemeanor traffic offenses—which can carry many of the same direct and collateral consequences as those classified as

---

grapple with abolitionist ideas." (footnote omitted) (first citing Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1631 (2012); and then citing Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015)).

15. *See* Amanda Agan et al., *Prosecuting Low-Level Crimes Makes Us Less Safe*, WASH. POST (Apr. 6, 2021), https://www.washingtonpost.com/outlook/2021/04/06/misdemeanor-prosecution-future-crime/.

16. NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES 2 (Jeremy Travis et al. eds., 2014).

17. *Id.*

18. *See id.*

19. *See* Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 737 (2018); *see also* NATAPOFF, *supra* note 2, app. at 256–58.

criminal and can lead to police detention—brings the number to an astounding 33 million cases annually.[20]

The dramatic growth of the criminal justice system has coincided with a decrease in crime through at least the past quarter century.[21] And while felony charges have increased significantly since the mid-1990s,[22] misdemeanor charges may have grown even faster.[23] This increase in volume has come without an accompanying increase in funding for indigent defense services,[24] which has resulted in higher caseloads for already overburdened public defenders.[25] And the reduced attention to appropriate indigent defense funding coincides with the rise of collateral consequences for even the most minor criminal offenses.[26]

Low-level courts have historically been more about the control of classes of people than about either rehabilitation or retribution for specific offenses.[27] Today, the vast system of collateral consequences does much of that work after the criminal adjudication system has

---

20. *See* NATAPOFF, *supra* note 2, at 45; *see also* Utah v. Strieff, 579 U.S. 232, 249–52 (2016) (Sotomayor, J., dissenting) (discussing the role that outstanding warrants for traffic and misdemeanor cases play in justifying police seizures and detentions of people not otherwise engaged in any criminal activity).

21. *See* John Gramlich, *What the Data Says About Crime in the U.S.*, PEW RSCH. CTR. (Apr. 4, 2024), https://perma.cc/P643-EWT9 ("Using the [Federal Bureau of Investigation] data, the violent crime rate fell 49% between 1993 and 2022 . . . . [And the data also show] a 59% reduction in the U.S. property crime rate between 1993 and 2022 . . . . Using the [Bureau of Justice Statistics] statistics, the declines in the violent and property crime rates are even steeper, [showing both rates declining by 71% over the same period].").

22. John Pfaff concludes that felony case filings have risen almost 40% since 1995. *See* John Pfaff, Opinion, *A Mockery of Justice for the Poor*, N.Y. TIMES (Apr. 29, 2016) [hereinafter Pfaff, *A Mockery of Justice for the Poor*], https://www.nytimes.com/2016/04/30/opinion/a-mockery-of-justice-for-the-poor.html. Others have criticized Pfaff's methodology, but the proposition that felony case filings have risen since the 1990s seems uncontroversial. *See* Bellin, *supra* note 6, at 837; Katherine Beckett, *Mass Incarceration and Its Discontents*, 47 CONTEMP. SOC. 11, 16 (2018). Pfaff has responded to these criticisms. *See generally* John Pfaff, *Prosecutors Matter: A Response to Professor Bellin's Review of* Locked In, 116 MICH. L. REV. ONLINE 165 (2018), https://perma.cc/8S2J-ZTHM.

23. *See* ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIM. DEF. LAWS., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (2009).

24. *See* Pfaff, *A Mockery of Justice for the Poor*, *supra* note 22.

25. *See* BORUCHOWITZ ET AL., *supra* note 23, at 30–35.

26. *See* John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R-C.L. L. REV. 1, 23–34 (2013).

27. *See* Natapoff, *supra* note 14, at 152 ("Low-level offenses are central to the carceral ethos and its racial consequences. . . . Such offenses expand the power of the state to criminalize large numbers of people for common, rarely culpable, often harmless conduct, and they confer vast discretion on police to aim that carceral power in racially disproportionate ways.").

assigned the label of conviction.[28] Indeed, the piecemeal and haphazard manner in which collateral consequences operate today serves not to rehabilitate those who have been convicted but primarily to prevent their successful integration into society.[29] Increasingly, the significance of a misdemeanor conviction and its collateral consequences far outstrip the direct consequences.[30] Like the rest of the criminal justice system, misdemeanor policing and prosecution are marked by racial disparities: African American people are stopped, arrested, charged, and prosecuted at higher rates than white people for low-level offenses.[31]

Post-Revolutionary War-era American legal systems "reproduced and maintained racial, class, and gender hierarchies in both intentional and unexpected ways."[32] Long before anyone coined the terms "law-and-order policing" or "broken windows," the central objective of low-level courts was "the maintenance of order ('the peace')[, which] required the management of human beings—including those human beings deemed property by law."[33] Modern municipal courts are a product of the Progressive Era and sprung from democratically-minded reforms of that time.[34] Like other Progressive-Era reforms, the creation of the modern municipal court "was predicated on corporate efficiency, management, and strengthening mechanisms of urban control . . . centering the behavior of poor people as that which had to be reformed."[35]

Low-level courts present an obvious dissonance between theory and practice: the promise of sweeping constitutional protections

---

28. STANDARDS FOR CRIM. JUST. intro. at 9 (AM. BAR ASS'N 3d ed. 2004) ("Given the number of people who have been convicted at one time or another, collateral consequences have become one of the most significant methods of assigning legal status in America.").

29. *See id.* at 10 ("If promulgated and administered indiscriminately, a regime of collateral consequences may frustrate the chance of successful re-entry into the community, and thereby encourage recidivism.").

30. Margaret Colgate Love, *Alternatives to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences*, 22 FED. SENT'G REP. 6, 6 (2009) ("The collateral consequences of conviction are, as a practical matter, as much a part of the sentence as a prison term, even though they generally have no expiration date. Avoiding a conviction record is often the most important part of the penalty phase for a defendant who does not already have one, since the collateral consequences of conviction may linger long after the court-imposed sentence has been satisfied.").

31. *See* NATAPOFF, *supra* note 2, at 149–57, 154 tbl.6.1.

32. Brendan D. Roediger, *Abolish Municipal Courts: A Response to Professor Natapoff*, 134 HARV. L. REV. F. 213, 218 (2021) (citing LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH 103 (2009)).

33. *Id.*

34. *See* Natapoff, *Criminal Municipal Courts*, *supra* note 9, at 992.

35. Roediger, *supra* note 32, at 219.

announced in canonical criminal procedure decisions like *Gideon v. Wainwright*[36] conflict with the reality of overcrowded and under-resourced misdemeanor courtrooms.[37] The diminished focus on due process in lower courts can nullify procedural guarantees, as defendants encounter incentives that encourage speedy exits, even at the cost of admitting guilt.[38] Because such a vanishingly small number of misdemeanor cases are ever reviewed on appeal,[39] the street-level practices and courtroom norms are even more important in low-level cases. And the disappearance of trials means the reduction or even elimination of judicial control over prosecutors' actions and decisions.[40] As a result, the accuracy of the fact-finding in such courts diminishes.[41] Instead of privileging accuracy or fairness, the "management of human beings" that has been the focus of low-level courts for many decades continues, with the specifics of charges, elements, and defenses taking a back seat to the mass processing that has long characterized misdemeanor courtrooms.[42]

---

36. 372 U.S. 335 (1963).

37. *See* Sibron v. New York, 392 U.S. 41, 52 (1968) ("Many deep and abiding constitutional problems are encountered primarily at a level of 'low visibility' in the criminal process—in the context of prosecutions for 'minor' offenses which carry only short sentences.").

38. *See* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 8 (1979) ("Constitutional changes notwithstanding, the lower courts are reluctant to treat formally that which has traditionally been treated informally, and they refuse to consider solemnly that which has usually been taken lightly. They will not regard as a *crime* that which has typically been treated as a *nuisance*.").

39. Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U. L. REV. 1933, 1941 (2019) (estimating that only one of every 1,250 state misdemeanor convictions is appealed).

40. *See* Stephen C. Thaman, *The Penal Order: Prosecutorial Sentencing as a Model for Criminal Justice Reform?*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 156, 157 (Erik Luna & Marianne L. Wade, eds., 2012).

41. *See* Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 930 n.164 (1980) ("[D]efendants who are charged with minor misdemeanors and who regard the burden of standing trial as more onerous than the sentence imposed upon a guilty plea will always plead guilty no matter how convincingly they might have been able to demonstrate their innocence. This prospect is made more likely by the low accuracy and thus minimal value of misdemeanor trials which lack many of the safeguards used at felony trials.").

42. *See* Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 612 (1956) ("Where conviction can be obtained by sight and smell alone, it makes little practical difference what charge is listed in the records, and it was apparent that police and magistrates frequently used these offenses [drunk, habitual drunk, vagrant, drunk and disorderly] interchangeably. The definition of vagrancy and the fact of drunkenness are regarded as merely illustrative of a mode of life which is to be suppressed.").

It has become an article of faith among criminal justice scholars that the American system of criminal justice is controlled by the prosecutor.[43] In an era that has seen the near-disappearance of the criminal trial,[44] the system depends, at least in theory, on the judicious and fair exercise of discretion by elected prosecutors and their deputies.[45] This model falls apart, however, in those jurisdictions that still allow for the prosecution of criminal offenses by law enforcement officers. And the problem is significant: a 1981 national survey found that 12% of misdemeanor judges said that prosecutors "infrequently" or "never" handled criminal cases in their courtrooms.[46]

Many states that condone these "prosecutor-less prosecutions" have no explicit authorization—either statutory or judicial—for the practice. South Carolina and New Hampshire have directly addressed the practice of police prosecution and concluded that the officers were not engaged in the practice of law and that convictions pursuant to this practice did not violate due process.[47] Courts in a few other states have acknowledged the practice approvingly, without squarely answering whether the practice violates constitutional limitations, principles of the separation of powers, or rules against the unauthorized practice of law.[48] And three states appear to have authorized the prosecution of low-level cases by police officers, although in language that is not entirely clear.[49]

In considering challenges to police prosecution of criminal cases,[50] the South Carolina and New Hampshire Supreme Courts

---

43. *See, e.g.*, Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821, 832 (2013).

44. *See* Lafler v. Cooper, 566 U.S. 156, 170 (2012) (recognizing "the reality that criminal justice today is for the most part a system of pleas, not a system of trials").

45. For a description of the breadth of prosecutorial discretion and the unreviewable nature of the exercise of that discretion, *see* Horwitz, *supra* note 9, at 1306 ("[T]he criminal justice system functions largely on a tremendous leap of faith that those who wield the government's prosecutorial power will wield it in a fair and just fashion. In large part, this leap of faith is justified by the prosecutor's legal training, by the prosecutor's oath of obedience to a binding code of legal ethics, and by the fact that the prosecutor . . . is an elected official who is expected to be responsive to the electorate.").

46. NAT'L INST. OF JUST., U.S. DEP'T OF JUST., MISDEMEANOR COURTS: POLICY CONCERNS AND RESEARCH PERSPECTIVES B-15 (James J. Alfini ed., 1981).

47. *See* Horwitz, *supra* note 9, at 1331–37.

48. *See id.* at 1332 ("In the federal system and in two other states—New York and Delaware—some support for the practice can be found in the decisions of several lower courts . . . .").

49. *See id.* (recognizing Massachusetts, Maine, and Iowa as states that have "at least arguably" authorized this practice by legislation).

50. For a more thorough treatment of these cases in state courts, see generally *id*.

were presented with the question (among several others) of whether the practice of law enforcement officers conducting trials constituted the unauthorized practice of law.[51] Faced with the South Carolina statute that prohibited the practice of law by non-lawyers, the Supreme Court of South Carolina simply declared in a lightly-reasoned *ipse dixit* that "the prosecution of misdemeanor traffic violations in the magistrates' courts by either the arresting officer or a supervisory officer assisting the arresting officer does not constitute the unlawful practice of law."[52] A previous case in which the Supreme Court of South Carolina considered the practice may have been more candid in the Court's reason for upholding prosecutions by police: "Ideally, the State's case would be presented by a prosecuting attorney, but unfortunately such is not practicable because of the large number of traffic court violations."[53] This instrumental reasoning was criticized by a dissenting justice: "Expediency is no justification for the action now taken by the majority."[54] A common thread throughout the few cases that directly address the issue of police prosecutions is an acknowledgement that the practice is so widespread that it would be difficult or impracticable to stop.

The Supreme Court of South Carolina has staked out a remarkable and extreme position on this issue, even after those cases in the 1970s authorizing prosecutions by law enforcement officers. In 1992, the Court extended the doctrine to private parties, upholding a conviction for shoplifting in which the defendant had been prosecuted by a security guard who was not a member of the police force.[55] This decision came in the same year that the Court rejected a proposal by a committee of the South Carolina Bar that would have banned the practice of criminal prosecutions by non-lawyers.[56]

While several states seem to tolerate police prosecutions without having ever given a clear stamp of approval, New Hampshire is another state—like South Carolina—in which the highest court has explicitly approved of the practice. In 1953, the Supreme Court of New Hampshire was confronted with the practice of law enforcement officers prosecuting low-level criminal offenses and specifically the question of whether this conduct violated the state's law prohibiting police officers appearing in court "as [an] attorney for any party in a

51. Every state has banned the practice of law by non-lawyers. *See* Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2581, 2585–86 (1999).

52. State *ex rel.* McLeod v. Seaborn, 244 S.E.2d 317, 319 (S.C. 1978).

53. State v. Messervy, 187 S.E.2d 524, 525 (S.C. 1972).

54. *McLeod*, 244 S.E.2d at 320 (Lewis, C.J., dissenting).

55. Easley v. Cartee, 424 S.E.2d 491, 492 (S.C. 1992).

56. *See In re* Unauthorized Prac. of L. Rules Proposed by S.C. Bar, 422 S.E.2d 123, 124 (S.C. 1992).

suit."[57] The Court in *State v. Urban*[58] explained that, although no New Hampshire court had specifically approved of the practice, several had referred to the practice without criticism.[59] The Court went on to take note that neighboring states in New England allowed for law enforcement prosecution of some criminal cases and simply concluded that the practice in New Hampshire did not violate the statute, declaring that "in prosecuting a misdemeanor in a municipal court a police officer is not acting 'as attorney for any party in a suit' within the meaning of the statute."[60] This declaration, seemingly at odds with common sense, has served to support the practice of police prosecution in New Hampshire over several challenges in the intervening years.[61] Almost a decade after *Urban*, the Court in *State v. LaPalme*[62] considered a challenge to a conviction for animal cruelty in a case that had been prosecuted by a police officer rather than a prosecutor.[63] In a remarkably brief opinion, the court rejected the challenge, citing *Urban* and explaining that the "prosecution of misdemeanors by police officers is a practice that has continued in one form or another since 1791."[64]

Although the Supreme Court of New Hampshire declined to describe any details in *Urban* or *LaPalme* about the conduct of those trials, a decade later it again affirmed a conviction of a police-prosecuted misdemeanor notwithstanding the troubling details of how the trial unfolded.[65] *State v. Morin*[66] involved a prosecution for driving while intoxicated (second offense) in which a police officer acted as prosecutor.[67] When the officer failed, over the defendant's hearsay objection, to introduce either evidence that the defendant had been driving the vehicle or that the defendant had previously been convicted of driving while intoxicated, the prosecution rested.[68] Instead of granting the defendant's motion to dismiss, however, the trial judge ordered the trial continued on the court's own motion so that the police officer could bring the appropriate witness to court.[69] When the trial resumed at a later date, that witness appeared and

57. State v. Urban, 100 A.2d 897, 897 (N.H. 1953).
58. 100 A.2d 897 (N.H. 1953).
59. *See id.* at 898.
60. *See id.* (describing the practice of police prosecution in Maine, Massachusetts, and Vermont).
61. *See generally, e.g.*, Nikolas Frye, *Allowing New Hampshire Police Officers to Prosecute: Concerns with the Practice and a Solution*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 339 (2012).
62. 179 A.2d 284 (N.H. 1962).
63. *Id.* at 285.
64. *Id.*
65. *See* State v. Morin, 327 A.2d 702, 702–03 (N.H. 1974).
66. 327 A.2d 702 (N.H. 1974).
67. *Id.* at 702.
68. *Id.*
69. *Id.*

gave testimony both that the defendant had been driving the vehicle and that the defendant had a previous conviction.[70] Over a defense objection, the trial court convicted the defendant.[71] The Supreme Court of New Hampshire affirmed the conviction, holding that the trial judge had discretion both to grant a continuance and to "allow the State to reopen its case to [correct] fatal deficiencies in its evidence."[72]

A single justice dissented in *Morin*, arguing that the trial court's "unsolicited intervention . . . after the prosecution had rested, designed to generate evidence which would permit a conviction, was impermissible."[73] The blurring of the roles of prosecutor and judge, argued the dissent, was contrary to principles of separation of powers and fundamental fairness.[74] Beyond this structural critique, however, the dissent in *Morin* argued that the majority opinion risked denigrating low-level courts in general and diminishing these courts in the eyes of the public.[75] Recognizing that a far greater number of people interact with low-level courts than with felony courts, the dissent argued that allowing for sloppy procedures or corner-cutting in low-level courts would not only hurt the fair administration of justice but also harm the reputation of the courts and the criminal justice system.[76] This was true in *Morin* not only because the case was prosecuted by a law enforcement officer but also because the judge stepped in and assisted the officer in critical ways.[77]

While courts in South Carolina and New Hampshire have considered and explicitly upheld the practice of law enforcement

---

70. *Id.*

71. *Id.* at 702–703.

72. *Id.* at 703 (first citing State v. Comparone, 269 A.2d 131, 132 (N.H. 1970); and then citing State v. Petkus, 269 A.2d 123, 125 (N.H. 1970)).

73. *Id.* (Griffith, J., dissenting).

74. *See id.* ("[T]he judge was exhibiting a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded, particularly in criminal trials. Despite every allowance [the trial judge] must not take on the role of a partisan . . . . Prosecution and [judgment] are two quite separate functions in the administration of justice; they must not merge." (quoting United States v. Marzano, 149 F.2d 923, 926 (2d Cir. 1945) (Hand, J.)) (alteration restores original language from *Marzano*, which was misquoted by the dissent in *Morin*)).

75. *See id.* ("Transcending the immediate result in this case is the possibility that it will be construed as diminishing the responsibility and independence of district courts.").

76. *Id.* ("The importance of responsible and independent district courts can hardly be overemphasized since they are the only form of justice encountered by most of our citizens. In criminal cases district courts are not 'police courts'; they stand between the State and the defendant and not as partisans of either the State or the defendant.").

77. *See id.* ("[Low-level courts'] independence is compromised when they assist in the preparation or presentation of the prosecution's case, either *ex parte* or in court.").

prosecution of criminal cases, other states that continue to condone the practice do so without clear authorization from the courts.[78] A similar implicit tolerance exists in the federal courts, too, where courts have affirmed convictions arising from police prosecution without squarely addressing the constitutional implications of allowing prosecution of criminal cases by non-prosecutors.[79]

II. THE GROWTH OF LOW-LEVEL CRIMINAL COURTS AND STATE RESPONSES

As the volume of criminal cases has exploded over the past few decades, state and local governments have struggled to find ways to fund this vast new legal bureaucracy. One well-documented response has been to shift the costs of the criminal adjudication system, as well as probation and incarceration systems, from taxpayers to defendants.[80] Some jurisdictions went so far as to conceive of their policing and prosecution systems as money-generating machines for other municipal priorities. The starkest example of this was the well-documented abuses in Ferguson, Missouri, which came to light in the report prepared by the Department of Justice in the wake of the 2014 protests.[81]

Another response to the rising costs of the criminal justice system, however, is not to transfer the costs onto the subjects of that system but to attempt to reduce the costs or improve efficiencies of the system. Often these "efficiencies" come at the expense of the procedural rights of the defendants. Some courts have done this through mass proceedings in which many defendants enter pleas of guilty and are processed at the same time.[82] Legislatures have tested

---

78. *See* Horwitz, *supra* note 9, at 1337–39 (noting that, aside from South Carolina and New Hampshire, lower courts in New York and Delaware have referred to the "long-established and accepted" practice and the "well-established" practice of police prosecution in low-level courts (first quoting People v. Jackson, 548 N.Y.S.2d 987, 991 (N.Y. Sup. Ct. 1989), *rev'd*, 558 N.Y.S.2d 590 (N.Y. App. Div.), *appeal denied*, 566 N.E.2d 1177 (N.Y. 1990); and then quoting Evans v. Barron, No. 81A-AU-7, at 4 (Del. Super. Ct. 1982) (listed by Horwitz as being on file with author))).

79. *See id.* at 1340–41.

80. *See, e.g.*, FERGUSON REPORT, *supra* note 13, at 2; *see also* ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 35 (2016).

81. *See* FERGUSON REPORT, *supra* note 13.

82. *See, e.g.*, Eric S. Fish, *Resisting Mass Immigrant Prosecutions*, 133 YALE L.J. 1884, 1897–1904 (2024) (describing Operation Streamline and other immigration-related mass processing schemes). Some jurisdictions have even attempted to control costs by turning to volunteer prosecutors: lawyers who work for free prosecuting misdemeanors. These lawyers perform this unpaid labor in hopes of eventually obtaining paid employment with the prosecutor's office, gaining trial skills, or from a sense of altruism. The use of these volunteers may be slightly less troubling than allowing law enforcement to prosecute, but of course, volunteer prosecutors lack the training, experience, and incentives to

the contours of the right to a criminal jury trial by reducing statutory maximum punishments below that which triggers a constitutional right to a jury trial.[83] Similarly, courts have avoided the expense of appointing counsel in misdemeanor cases by declaring in advance of trial that the defendant, if convicted, would not be sentenced to incarceration.[84]

In addition to reducing the roles of juries and defense lawyers in low-level criminal adjudication, some courts have eliminated prosecutorial expenses. Today approximately fourteen states allow the practice of police prosecution in low-level courts.[85] Although examples of "police courts" are nothing new, their use may be on the rise as a response to the financial burden of processing so many low-level criminal offenses.[86] New constitutional challenges to this practice argue that convictions obtained without a public prosecutor violate principles of due process and separation of powers.

Harwinder Sangha was charged with one count of operating a motor vehicle without an ignition interlock system, a device that

---

comply with the ethical norms and rules that are supposed to constrain prosecutors. More fundamentally, the use of volunteers to increase the "efficiency" of low-level prosecution only allows for an ever-expanding system that ensnares more community members and does not need to internalize the costs of this expansion. *See generally* Russell M. Gold, *Volunteer Prosecutors*, 59 AM. CRIM. L. REV. 1483 (2022).

83. *Duncan v. Louisiana*, 391 U.S. 145 (1968), and its progeny provide for a federal constitutional right to a jury trial in any criminal case for which the potential maximum punishment is at least six months of incarceration.

84. The federal constitutional right to appointed counsel that flows from *Gideon v. Wainwright*, 372 U.S. 335 (1963), only protects those criminal defendants who face the possibility of incarceration if convicted. A defendant who faces only a fine or other non-incarcerative penalty in a misdemeanor has no federal constitutional right to appointed counsel. *See* Scott v. Illinois, 440 U.S. 367, 373–74 (1979); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

85. *See* Alexandra Natapoff, Opinion, *When the Police Become Prosecutors*, N.Y. TIMES (Dec. 26, 2018), https://www.nytimes.com/2018/12/26/opinion/police-prosecutors-misdemeanors.html ("In hundreds of misdemeanor courts in at least 14 states, police officers can file criminal charges and handle court cases, acting as prosecutor as well as witness and negotiator. People must defend themselves against, or work out plea deals with, the same police officers who arrested them for low-level offenses like shoplifting and trespassing."). In some states, low-level courts not only lack prosecutors but are also overseen by judges who are not required to be lawyers. *See id.* Because jurisdictions vary with regard to the specific roles that prosecutors are allowed to play in low-level courts, it is difficult to get an accurate count of how many states should be included in this count. *See* Alexandra Natapoff, *Misdemeanor Declination: A Theory of Internal Separation of Powers*, 102 TEX. L. REV. 937, 1005–07 (2024) [hereinafter Natapoff, *Misdemeanor Declination*].

86. *See* Murray, *supra* note 6, at 24–25 (arguing that law enforcement officers could subvert efforts of reformist prosecutors by handling prosecutions themselves in "police courts").

would only allow his car to start after he passed a breath alcohol test.[87] Having previously been convicted of Driving Under the Influence,[88] the defendant was required to maintain an ignition interlock system on any motor vehicle that he operated.[89] Failure to do so constituted a new criminal offense, and Sangha was charged with violating this law.[90] When he appeared for trial in general district court in the Commonwealth of Virginia, the local prosecuting authority chose not to participate in the trial.[91] According to the website of the local prosecuting authority, its policy was not to get involved with the prosecution of misdemeanors except those within a specifically enumerated list.[92] This practice of staying out of misdemeanor prosecutions is at least tacitly endorsed by the Virginia General Assembly, which requires only that Virginia's prosecutors represent the Commonwealth in the prosecution of felonies and further provides that the prosecutor "may in his discretion, prosecute . . . misdemeanors, or any other violation, the conviction of which carries a penalty of confinement in jail, or a fine of $500 or more, or both such confinement and fine."[93]

In the county where Sangha was charged, a new prosecutor had recently been elected.[94] Concerned with the limited funds available to his office, the new prosecutor testified before the county board of supervisors that his office would not "be able to prosecute some lower-level crimes, properly review evidence, [or] handle juvenile offenses . . . without approval of new positions."[95] When no additional funding was approved, he implemented just such a policy, deciding

87. *See* Justin Jouvenal, *Ruling Challenges Va.'s Tradition of Judges, Police Officers Prosecuting Misdemeanor Cases*, WASH. POST (April 9, 2021), https://www.washingtonpost.com/local/public-safety/virginia-misdemeanor-cases-ruling/2021/04/08/f654ad4a-9256-11eb-a74e-1f4cf89fd948_story.html; *see also* VA. CODE ANN. § 18.2-272(C) (2025).

88. *See* Jouvenal, *supra* note 87 ("Harwinder Sangha, who had a previous conviction for drunken driving, was charged in February 2020 with driving a car without an ignition interlock, a device with a breathalyzer that prevents intoxicated drivers from starting a vehicle . . . ."); *see also* VA. CODE ANN. § 18.2-266 (2025).

89. *See* Commonwealth v. Sangha, 107 Va. Cir. 408, 408–09 (2021); VA. CODE ANN. § 18.2-272(C) (2025).

90. *Sangha*, 107 Va. Cir. at 408–09.

91. *Id.* at 409.

92. *Id.* at 409 n.2.

93. VA. CODE ANN. § 15.2-1627(B) (2025).

94. WTOP Staff, *Fairfax County Election Results 2019*, WTOP (Nov. 6, 2019), https://perma.cc/8PMH-LSN3.

95. Justin Jouvenal, *Fairfax's Top Prosecutor Says Staffing 'Crisis' Will Hurt County's Ability to Seek Justice*, WASH. POST (Sept. 22, 2020), https://www.washingtonpost.com/local/public-safety/fairfax-county-prosecutor-says-staffing-crisis-will-hurt-ability-to-seek-justice/2020/09/22/a81d37ee-fcda-11ea-b555-4d71a9254f4b_story.html.

that his office would only assign prosecutors to certain select misdemeanor cases and would not be involved with the majority of misdemeanor prosecutions.[96] Instead of these cases going unprosecuted, however, the county's general district court judges simply proceeded without a prosecutor, calling law enforcement witnesses to give evidence against the defendant.[97]

Without the prosecution's involvement, the general district court judge began Sangha's trial, swore in a law enforcement officer and heard testimony from that witness, found Sangha guilty, and sentenced him to both an active jail sentence and a fine.[98] Sangha appealed this conviction to the local circuit court, where he was entitled to a trial de novo pursuant to state law.[99] Prior to trial in circuit court, Sangha filed a motion to dismiss the prosecution, arguing that the court lacked the power to try him without the participation of the prosecuting authority.[100] After extensive briefing on the issue, the circuit court granted Sangha's motion and dismissed the prosecution.[101]

Generally, an elected prosecutor has the authority and discretion to not prosecute any specific case.[102] The circuit court in *Sangha* concluded that a court cannot exercise executive power and therefore cannot call or examine witnesses (except in very limited circumstances).[103] If a court were to proceed to trial when the prosecutor has elected not to prosecute, "the 'whole power' of the executive to prosecute would be effectively, and thus unconstitutionally, devolved to the court."[104]

---

96. *See id.*

97. Jouvenal, *supra* note 87.

98. Commonwealth v. Sangha, 107 Va. Cir. 408, 409 (2021).

99. *See id.* at 409 n.3 (citing VA. CODE ANN. § 16.1-136).

100. *See id.* at 408–09.

101. *See id.* at 409–10, 428. Prior to ruling on the defendant's motion, the court invited briefing not only from the parties but also from any interested party on the following questions: "Whether the circuit court may conduct a trial where the Commonwealth Attorney has declined to prosecute a case and, if so, what role, if any, a police officer may play in such a trial and what role, if any, the court has in calling and examining witnesses." *Id.* at 409. Six amicus briefs were filed from various perspectives. *Id.*

102. Less settled is whether, in the absence of a specific statutory provision, an elected prosecutor can decide not to prosecute a particular offense. *See, e.g.*, Frances Robles & Alan Blinder, *Florida Prosecutor Takes a Bold Stand Against Death Penalty*, N.Y. TIMES (Mar. 16, 2017), https://www.nytimes.com/2017/03/16/us/orlando-prosecutor-will-no-longer-seek-death-penalty.html; Ned Oliver, *Virginia Explained: Can a Local Prosecutor Decide to Just Stop Prosecuting Marijuana Cases? The Va. Supreme Court Will Decide*, VA. MERCURY (Apr. 22, 2019), https://perma.cc/T9DZ-TTHH.

103. *Sangha*, 107 Va. Cir. at 421.

104. *Id.* at 420.

Shortly after the trial court in *Sangha* dismissed the case against him, the same issue was litigated in a different part of Virginia. In the city of Newport News, the prosecutor declined to participate in the prosecution of Norman Wilkerson for Carrying a Concealed Weapon,[105] a misdemeanor punishable by up to one year in jail.[106] While agreeing with the *Sangha* Court that the prosecution may elect not to prosecute misdemeanors, or certain classes of misdemeanors, the *Wilkerson* Court found no problem with a misdemeanor criminal trial proceeding without a prosecutor. The *Wilkerson* Court found that Virginia courts had approved of criminal prosecution by private parties[107] and that the Virginia General Assembly had "contemplated prosecutorial abilities that lie outside the purview of the Commonwealth's Attorney."[108]

Affirming the ability of criminal courts to proceed without a prosecuting attorney, the *Wilkerson* Court characterized the actions of the law enforcement officer presenting the case not as the unauthorized practice of law but simply as "facilitat[ing] the orderly presentation of witnesses."[109] The trial judge was similarly untroubled by the fact that no prosecutor would be available to fulfill the constitutional obligation recognized by *Brady v. Maryland* and its progeny,[110] seeming to conclude that exculpatory information may come to light during questioning at trial.[111] The *Wilkerson* Court further opined that law enforcement officers might be expected to comply with the *Brady* rule even while acknowledging that no existing authority compels this action from members of law enforcement.[112]

The *Wilkerson* Court's explanation of the constitutional issues is less than persuasive, and does not fully engage either the separation-of-powers argument or the logical impossibility of requiring the prosecutor to disclose favorable evidence in a case in which the prosecutor's office has announced that it is not involved. The Court's discussion of efficiency, however, and the "practical tradition" of how low-level cases are litigated, seems to hold the key to the outcome: "If [Virginia law] were read as Defendant urges, the long standing and

105. *See* Commonwealth v. Wilkerson, 108 Va. Cir. 430, 430 (2021).

106. *See* VA. CODE ANN. § 18.2-308 (2025).

107. *See Wilkerson*, 108 Va. Cir. at 433 (first citing Cantrell v. Commonwealth, 329 S.E.2d 22, 26 (Va. 1985); and then citing 1995 Va. Op. Att'y Gen. 139 (1995)).

108. *Id.*

109. *Id.*

110. *See id.* at 440.

111. *See id.* at 440–43.

112. *See id.* at 441 ("There is no direct appellate case law mandating law enforcement to comply with *Brady* in the absence of the Commonwealth's Attorney, whereas an express affirmative duty for the prosecution exists. Therefore, an inference may exist that a Commonwealth's Attorney need be present to enforce *Brady*. This Court does not agree with that inference.").

practical tradition of [cases without prosecutors] moving forward would abruptly end, creating disastrous public policy considerations."[113] Rather than grapple with the constitutional issues raised by the defendant, the Court simply presents the outcome—that a prosecutor would be required to attend every criminal prosecution and participate—to be "an almost impossible endeavor."[114] The fact that a majority of American jurisdictions have just such a requirement[115] demonstrates the weakness of this argument.

Of course, law enforcement is not a party to criminal litigation. The state and the defendant are the only parties in a criminal case. And only an attorney is empowered to represent the state in criminal litigation, not a law enforcement officer or a judge. Duties of a prosecutor include not only the decision to charge or not to charge[116] and which offense to charge, but also presentation of evidence and objections to adverse evidence, evaluation of whether the available evidence is sufficient to support a conviction,[117] and importantly, the disclosure of evidence favorable to the defendant.[118] The constitutional obligation that prosecutors disclose favorable evidence to the defendant in a criminal case would obviously be rendered toothless if prosecutors were allowed to simply sit out a criminal prosecution. And the Supreme Court has been clear that the constitutional obligation is not only to disclose known evidence to the defendant but "to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[119] No such obligation applies to law enforcement officers or any other kind of witnesses.[120] Moreover, only prosecutors are able to evaluate the sufficiency of available and admissible evidence to determine whether the initiation of charges is warranted and whether to reduce

---

113. *Id.* at 435.

114. *Id.* at 436 ("An absurd reading of the statute would be to have the Commonwealth's Attorney present for every single misdemeanor, certainly an almost impossible endeavor 'internally inconsistent or otherwise incapable of operation.'") (quoting Covel v. Town of Vienna, 694 S.E.2d 609, 614 (Va. 2010)).

115. Emma Kaufman, *The Past and Persistence of Private Prosecution*, 173 U. PA. L. REV. 89, 129 (2024).

116. *See* FEELEY, *supra* note 38, at 16 ("The antithesis of bureaucracy is discretion, the ability to base decisions on individual judgments rather than on rules.").

117. MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 1983); *see also* CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION §§ 3-4.2 to 3-4.4 (AM. BAR ASS'N 2017).

118. MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 1983).

119. Kyles v. Whitley, 514 U.S. 419, 437 (1995).

120. *See* Jean v. Collins, 221 F.3d 656, 660 (4th Cir. 2000) (Wilkinson, C.J., concurring) ("[T]o speak of the duty binding police officers as a *Brady* duty is simply incorrect. The Supreme Court has always defined the *Brady* duty as one that rests with the prosecution.").

charges, either through motion to the court or through the process of plea bargaining.[121]

Even without resolving the broader issue of whether allowing for convictions without prosecutors violates separation-of-powers principles, the *Brady* issue demonstrates the constitutional invalidity of any such conviction. The Supreme Court has held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[122] A criminal defendant facing not a prosecutor but only a judge and law enforcement witnesses has no meaningful protections under *Brady*. It would make no sense to require disclosure of favorable evidence to the accused but then exempt any case in which a prosecutor chose not to be involved. A statute allowing for such a result would violate due process.[123] Any criminal conviction obtained without the involvement of a prosecutor, therefore, violates the principles of *Brady* and should be considered constitutionally invalid.[124]

Allowing for criminal convictions without the involvement of prosecutors violates the foundational principles of separation of powers and the adversarial system. The Supreme Court recently reiterated the centrality of the adversarial system in criminal litigation in *United States v. Sineneng-Smith*[125]:

> [W]e follow the principle of party presentation. . . . "[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties

---

121. In addition to the fact that prosecutors alone are bound by *Brady* and other constitutional requirements, prosecutors are bound by rules of ethics and standards of practice that do not apply to law enforcement officers, judges, or non-lawyers. *See, e.g.*, CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION, §§ 3-1.2 to 3-1.4 (AM. BAR ASS'N 2017); MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 1983).

122. Brady v. Maryland, 373 U.S. 83, 87 (1963).

123. *See, e.g.*, VA. CODE ANN. § 15.2-1627(B) (2023) ("The attorney for the Commonwealth . . . shall have the duties and powers imposed upon him by general law, including the duty of prosecuting all warrants, indictments or informations charging a felony, and *he may in his discretion*, prosecute Class 1, 2 and 3 misdemeanors, or any other violation, the conviction of which carries a penalty of confinement in jail, or a fine of $500 or more, or both such confinement and fine." (emphasis added)).

124. *See* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1321 (1997) ("Commitment to the rhetoric and formalities of the adversary system, coupled with a refusal to acknowledge the profound inequality between certain adversaries, means that innocent people will be convicted simply because there is no meaningful way for them to learn about or present exculpatory evidence.").

125. 140 S. Ct. 1575 (2020).

> present." . . . [A]s a general rule, our system "is designed around the premise that [parties represented by competent counsel] know what is best for them" . . . .
>
> "[C]ourts are essentially passive instruments of government." They "do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties."[126]

One of the reasons for this principle of party presentation is the recognition that courts are poorly suited—relative to democratically elected prosecutors—to decide which types of cases are most important and when to exercise discretion not to prosecute a particular defendant or type of case. Courts have long recognized the superior position of public prosecutors to other actors in deciding which cases should and should not go forward: "[As] the representative of the public, [the prosecutor possesses] a discretion, which is not to be controlled by the courts or *by an interested individual*."[127]

Good policy reasons of course also exist as to why the executive branch, rather than the judicial branch, should retain the power to decide which types of cases and which particular cases get prosecuted.[128] The United States Supreme Court has explained the reasons for the strong presumption against interference by courts in prosecutorial decision-making:

> Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily

126. United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020) (citations omitted) (first quoting Greenlaw v. United States, 554 U.S. 237, 243 (2008); then quoting Castro v. United States, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment); and then quoting United States v. Samuels, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of reh'g en banc)).

127. Ganger v. Peyton, 379 F.2d 709, 713 (4th Cir. 1967) (quoting United States v. Brokaw, 60 F. Supp. 100, 101 (S.D. Ill. 1945)); *see also* Heckler v. Chaney, 470 U.S. 821, 832 (1985) ("[T]he decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch."); United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965) ("It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of [prosecutors'] discretionary powers . . . in their control over criminal prosecutions.").

128. *See, e.g.*, Moore v. Commonwealth, 722 S.E.2d 668, 675 (Va. Ct. App. 2012) ("[T]he prosecution is the first and, presumptively, best judge of where the public interest lies, and the trial court should not merely substitute its judgment for that of the prosecution.").

> susceptible to the kind of analysis the courts are competent to undertake."[129]

Police prosecution also raises the issue of whether the police prosecutor is entitled to prosecutorial immunity. Generally, prosecutors are absolutely immune from liability arising from any decisions or actions they take in the prosecution of a criminal case.[130] The logic of prosecutorial immunity does not apply to police officers prosecuting cases, however, because they lack the training and ethical obligations of the professional prosecutor.[131]

Even where explicitly authorized by state statute, a criminal conviction obtained by a law enforcement officer instead of a public prosecutor violates basic principles of due process. A police officer is not bound by rules of professional legal ethics and is not subject to discipline for violating a state's code of legal ethics.[132] All criminal defendants enjoy the right to the disclosure of material evidence that is favorable to them;[133] a police officer is not trained in these constitutional obligations and how to comply with them. Chief Justice Burger argued that police officers "do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow."[134]

Discretion in which charges to bring and which charges to decline is an enormous power that is given to the public prosecutor. This power is vast and virtually unreviewable.[135] The American system of criminal adjudication is comfortable with this broad grant of power to prosecutors because they are democratically accountable to the public through regular election, and because prosecutors have undergone legal training and testing and are subject to professional discipline. None of that is true of law enforcement officers. A law enforcement officer acting as a prosecutor, for example, might seek to introduce illegally-obtained evidence against the defendant. Even if such misconduct is inadvertent due to a lack of legal training, such conduct taints the proceeding and deprives the defendant of a fundamentally fair trial.

---

129. United States v. Armstrong, 517 U.S. 456, 465 (1996) (quoting Wayte v. United States, 470 U.S. 598, 607 (1985)).

130. *See* Imbler v. Pachtman, 424 U.S. 409, 431 (1976) ("[I]n initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983.").

131. *See* David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 503 (2016).

132. *See* MODEL RULES OF PRO. CONDUCT r. 5.3(c) (AM. BAR ASS'N 1983).

133. Brady v. Maryland, 373 U.S. 83, 87 (1963).

134. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 417 (1971) (Burger, C.J., dissenting).

135. *See, e.g.*, DAVIS, *supra* note 6, at 5; William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2558 (2004).

Allowing for police prosecutions is really just a form of allowing for private, or third-party prosecutions, a practice that has been repudiated by most American courts.[136] Although authorized in the colonial period and the early days of the Republic, the use of private prosecutors has long been banned in the vast majority of American courts.[137] Courts have held that a criminal charge may generally not be instituted or prosecuted by a victim or a representative of the victim.[138] The reasons for this limitation are philosophical, political, and pragmatic. Prosecutors are not only bound by constitutional obligations uniquely applicable to the role, they are also subject to political and ethical[139] constraints on their performance, none of which are true of law enforcement officers or private parties presenting cases in court.[140] In addition to not being bound by any

136. *But see* I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1586–609 (2020) (describing the benefits of giving crime victims the option to pursue criminal charges through public or private prosecution).

137. *See* Andrew Sidman, Comment, *The Outmoded Concept of Private Prosecution*, 25 AM. U. L. REV. 754, 762–65 (1976). For a thorough and contrary view, see generally Kaufman, *supra* note 115.

138. *See, e.g.*, Rogowicz v. O'Connell, 786 A.2d 841, 842, 844 (N.H. 2001) (holding that a prosecutor could not serve "two masters" because the prosecutor "has a duty to the public to achieve justice and a duty to the defendant [who] . . . 'is entitled to a full measure of fairness.'" (quoting 63C AM. JUR. 2D *Prosecuting Attorneys* § 23 (1997))); *see also* State v. Noble, 646 N.W.2d 38, 52 (Wis. 2002) (Abramson, C.J., dissenting) ("[W]hen someone other than a district attorney (or a person authorized by statute) exercises the functions of a district attorney, the criminal proceedings are void.").

139. *See* Berger v. United States, 295 U.S. 78, 88 (1935) ("The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."); *see also* MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR. ASS'N 1983); CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(c) (AM. BAR ASS'N 2017).

140. *See, e.g.*, Andrew Horwitz & John R. Grasso, *Police Prosecutions in Rhode Island: The Unauthorized Practice of Law*, R.I. BAR J., May/June 2006, at 5, 5 ("While it may seem superficially harmless to entrust a misdemeanor or traffic prosecution to a police officer, that delegation of responsibility completely ignores the prosecutor's vital role. . . . The proper exercise of [prosecutorial] discretion is dependent upon a number of factors, not the least of which include legal training and ethical obligations. Indeed, the criminal justice system functions almost entirely on a presumption that the extraordinary power of the government, as wielded through a prosecutor, is being applied fairly and justly. This presumption is founded on the fact that the prosecutor is an attorney who, having been licensed to practice law in the jurisdiction, is fully trained in the law and bound by the code of legal ethics governing attorney conduct.").

rules of legal ethics or system of professional legal discipline, law enforcement officers lack the professional autonomy of a prosecutor, because they are bound to answer to the chief of police.[141] The prosecutor, on the other hand, is both democratically accountable and subject to professional discipline. Courts have also held that convictions obtained in proceedings in which an out-of-state lawyer assisted the prosecutor violated due process and must be reversed, because that out-of-state lawyer was not subject to the professional discipline of the state's bar.[142]

Discretionary determinations of a prosecutor include whether to charge a crime and what crime to charge,[143] whether a conflict exists in the prosecution of the charge in a particular court, whether the evidence against the defendant was gathered in an unconstitutional manner, whether evidence exists that is favorable to the defendant and therefore should be disclosed prior to trial,[144] which evidence is subject to statutory disclosure requirements, and whether and how to engage in plea negotiations.[145]

Trial presents an entirely new set of difficult discretionary calls for the prosecutor. Law enforcement officers trying to fulfill this role may lack an understanding of the rules of evidence, the law and ethical rules surrounding the preparation of witnesses to testify, and the procedural rules that govern trials. And where the judicial officer steps in to assist the law enforcement officer who needs help, the

141. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 5.2(a) (AM. BAR. ASS'N 1983) ("A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.").

142. *See, e.g.*, State v. Russell, 53 N.W. 441, 422 (Wis. 1892) (holding that the involvement of a Minnesota attorney, although competent, in the prosecution required reversal and that the district attorney constituted a "*quasi* judicial officer" whose responsibilities could not be delegated to a third party (quoting Wright v. Rindskopf, 43 Wis. 344, 354 (1877)).

143. These decisions, of course, are comprised of different components: whether the admissible evidence would support a conviction, whether justice would be served by a conviction (and at what level), and whether pursuit of a conviction would be consonant with the priorities of the office and the community.

144. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963); Giglio v. United States, 405 U.S. 150, 154–55 (1972).

145. Whether a law enforcement officer would be allowed to engage in plea negotiations is another difficult issue that remains unresolved in police prosecutions. Law enforcement officers are not bound by the ethical rules that forbid misrepresentation, and the use of deception in police investigations has consistently been upheld by courts. A law enforcement officer, then, might have lied to the defendant during the investigation (as allowed by Supreme Court precedent), but then may be placed in the role of negotiating with them prior to trial. It is unclear which rules, if any, would bind the law enforcement officer in this dual role. *See* Horwitz, *supra* note 9, at 1324–25 & nn. 94–99.

perception of a neutral and detached judiciary is undermined, as is the belief in a fair trial.[146]

Ideally, prosecutors act as a buffer between the desires of law enforcement and the effective and fair administration of justice. Law enforcement officers may possess personal or institutional biases in favor of prosecution, for example, in cases that involve an allegation of excessive force or police misconduct.[147] More generally, law enforcement officers may be less likely to make decisions that will alienate police colleagues than would a prosecutor. If, for example, a law enforcement witness in a case seems unreliable or the evidence unconstitutionally obtained, a prosecutor would likely find it easier to decline prosecution or alert the defense than would a member of law enforcement in charge of the prosecution.

Finally, the practice of police courts violates the principle that a person cannot appear as an advocate and a witness in the same case.[148] This blurring of roles not only causes problems in the presentation of evidence[149] but also with regard to the public perception of fairness and legitimacy in low-level criminal courts. Allowing non-lawyers to prosecute criminal cases sends the message that such cases are unimportant and not "real" criminal cases.[150] Such a message might have the effect of convincing defendants to not take the proceedings as seriously, which could be detrimental not only to those defendants but to the rule of law generally.[151] The Department of Justice Ferguson Report illustrated the systemic problems that arise when a judicial system lacks a clear definition of role between prosecutor, judge, and law enforcement.[152]

---

146. *See id.* at 1327 (citing State v. Morin, 327 A.2d 702, 703–04 (N.H. 1974) (Griffith, J., dissenting) (judge assisted police officer in calling appropriate witness in order to admit certain necessary evidence over defendant's hearsay objection)).

147. *See id.* at 1312.

148. *See* MODEL RULES OF PRO. CONDUCT r. 3.7(a) (AM. BAR ASS'N 1983).

149. *See* Nikolas Frye, *supra* note 61, at 354 ("Traditional or not, allowing prosecutors to also act as material witnesses against defendants violates due process because it removes impartiality from the prosecutorial decision-making process. It asks the police officer to separate his duties as the arresting officer and material witness for the state from his duty to the court to impartially evaluate the evidence in front of him and decide whether to move forward with the case." (footnotes omitted)).

150. *See* Horwitz & Grasso, *supra* note 140, at 5.

151. *See id.* ("By failing to distinguish between the functions of the police department and the functions of a prosecutor's office, the practice suggests the existence of an unsupervised police state.").

152. *See generally* FERGUSON REPORT, *supra* note 13. Thirty states continue to allow non-lawyers to preside over the adjudication of low-level offenses. William Glaberson, *In Tiny Courts of N.Y., Abuses of Law and Power*, N.Y. TIMES (Sept. 25, 2006), https://www.nytimes.com/2006/09/25/nyregion/25courts.html. The Supreme Court of California, however, long ago held that this practice violated

In her recent article on misdemeanor declination and the separation of powers, Alexandra Natapoff characterizes the issue of police acting as prosecutors as a structural problem. Referring to the design flaw in the American criminal justice system of vesting both law enforcement and adjudicative power in a single public prosecutor, Natapoff calls police acting as prosecutors in their own cases "even more egregious."[153] Among other reforms, Natapoff calls for prohibiting the practice of police acting as prosecutors as a violation of separation-of-powers principles or, at a minimum, clarifying that police officers acting in that capacity do not enjoy absolute prosecutorial immunity but instead only the qualified immunity that ordinarily protects police officers acting in their professional capacity.[154] Because so few courts have squarely addressed the practice of "police courts,"

> the practice has been permitted to persist even though it sits in tension with numerous basic assumptions about the prosecutorial role and the need for checks on the police power. This inattention is consistent with the judiciary's generally cavalier treatment of the misdemeanor system, an inattentiveness that routinely tests the boundaries of fundamental criminal doctrines and principles.[155]

As scholars and others pay increasing attention to the problems of misdemeanor adjudication, legislatures and appellate courts should make clear that prosecutions without prosecutors—at any level—are inconsistent with fundamental fairness and due process.

III. REFORM, ABOLITION, AND RE-IMAGINING MISDEMEANOR COURTS

Prosecutors have always exercised discretion over which cases—or types of cases—to pursue. In a world of limited resources, elected prosecutors must decide where to allocate those finite funds. The prosecutor in the *Sangha* case was by no means alone in his approach. Other elected prosecutors have made the argument to funding sources that, unless they received more financial support, they would decide to restrict the number or type of criminal charges they pursue.[156]

---

due process, and the Court required that judges in that state be licensed attorneys. Gordon v. Justice Court, 525 P.2d 72, 78 (Cal. 1974).

153. Natapoff, *Misdemeanor Declination*, *supra* note 85, at 1004.

154. *See id.* at 1007–08.

155. *Id.* at 1008.

156. *See, e.g.*, Cher Muzyk, *Prosecutor, Public Defender Grapple with the Future Handling of Low-level Crimes*, PRINCE WILLIAM TIMES (May 5, 2021), https://perma.cc/E6QT-QXPX (describing the efforts of Prince William County, Virginia elected prosecutor Amy Ashworth to secure more funding from the county's board of supervisors: "Ideally, my office would stay in as many cases as possible . . . . No decisions have been made yet on what misdemeanors we may

Prosecutors who have enacted policies against prosecuting certain low-level offenses can be said to have begun the process of abolition, at least in some small part. Some who have declined prosecutions have said that, because the system lacked the resources and safeguards to protect defendants and allow prosecutors to fulfill their ethical duties, they could not participate.[157] Others have concluded that the safety of their community is not served by prosecuting certain kinds of conduct, even though it has been criminalized by the legislature.[158] These policies have generated significant political pushback, as in the case of the successful recall in June 2022 of San Francisco District Attorney Chesa Boudin.[159]

Any proposed reform to the criminal justice system today must anticipate the abolitionist response. One recent and valuable such contribution is Brendan Roediger's response to Alexandra Natapoff's reformist proposal in her article *Criminal Municipal Courts*.[160] Roediger argues for the abolition, not reform, of municipal courts.[161] He refers to Natapoff's project of imagining a fairer and more just system of municipal courts as an example of "progressive legal legitimation."[162] Roediger describes himself as both an abolitionist and a lawyer and discusses the tension between performing the two roles simultaneously: "For me, in practice, this means attempting to protect clients from state power and working with organizers

---

get out of, as we have only recently received confirmation that the budget passed.").

157. STEVE DESCANO, FAIRFAX CNTY. COMMONWEALTH'S ATT'Y, 2020 FAIRFAX COUNTY COMMONWEALTH'S ATTORNEY RESOURCES REPORT (2020), https://perma.cc/25G2-5SWK.

158. *See, e.g.*, Sonia Moghe, *Manhattan District Attorney Announces He Won't Prosecute Certain Crimes*, CNN (Jan. 6, 2022), https://perma.cc/U6BQ-6QSK (detailing district attorney Alvin Bragg's claim that reducing recidivism by declining to prosecute certain crimes, rather than increasing incarceration, is the key to greater community safety).

159. *See* Thomas Fuller, *Voters in San Francisco Topple the City's Progressive District Attorney, Chesa Boudin.*, N.Y. TIMES (June 8, 2022), https://www.nytimes.com/2022/06/07/us/politics/chesa-boudin-recall-san-francisco.html. Other examples include the case of elected Commonwealth's Attorney Buta Biberaj in Loudoun County, Virginia, who was voted out of office in 2023 after suggesting that some incidents of domestic violence could be better handled outside of the criminal justice system. *See* Paul H. Robinson & Jeffrey Seaman, *Is Progressive Criminal Justice Reform Fair, Just, and Equitable?*, 14 WAKE FOREST L. REV. ONLINE 124, 132 (2024), https://perma.cc/M3UE-FHYH.

160. Roediger, *supra* note 32 (responding to Natapoff, *Criminal Municipal Courts*, *supra* note 9, at 993).

161. *See id.* at 215.

162. *Id.* at 214 ("By [progressive legal legitimation] I mean an approach that proceeds to prescribe from the traditional 'medication list' of liberal reforms (substantive, procedural, and 'democratizing') without grappling with whether a system or apparatus is so inextricably bound up with the maintenance of race and class hierarchy that it should be demolished.")

interested in fundamentally shifting power toward my clients and away from the state."[163]

Roediger's response is straightforwardly anti-reformist and does not seek to describe or imagine a judicial system that would replace our current system of low-level courts.[164] He laments the tendency of law to co-opt critiques and re-form itself without meaningful structural change.[165] He argues that municipal courts exist for the purpose of "racialized management of everyday life through surveillance and petty regulatory regimes" and so should not be replaced.[166] This critique is well-placed and important, but it is also worthwhile to imagine a system that provides the socially useful service of maintaining and encouraging democratically imagined "peace" or "order" without replicating the racialized hierarchy of the existing system. Voters have removed from office prosecutors whose policies were seen to be contributing to rising crime rates. Voters in Oregon recently voted to re-criminalize the possession of most drugs, ending an experiment that began in 2020 with a popular referendum that passed with broad popular support.[167] Some scholars have argued that when the criminal law fails to condemn conduct that most of society considers condemnable, the "moral credibility of the law" is harmed and can lead to a perceived illegitimacy of the system and even vigilantism.[168]

Roediger is skeptical of Natapoff's descriptions of reform, arguing that the examples she gives are unconvincing and insufficient to support her claim that courts can operate as a "de facto forum for decriminalization."[169] Although some courts continue to experiment with diversion programs and "civil ordinances," he finds contemporary low-level courts to be a fundamental part of today's police bureaucracy, a system that "creates and recreates racialized

---

163. *Id.* at 215.

164. *See id.* at 216 ("Abolitionism seeks to destroy, and abolitionism seeks to build, but it does not seek to replace that which is destroyed.").

165. *See id.* ("Law is a space where even the most hardened materialism, grounded in radical movements and mutual aid, tends to give way to defensive idealism or reformism.").

166. *Id.* at 217.

167. *See* Mike Baker, *Oregon Is Recriminalizing Drugs. Here's What Portland Learned.*, N.Y. TIMES (Apr. 1, 2024), https:www.nytimes.com/2024/04/01/us/oregon-drug-law-portland-mayor.html.

168. *See* Paul H. Robinson & Jeffrey Seaman, *Decriminalizing Condemnable Conduct: A Miscalculation of Societal Costs and Benefits*, 98 S. CAL. L. REV. 585, 634–43 (2025); *see also* Youngjae Lee, *Is Prison Abolitionism Self-Defeating?*, CRIM. L. & PHIL. (forthcoming 2025) (manuscript at 8–13), https://perma.cc/EG7W-ALGH.

169. *See* Roediger, *supra* note 32, at 221 (quoting Natapoff, *Criminal Municipal Courts*, *supra* note 9, at 993).

subjects relegated to an external position."[170] One of the central purposes of low-level courts, he argues, is "the expansion of the scope of police power"[171] and the legitimation of police activity.[172] A central part of police activity that requires court legitimation is the extraction of money from the subjects of low-level courts, disproportionately people of color and poor people.[173] And the more that municipalities depend on the revenue generated by low-level courts, the more difficult it will be to meaningfully reform them. If low-level courts exist to legitimate police action—both maintenance-order policing and revenue-generation policing—then it makes little sense to propose reforms that are at odds with these objectives.

Natapoff writes that "[w]hile it is tempting to conclude that the pathologies of municipal courts outweigh their redeeming qualities, it is too soon" to abandon hope in reforming municipal courts.[174] Roediger disagrees, arguing that low-level courts are accomplishing what they are designed for: placing limitations on and extracting wealth from racialized subjects: "Reforms, no matter how serious or how imaginative, can never change the *nature* of the arrangement, which is control."[175]

Bennett Capers argues that we should look beyond the figure of the public prosecutor in reimagining societal responses to crime. In *Against Prosecutors*, Capers shows the historical contingency of the public prosecutor as an institution and argues that the existence of such a figure is not a historically necessary ingredient of a justice system.[176] Capers argues that we have exalted the public prosecutor and thereby devalued and displaced victims in our response to

---

170. *Id.* at 223. Roediger elaborates on how courts exclude their subjects from full democratic participation: "This is not mere hyperbole; municipal courts strip my clients of a range of things associated with citizenship in the United States: employment, guns, houses, children, the right to be present in a neighborhood, and the ability to stay in this country." *Id.*

171. *Id.*

172. *Id.* at 224.

173. *See* Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545, 556–65 (2017).

174. Natapoff, *Criminal Municipal Courts*, *supra* note 9, at 1046.

175. Roediger, *supra* note 32, at 226 (emphasis in original); *see also* Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 449–50 (2018); Paul Butler, *Locking Up My Own: Reflections of a Black (Recovering) Prosecutor*, 107 CALIF. L. REV. 1983, 1990 (2019); Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684, 1694 (2019); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1623 (2019); Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 15 (2019); Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1597 (2019); Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650, 1673 (2019).

176. *See* Capers, *supra* note 136, at 1581.

crime.[177] A return to a system of private prosecutions, he claims, would be a democratic and progressive move, "restoring agency to victims of crime, and by extension, to all of us."[178] Empowering victims would, in his view, open up possibilities of empathy, mercy, and connection that are missing from our current system of addressing crime.[179] Capers's approach to the problem is valuable and provocative, if quite optimistic. One does not need to be a cynic to worry about how "we, the people" would wield their newfound power, unmediated by a public prosecutor who is bound, at least in theory, by norms and rules of professional conduct, constitutional safeguards, and electoral accountability. A system without public prosecutors might solve one problem but create (and aggravate) many others at the expense of those accused of crimes.

An abolitionist approach can entail a number of different simultaneous critiques. "Prison abolition is two things: It's the complete and utter dismantling of prisons, policing, and surveillance as they currently exist within our culture. And it's also the building up of new ways of . . . relating with each other."[180] Although initially focused on prisons,[181] the abolition movement has expanded to consider other forms of oppressive state control, including police practices, coercive supervision, and punitive practices—even apart from incarceration.[182] A critique of current practices is not necessarily contrary to maintaining an abolitionist imagination. By forcing the system to internalize its own costs, rather than externalizing those costs onto defendants either in the form of increased fines and fees or in the form of reduced procedural safeguards throughout the prosecution, we at least shrink the system and create space for a broader imagining of what might replace it.

Since the 2014 murder of Michael Brown in Ferguson, Missouri and the nationwide protests in response,[183] many communities have rejected traditional "law and order" prosecutors in favor of electing prosecutors who promise to reform the criminal justice system.[184] Gathering steam in 2015, the "progressive prosecutor" movement was

177. *Id.* at 1590–91.

178. *Id.* at 1604.

179. *See id.* at 1603.

180. McLeod, *supra* note 175, at 1617 (quoting Mariame Kaba, *Episode 29—Mariame Kaba*, AIRGO (Feb. 2, 2016), https://perma.cc/QX76-WKJA).

181. *See generally, e.g.*, ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003).

182. *See* Rodriguez, *supra* note 175, at 1576 (describing the abolition movement as a "struggle against . . . carceral state violence" (emphasis omitted)).

183. *See* FERGUSON REPORT, *supra* note 13, at 5.

184. *See* Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 738 (2020) ("These included prosecutors elected in Boston, Brooklyn, Kansas City, Philadelphia, . . . San Francisco[,] . . . . Dallas, Houston, Orlando, San Antonio and localities in Louisiana, Mississippi, and Virginia, among other places.").

aided by political action committees that have continued to support such candidates across the country.[185] The majority of states have now experienced firsthand the election of progressive prosecutors in both urban centers and more rural areas.[186] Although the specific policies and priorities vary, the existence of organized financial support from political action committees has imposed a degree of uniformity: Each of the progressive prosecutors supports a lesser reliance on monetary bail, incarceration as punishment, discriminatory police practices, and the reflexive prosecution of low-level offenses.[187] More specifically, reformist prosecutors have promised to reduce or eliminate the use of cash bail,[188] minimize the use of pretrial incarceration,[189] divert low-level offenses away from the criminal justice system,[190] discourage sentences of incarceration that are unnecessarily long,[191] reduce racial disparities in charging and sentencing,[192] and decline to prosecute various classes of low-level offenses that disparately affect poor communities and communities of color.[193]

These popularly elected prosecutors have made a variety of efforts to change the way that charging decisions are made. Progressive prosecutors have won electoral victories on platforms that included promises to aggressively scale back the size of the criminal justice system, especially with regard to low-level crimes.[194] Examples of "prosecutorial nonenforcement"[195] can include relatively limited policies by which prosecutors decline to prosecute certain

185. Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187, 195–96 (tracing the history of efforts to coordinate the progressive prosecutor movement).

186. *See id.* at 197–99 (listing states in which progressive prosecutors have been elected as of 2021). By one estimate, over 72 million Americans live in jurisdictions that have elected "progressive prosecutors." *See* Robinson & Seaman, *supra* note 159, at 124.

187. *See* Covert, *supra* note 185, at 201.

188. *See* Mark Berman, *These Prosecutors Won Office Vowing to Fight the System. Now, the System Is Fighting Back.*, WASH. POST (Nov. 9, 2019), https://www.washingtonpost.com/national/these-prosecutors-won-office-vowing-to-fight-the-system-now-the-system-is-fighting-back/2019/11/05/20d863f6-afc1-11e9-a0c9-6d2d7818f3da_story.html.

189. *See* FAIR & JUST PROSECUTION, 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR 14 (2018), https://perma.cc/F43R-Z7G9.

190. *See* Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1238 (2020).

191. *See id.* at 1234.

192. *See* David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 26 (2017).

193. *See* K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 288 (2014).

194. *See* Covert, *supra* note 185, at 208–209.

195. *See generally* Murray, *supra* note 6.

specific low-level offenses, a more general orientation toward diversionary and rehabilitative programs rather than punitive and carceral options, or a policy against pursuing harsh sentences even while still pursuing convictions.[196]

A high-profile example of the latter approach was Aramis Ayala, the elected prosecutor in the Ninth Judicial Circuit in Florida, who announced in 2017 that she would not seek the death penalty in any criminal case.[197] This announcement set off a political and legal battle, with Florida Governor Rick Scott reassigning all potential capital murder cases away from Ayala and to another state attorney.[198] Ayala's petition to the Florida Supreme Court seeking to stop the governor's move was unsuccessful, and the cases were ultimately reassigned to another prosecutor who had not categorically ruled out the death penalty as a sentencing option.[199]

Prior to Virginia legalizing the possession of marijuana, some individual elected prosecutors announced that their offices would not be prosecuting marijuana possession cases.[200] This happened in a handful of mainly urban jurisdictions beginning in Norfolk in 2019.[201] When Commonwealth's Attorney Greg Underwood announced his policy of non-prosecution of marijuana possession cases, representatives of the local police department responded that its officers would continue making arrests and bringing charges for violations of the state law against marijuana possession.[202] Local judges denied prosecution motions to dismiss existing cases of marijuana possession.[203] When Underwood challenged the power of the local trial judges to refuse to dismiss the charges that the prosecutor wanted to abandon, he was unsuccessful.[204] The Supreme Court of Virginia rejected his claim that a prosecutor had the inherent power to dismiss any criminal charge as a part of their inherent executive power and instead ruled that Virginia law required judicial consent before the prosecutor could dismiss a pending charge.[205] Similar struggles between reform-minded prosecutors and resistant judges and law enforcement played out over the next year or so in

196. *See* Natapoff, *Misdemeanor Declination*, *supra* note 85, at 993–94 (collecting examples of prosecutors adopting categorical non-prosecution policies based in part on concerns of racial equity).

197. Angela J. Davis, *Reimagining Prosecution: In Search of the True Progressive*, 3 UCLA CRIM. JUST. L. REV. 1, 18 (2019).

198. *See id.*

199. *See id.* at 18–19.

200. *See* Murray, *supra* note 6, at 398–402.

201. *See id.*

202. *Id.* at 398.

203. *Id.* at 398–99.

204. *Id.* at 399.

205. *See id.* at 399 (citing In re Underwood, Nos. 190497 & 190498, 32 FED. SENT'G REP. 228, 228–29 (Va. May 2, 2019)).

different Virginia jurisdictions.[206] Although the Supreme Court of Virginia declined to adopt the argument of these prosecutors that they had the inherent right and ability as elected executive officials to use their discretion in the charging decision as they saw fit, the legislature offered some relief in 2020 by passing legislation that required courts to grant a prosecutor's motion to dismiss a pending criminal charge unless that decision is clearly motivated by a corrupt reason.[207] On the specific issue of marijuana possession, the Virginia legislature quickly rendered those disagreements moot only a few months later by legalizing the possession of small amounts of marijuana.[208]

Larry Krasner was one of the first "progressive" prosecutors to be elected in a major American city.[209] Elected Philadelphia District Attorney in 2017, Krasner vowed—among other initiatives—to reduce the scope of the city's probationary system.[210] Facing one of the highest rates of probation supervision in the nation, Krasner instructed his prosecutors not to seek probationary terms beyond thirty-six months for felony convictions and twelve months for misdemeanor convictions.[211] Krasner argued that this policy would not only allow Philadelphia's probation officers to focus their efforts on the most serious and dangerous offenders but also reduce racial disparities in the supervision of offenders.[212] Krasner has also advocated for ending the use of cash bail in the Philadelphia criminal

206. The same general story played out along similar lines with Commonwealth's Attorney Steve Descano in Fairfax, Stephanie Morales in Portsmouth, and Parisa Dehgani-Tafti in Arlington. *See id.* at 399–402.

207. *See* VA. CODE ANN. § 19.2-265.6(A) (2025) ("Upon motion of the Commonwealth to dismiss a charge, whether with or without prejudice, and with the consent of the defendant, a court shall grant the motion unless the court finds by clear and convincing evidence that the motion was made as the result of (i) bribery or (ii) bias or prejudice toward a victim . . . because of the race, religious conviction, gender, disability, gender identity, sexual orientation, color, or national origin of the victim.").

208. *See* VA. CODE ANN. § 4.1-1100 (2025) ("Except as otherwise provided in this subtitle and notwithstanding any other provision of law, a person 21 years of age or older may lawfully possess on his person or in any public place not more than one ounce of marijuana . . . .").

209. *See* Davis, *supra* note 197, at 10–12.

210. *See id.* at 12.

211. *See* Ryan Briggs, *Krasner: 'Mass Supervision' Is the 'Evil Twin' of Mass Incarceration*, WHYY, (Mar. 21, 2019), https://perma.cc/8YMP-C9SS.

212. *See* Samantha Melamed, *How Philly, the Nation's Most Supervised Big City, Cut Its Probation Numbers by a Third*, PHILA. INQUIRER (Apr. 19, 2021), https://www.inquirer.com/news/philadelphia-probation-community-supervision-reform-da-larry-krasner-20210419.html. As with many of Krasner's reformist initiatives, this one met resistance. Although Krasner instructed his prosecutors to coordinate with courts and probation officers to identify low-risk individuals who could be terminated early from probation, many declined to assist with this effort. *See id.*

justice system.[213] And, in addition to dismissing all marijuana possession cases and declining to prosecute such offenses going forward, Krasner announced that his office would not prosecute sex workers with fewer than two prior such convictions.[214]

Elected in Suffolk County (Boston), Massachusetts, in 2018, Rachael Rollins campaigned on a platform of effectively decriminalizing a wide variety of nonviolent low-level offenses.[215] By promising not to prosecute shoplifting, marijuana possession, and certain driving offenses, Rollins singlehandedly removed such conduct from the criminal justice system.[216] Acknowledging that the criminal justice system had created and reinforced undue hardships in communities of color, Rollins argued that "[a]ccountability does not need to have incarceration."[217] Her hope in diverting these cases away from the criminal justice system, she said, was to prevent future such offenses.[218] Rollins rolled out her vision in a 65-page policy memo in March 2019, providing what she believed was "a roadmap to a criminal justice system that works equally for everyone, based on research, data, and input from across the spectrum of stakeholders."[219] Her memo sought not only to divert and dismiss low-level offenses but also to create a new office culture based on a different understanding of what a prosecution office could be.[220]

In 2020, voters elected Chesa Boudin as San Francisco's district attorney.[221] Boudin may have had the most far-reaching policies of this group of reformist prosecutors, having prohibited his prosecutors from requesting cash bail absent "extraordinary circumstances"[222] and from requesting sentence enhancements for factors like gang

213. *See* Davis, *supra* note 197, at 12.

214. Zayrha Rodriguez, *"Philly D.A.": Larry Krasner's First Term, Under a Lens*, MARSHALL PROJECT, (June 5, 2021), https://perma.cc/3Q2W-RSPD. Krasner also effected change by replacing many long-time prosecutors with former defense attorneys and community activists, some of whom had their own adverse experiences with law enforcement and the criminal justice system. *See id.*

215. *See* Davis, *supra* note 197, at 20.

216. *See* Milton J. Valencia, *Study Shows No-Prosecution Policies May Work*, BOS. GLOBE, (Mar. 29, 2021), https://www.bostonglobe.com/2021/03/29/metro/study-shows-no-prosecution-policies-may-work/.

217. *See id.*

218. *See id.*

219. *See* Press Release, Andrew Binns, Suffolk Cnty. Dist. Att'y's Off., District Attorney Rollins Releases Comprehensive Policy Memo (Mar. 25, 2019), https://perma.cc/KSY5-KDKM.

220. *See id.*

221. *See* Fuller, *supra* note 159.

222. *Policy Directive: San Francisco District Attorney's Office 1.1 Pretrial Detention and Release Conditions*, CITY & CNTY. S.F.: OFF. DIST. ATT'Y (Jan. 19, 2022), https://perma.cc/5U55-VAQT.

involvement or prior conviction history.[223] In June 2022, Boudin was recalled by voters in a referendum that focused on concerns about rising crime rates in the city.[224]

Although reformist prosecutors like Krasner, Rollins, and Boudin can easily effect change within the system by announcing new prosecution policies, emphases, and personnel, none of these changes is permanent or structural, and each could be changed easily by a subsequent elected prosecutor.[225] Legislative change, although more difficult to achieve, is necessarily longer-lasting and more pervasive. The actions of a single prosecutor or set of prosecutors in declining prosecutions are subject to philosophical critique as "nullifying" popular will and democratic decision-making.[226]

Each of the reform-minded prosecutors described above have faced significant opposition from other prosecutors, law enforcement, and judges. Prosecutors' decisions not to charge certain offenses were criticized as attempts "to usurp the power of the state legislature."[227] In addition, some police departments announced that they would continue to make arrests regardless of the prosecutors' policy of not prosecuting or moving immediately to dismiss those charges.[228] When Los Angeles County District Attorney George Gascón announced that his office would generally not seek sentencing enhancement such as California's "three strikes" law, he was sued by several of his line prosecutors.[229]

---

223. *See* MJ Johnson, *DA Boudin to Stop Charging for Contraband at Traffic Stops, Gang Enhancements*, S.F. EXAM'R (Feb. 28, 2020), https://perma.cc/26RH-MV7R.

224. *See* Recent Election, *San Francisco District Attorney Chesa Boudin Recalled*, 136 HARV. L. REV. 1740, 1740, 1742–43 (2023).

225. *See* Murray, *supra* note 6, at 416 ("The (relative) ease of electing a reformer and then demanding that he or she unilaterally exercise the DA's discretionary power to embrace nonenforcement—rather than going through all the trouble of reforming state and local criminal justice systems via legislative change—is part of what attracts some criminal justice reformers to prosecutor-centric decarceral strategies . . . .").

226. *See, e.g.*, W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 178–79 (2021). Others have referred to prosecutorial policies categorically declining types of criminal cases as "an executive veto" over popularly enacted laws. *See* Andrew McCarthy, *The Progressive Prosecutor Project*, COMMENT. (Mar. 2020), https://perma.cc/KMV7-NJVR.

227. *See* Jonathan Edwards, *Norfolk Judges Unite to Block Prosecutor from Dropping Marijuana Cases*, VIRGINIAN-PILOT (July 31, 2019), https://perma.cc/QZ58-LR2Y (quoting Circuit Judge Mary Jane Hall).

228. *See* Gordon Rago & Katherine Hafner, *Norfolk Prosecutor to End Cash Bail in Many Cases, Dismiss Misdemeanor Marijuana Charges*, VIRGINIAN-PILOT (July 27, 2019), https://perma.cc/L6ZC-72LN.

229. *See* James Queally, *When Prosecutor Is Defendant: L.A. D.A. George Gascón's Legal Battles with His Own Staff*, L.A. TIMES (June 19, 2024), https://perma.cc/CYQ9-RESJ.

IV. ALTERNATIVES TO CRIMINALIZATION FOR PETTY OFFENSES

One of the most frequent defenses of allowing criminal prosecutions without prosecutors is the high volume of cases that flow through our nation's misdemeanor courtrooms. If the scope of the misdemeanor criminal justice system has grown so vast that it is impracticable to expect licensed prosecutors to handle each case, however, other solutions exist that are more consistent with principles of adversarialism, separation of powers, and fundamental fairness to criminal defendants. One of the simplest is for prosecutors to exercise a more exacting discretion in deciding which allegations require charging and prosecution.[230] While a significant number of misdemeanor prosecutions will end in a dismissal or nolle prosequi, many prosecutors fail to meaningfully exercise their discretion not to prosecute at the outset of a case.[231] A more exacting review of low-level cases prior to the filing of formal charges would result in huge financial savings.[232]

One might think that, as this new wave of prosecutors took office and gradually transformed the culture of prosecution, fewer low-level cases would be charged at all. Just as traditional prosecutors bore much responsibility for the growth of the criminal justice system, so could prosecutors with a new vision rein it in.[233] Aside from a few outliers, however, there is little evidence that this has happened. Scholars have criticized prosecutorial declination as a realistic solution to the problem of mass incarceration, since so few prosecutors willingly choose to forego charging crimes where the evidence is sufficient.[234] Where a new prosecutor would like to institutionalize a new approach to the exercise of discretion in the charging decision, that impulse needs to be memorialized in written policy rather than a hoped-for cultural shift in approach. Another concrete reform would be the creation of advisory boards or review boards including representation from outside of the prosecutor's office who could

230. This more robust screening prior to bringing charges would also necessarily reduce the need for plea bargaining later in the life of a case. *See generally* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002).

231. *See* Natapoff, *Misdemeanor Declination*, *supra* note 85, at 980.

232. *See id.* at 978–79 (describing the various cost savings that attend early declination and citing various studies that estimate the per-case cost of misdemeanor declination at between $1,000 and $4,700).

233. *See* Davis, *supra* note 197, at 5.

234. *See* Shima Baradaran Baughman, *Do Prosecutorial Declination Trends Provide Hope for Reducing Mass Incarceration?*, 60 GONZ. L. REV. 255, 281 (2024–2025) (finding that prosecutors have become more aggressive in their charging policies over the last twenty years and that most prosecutors tend to charge every case for which sufficient evidence exists).

review the process by which charges are selected for prosecution or declination.[235]

A recent study suggests that a prosecutor's decision not to prosecute nonviolent misdemeanors reduces recidivism while not resulting in declines in public safety.[236] In 2021, researchers Amanda Agan, Jennifer Doleac, and Anna Harvey looked at over 67,000 misdemeanors in Suffolk County, Massachusetts, and the effects of non-prosecution of nonviolent misdemeanors on future criminal involvement.[237] They found that, comparing subjects who were charged with nonviolent misdemeanors, involvement in the judicial system—being prosecuted for that offense—correlated with a greatly increased chance of being prosecuted for new criminal activity within two years.[238] The most significant effects of non-prosecution were for those who had no previous involvement with the criminal justice system, lending support to the idea that entanglement with the criminal courts is itself criminogenic.[239] An early exit from the bureaucracy of low-level courts seems to be the best way to forestall future involvement.

Those who were not convicted had lower rates of recidivism than those who were convicted. Given the anticipated consequences of a criminal conviction, this is not surprising: those convicted of crimes have more difficulty finding employment[240] and housing[241] and are burdened—by design—with the punishment associated with their convictions.[242] Fines, probation requirements, and even minimal

---

235. *See id.* at 291 (proposing "internal review boards with community representation to study prosecutorial charging").

236. *See* Amanda Y. Agan et al., *Misdemeanor Prosecution*, 138 Q.J. ECON. 1453, 1453 (2023).

237. *Id.*

238. *Id.* ("We find that for the marginal defendant, nonprosecution of a nonviolent misdemeanor offense leads to a 53% reduction in the likelihood of a new criminal complaint and a 60% reduction in the number of new criminal complaints over the next two years.").

239. *See* Agan et al., *supra* note 15. The authors argue that, regardless of conviction, the prosecution of an individual has adverse life consequences that might make future criminal courts involvement more likely:

> Consider what happens to a prosecuted defendant, even if they are not convicted: A criminal record of the arrest will still be added to the state database. That record is then visible to other law enforcement agencies and potentially to employers, who may choose not to hire the person. Having a criminal record can have collateral consequences in many domains (reducing access to public benefits or housing, for instance) that also increase the likelihood of future criminal activity.

Id.

240. *See* Love, *supra* note 30, at 6.

241. *See id.*

242. *See id.*

incarceration create instability that can lead to further involvement with the criminal justice system.

The study found, however, that even prosecutions that did not lead to conviction were associated with higher levels of recidivism.[243] Even if a prosecution does not result in a conviction, it will create a record that is visible to law enforcement and possibly to the public, which can have the same deleterious effects as a conviction on finding housing and employment. And regardless of outcome, a criminal prosecution comes with stress, expenses, and obligations that can lead to disruptions in other parts of a defendant's life. These additional stressors can interfere with family and work obligations and can lead to aggravations in drug and alcohol abuse, all leading to an increase in involvement with law enforcement and the criminal justice system.[244]

The study concludes that "it appears that prosecuting defendants for nonviolent misdemeanor offenses has substantial costs for those individuals without any evidence of public safety benefits (and suggestive evidence of public safety costs)."[245] Such experiments are now happening in a more systematic way as reformist prosecutors implement policies of non-prosecution for certain types of criminal offenses. Just as studies have shown that prison is criminogenic,[246] these findings suggest that any involvement with the criminal courts can have the same effect, and that presumptions against prosecution—at least for certain low-level offenses—can have a crime-reducing effect.[247]

The United States has drastically reduced the use of incarceration for juveniles over the past twenty years and crime rates have continued to drop.[248] Those involved in the juvenile justice system have begun to realize not only that incarceration is criminogenic but also that involvement in the juvenile justice system itself leads to higher rates of recidivism.[249] Evidence suggests that a

---

243. *See* Agan et al., *supra* note 15.

244. *See id.*

245. Agan et al., *supra* note 236, at 1459.

246. *See generally* Paul S. Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017); Joseph Margulies, *Why Prisons are Criminogenic*, JUSTIA: VERDICT (Jan. 3, 2022), https://perma.cc/2AEM-5U5D.

247. For a comprehensive taxonomy of prosecutorial declination decisions, see generally Carissa Byrne Hessick & Meighan R. Parsh, *The Nuances of Prosecutorial Nonenforcement*, 67 WM. & MARY L. REV. 399 (2025).

248. *See* James Forman Jr., *What Happened When America Emptied Its Youth Prisons*, N.Y. TIMES MAG. (Jan. 28, 2025), https://www.nytimes.com/2025/01/28/magazine/juvenile-prison-crime-rates.html.

249. *See id.*

similarly minimalist approach should be tried regarding adults as well, certainly those suspected of low-level misbehavior.[250]

Legislatures can reclassify certain minor wrongful conduct, from low-level criminal offenses to civil infractions. Possession of marijuana is an instructive example: while many states have now legalized the possession of marijuana entirely,[251] others have taken the half step of decriminalizing it.[252] Prior to legalizing marijuana, the California legislature reclassified the possession of marijuana as a civil offense. The governor of the state explained the decision in economic terms: "In this time of drastic budget cuts, prosecutors, defense attorneys, law enforcement, and the courts cannot afford to expend limited resources prosecuting a crime that carries the same punishment as a traffic ticket."[253] In practice, the punishment for conviction of low-level crimes often includes only a fine, with no incarceration or active term of probation. On the possibility of the decriminalization of petty wrongdoing, the United States Supreme Court has already suggested it: "One partial solution to the problem of minor offenses may well be to remove them from the court system."[254] Hawaii has already begun a comprehensive review of its criminalization of petty offenses, with an eye toward taking the Supreme Court's advice.[255] Massachusetts law allows a court to treat a misdemeanor as a civil infraction and to proceed accordingly, without the need to appoint counsel and—presumably—without any future collateral consequences that would accompany a criminal conviction.[256]

---

250. *See id.*

251. *See* Matt Richtel, *A Patchwork of Cannabis Laws Creates Health Risks, Study Finds*, N.Y. TIMES (Sep. 26, 2024), https://www.nytimes.com/2024/09/26/science/cannabis-laws-health-risk.html (describing the "fractured and inconsistent legal framework" of marijuana laws across the United States).

252. *See id.*

253. *See* Letter from Arnold Schwarzenegger, Governor of Cal., to Members of the Cal. State Senate (Sept. 30, 2010), https://perma.cc/2QVV-6Z8E.

254. Argersinger v. Hamlin, 407 U.S. 25, 38 n.9 (1972).

255. *See* BORUCHOWITZ, ET AL., *supra* note 23, at 27. As detailed in the NACDL report, Massachusetts has also begun to take some steps to study which petty offenses might be reclassified as non-criminal. *See id.* at 27–28.

256. MASS. GEN. LAWS ch. 277, § 70C (2024) ("[U]pon the court's own motion at any time, the court may, unless the commonwealth objects, in writing, . . . treat a . . . misdemeanor offense as a civil infraction. . . . If a motion to proceed civilly is allowed, the court shall not appoint counsel. . . . A person complained of for such civil infraction shall be adjudicated responsible upon such finding by the court and shall not be sentenced to any term of incarceration.") Such an outcome may not trigger a future collateral consequence in the same way that even a low-level conviction might. *See* Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 616 & nn. 173–175 (2011).

Of course, this legislative decriminalization would not solve the problem of racial bias in policing but would at least drastically mitigate the consequences. A system of civil infractions for certain minor wrongful conduct could achieve the same goals as misdemeanor criminal adjudication while saving state resources and preventing the harsh collateral consequences for defendants that result from a criminal conviction.

Prosecutors can effectively decriminalize categories of conduct without waiting for legislative action. In practice, this happens every day as elected prosecutors and their deputies exercise discretion in determining which conduct (and which categories of conduct) are worth the expense of a criminal prosecution. Again, changing social attitudes toward the use of marijuana provide an example: even before state legislatures moved toward the decriminalization or legalization of marijuana possession, some elected prosecutors announced new policies of non-prosecution. Several years before New York legalized marijuana in 2021,[257] for example, the elected prosecutor for Kings County (Brooklyn) announced a policy of non-prosecution and explained it in terms of allocating the scarce resources of his office "in a manner that most enhances public safety."[258]

Prosecutors unwilling to categorically declare certain types of illegal conduct no longer subject to criminal prosecution could more broadly use diversionary programs or deferred prosecution agreements.[259] These programs allow a prosecution office to retain more flexibility and control than a blanket policy of non-prosecution for certain types of offenses. One common requirement, for example, is that the defendant not have previously been allowed to participate in a diversion program.[260] Repeat offenders, even of relatively benign conduct like public intoxication or shoplifting, could be referred for criminal prosecution in order to deter chronic behavior, if the prosecutor deems that necessary.[261] And for those allowed to participate in diversion, the prosecutor can tailor the terms of the agreement to include programs or requirements that will best address

257. *See* Luis-Ferré Sadurní, *New York Legalizes Recreational Marijuana, Tying Move to Racial Equity*, N.Y. TIMES (Mar. 31, 2021), https://www.nytimes.com/2021/03/31/nyregion/cuomo-ny-legal-weed.html.

258. Memorandum from Kenneth P. Thompson, Dist. Att'y, Kings Cnty., N.Y., to Dist. Att'y's Off. for King's Cnty., N.Y., Policy Regarding the Prosecution of Low-Level Possession of Marihuana Cases (July 8, 2014), https://perma.cc/A87J-GA92.

259. *See generally* Shima Baradaran Baughman, *Prosecution Deferred*, 77 FLA. L. REV. 1139 (2025) (describing the widespread use of deferred prosecution agreements in corporate criminal prosecutions and the relative absence of such agreements in individual criminal prosecutions).

260. *See id.* at 1161.

261. *See id.* at 1161 n.88.

the defendant's specific issues. And the defendant maintains the ability to avoid prosecution and a potential criminal conviction.[262]

The devil, of course, is in the details. A program of "diversion" that requires defendants to enter a plea of guilty first, and then to satisfy onerous probation-like conditions, may only ensnare more people in a system of surveillance and control and may even increase the likelihood of conviction. Such a program would serve only to broaden the scope of the misdemeanor criminal justice system in a way that is counterproductive and to do so without the benefit of even the small procedural safeguards that attend trials in low-level courts. This net-widening problem[263] would be exacerbated by the fact that the federal constitutional right to counsel does not apply to minor offenses for which the sanction does not include jail time.[264] Moreover, the ready availability of diversion might allow for certain cases to stay "alive" when an outright dismissal would have been more appropriate. For this reason, prosecutors' offices should carefully draft and scrupulously adhere to standards governing which cases should be prosecuted, which should be diverted, and which should be dismissed outright.

The "net-widening" problem is a big one and is nothing new. The confirmation bias of prosecutors and an aversion to "losing" is probably as old as the American adversarial system of adjudication. One account from more than a half-century ago quotes a Chicago prosecutor: "When we have a weak case for any reason, we'll reduce to almost anything rather than lose."[265] This "half a loaf is better than none" approach to plea bargaining creates a system wherein the greatest pressure to plead guilty falls on those who are factually innocent. If we assume that factually innocent defendants usually have cases that are (from the prosecutors' perspective) weak, then those people will get the relatively most attractive plea offers. This is also true only if we assume the premise is true: that "prosecutors believe that their interest lies in securing as many convictions as possible."[266]

One procedure common in some European countries is the penal order. Penal orders are one among many "'consensual' procedural modes" of adjudication.[267] Although slightly different from country to

---

262. *See id.* at 1150.

263. *See* Thaman, *supra* note 40, at 162 (noting criticisms of both diversionary programs and penal order as procedures "whereby an executive official can punish the merely suspicious and bypass the jurisdictional work of the courts").

264. *See id.* at 163–64.

265. Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 59 (1968) (quoting a Chicago prosecutor).

266. *Id.* at 60; *see also id.* at 62 ("When prosecutors respond to a likelihood of acquittal by magnifying the pressures to plead guilty, they seem to exhibit a remarkable disregard for the danger of false conviction.").

267. *See* Thaman, *supra* note 40, at 158.

country,[268] penal orders allow for someone accused of wrongdoing to resolve a case through financial sanction without admitting guilt or being convicted of a crime.[269] In those systems that do not equate a penal order with an adjudication of guilt, the process has been compared to the bond forfeiture process by which many American states resolve non-criminal traffic infractions and other civil infractions.[270] Use of penal orders is also comparable to various diversionary programs that have been implemented in jurisdictions across the country.[271] In those jurisdictions in which a penal order functions as a formal adjudication of guilt, the defendant may be required to confess to the offense or to accept responsibility, without actually being required to plead guilty.[272]

In most jurisdictions that allow them, penal orders are available for minor offenses, which would not be punishable by incarceration.[273] Some jurisdictions, however, allow the use of penal orders for more serious offenses.[274] The use of these orders is generally controlled by the prosecutor, who would, in an appropriate case, draft an order detailing the charge, facts of the offense, and proposed sanction, which would not include any deprivation of liberty. This proposal is then presented to the defendant, who has a specified amount of time within which to object. If no objection is raised by the defendant, the

---

268. Although similar vehicles of adjudication are found in various countries, the use of penal orders is widespread in Germany, France, Japan, and Italy. *See* Joachim Herrmann, *Models for the Reform of the Criminal Trial in Eastern Europe: A Comparative Perspective*, 1996 SAINT LOUIS-WARSAW TRANSATLANTIC L.J. 127, 149 (1996).

269. *See, e.g.*, Richard S. Frase, *The Search for the Whole Truth about American and European Criminal Justice*, 3 BUFF. CRIM. L. REV. 785, 839 (2000) (citing Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMPAR. L. REV. 317, 337–40 (1995)); Sklansky, *supra* note 131, at 492; Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do it, How We Can Find Out, and Why Should We Care?*, 78 CALIF. L. REV. 539, 627 (1990) [hereinafter Frase, *Comparative Criminal Justice*]; Josh Bowers, *The Unusual Man in the Usual Place*, 157 U. PA. L. REV. PENNUMBRA 260, 271 (2009). In some countries, agreeing to a penal order is akin to an adjudication of guilt, which makes it more similar to a no-contest plea.

270. *See* Thaman, *supra* note 40, at 161 n.26.

271. *See id.* at 162.

272. *See id.* at 166. The significance of the penal order not constituting a finding of guilt is large and not always clear enough in the literature on penal orders. *See id.* at 171–72.

273. *See id.* at 161.

274. *See* Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1449 (2010). The German system allows for the use of penal orders for offenses carrying potential penalties of less than one year incarceration. *See* Markus D. Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 556–57 (1997).

proposed order becomes final.[275] Were a defendant to object to the proposed penal order, the case would simply be set for trial according to normal trial procedures.[276]

An adoption of some type of "penal orders" to resolve minor offenses without adjudication of guilt would ameliorate many of the problems with today's low-level courts.[277] Such a system would, for example, make repeated court appearances unnecessary. In many low-level courts, sanctions for failing to appear in court constitute the bulk of meaningful punishments.[278] And to the extent resolution in this manner would explicitly avoid conviction, those whose charges are resolved in this manner would avoid being entangled in the web of collateral consequences that has grown to encompass even the most minor criminal convictions.

The system of penal orders is similar to diversionary programs but tends to be more formalized and to exist within—rather than

---

275. The specific procedures vary by jurisdiction. Whereas law enforcement drafts the initial order in France, this function is performed by the prosecutor in Germany. *See* Frase, *Comparative Criminal Justice*, *supra* note 269, at 645 n.552. In both the Swedish and the Dutch systems of penal orders, courts and judges play virtually no role: prosecutors have the independent power—with the consent of the defendant—to impose convictions and sanctions through the use of a penal order, and it is the prosecutor who drafts the proposed order and provides it to the defendant with instructions about how to proceed if the defendant wishes to accept the proposal. *See* Luna & Wade, *supra* note 274, at 1450. The available sanctions through such a procedure in France are limited to monetary fines, while in Germany additional sanctions are available, like the suspension of a driver's license. *See* Frase, *Comparative Criminal Justice*, *supra* note 269, at 645 n.552; *see also* Dubber, *supra* note 274, at 559. In Germany, where the use of the penal order is widespread, the legislature amended the law in 1970 to eliminate the possibility of incarceration through the use of penal order. That limitation was later rolled back in 1993, when the legislature agreed to allow for suspended sentences of up to one year through a penal order. *See* Thaman, *supra* note 40, at 160. The German system of penal orders requires the approval of a judge but, in practice, such judicial approval has been rarely withheld. *See* Thomas Weigend, *Sentencing in West Germany*, 42 MD. L. REV. 37, 54 (1983). During one particular year, judges signed off on proposed penal orders in 99.4% of cases in which they were proposed, and rejected the penal order in only 0.6% of cases. *Id.* Although a judge may reject the terms of a proposed penal order, the judge generally is without power to change the terms of a proposed penal order. *See* Thaman, *supra* note 40, at 169.

276. *See* Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 957 (1983); *see also* Bowers, *supra* note 269, at 271.

277. Another intriguing recent proposal is for a system of "redeemable fines" in which people found to have committed certain crimes would be charged an up-front fee that would be returnable to them in installments on the condition that they commit no further crimes. *See generally* Parchomovsky & Stein, *supra* note 8 (arguing that such a system would better align incentives with outcomes and lead to a fairer, more effective, and more efficient system).

278. *See* FERGUSON REPORT, *supra* note 13, at 55–56.

apart from—the adjudicative system.[279] A broad system of resolving criminal allegations by executive agreement, without meaningful oversight by any judicial officer, could constitute simply a regressive return to an era before defendant-protective procedural rights.[280] Even more extreme, it could be considered an abandonment of the adversarial model altogether. These significant criticisms are addressed, at least in part, by a structural mechanism that ensures that a diverted case stays entirely out of the criminal justice system and is not considered a conviction or finding of guilt for purposes of any future determinations.[281] Still, this system risks simply legitimizing a new system of social control without even the pretense of due process.

Some have proposed different procedural safeguards for those who contest their guilt and those who admit it. One commentator has defended the penal order system by arguing that it serves different goals from the more comprehensive and adversarial system of adjudication that applies when a defendant contests guilt. In abandoning the objective of retribution, he argues, the prosecutor using a penal order is aiming toward rehabilitation "with a breath of repression."[282] A penal order could be seen as a "wake-up call" rather than a fully retributive sentence.[283]

A system of pre-adjudicative penal orders could have all of the benefits (efficiency) of the process-free misdemeanor court system with very few of the detriments (namely, all of the collateral consequences that now attend a criminal conviction). The crucial

279. Thaman *supra* note 40, at 161 ("The main characteristics of the penal order are: (1) it normally applies to less serious crimes, because as a rule no deprivation of liberty may be directly imposed; (2) it is exclusively the prosecutor's prerogative to proceed by penal order; (3) there is no adversarial hearing or even a face-to-face meeting between prosecution and defense in court that precedes the imposition of a sentence if the defendant does not object to the penal order; (4) it is the prosecutor who decides the legal qualification of the crime and the amount of the sentence; and (5) the judge may not alter the terms of the penal order, but as with the defendant, must 'take it or leave it.'" (footnote omitted)).

280. *See id.* at 173 ("[T]he grand march of consensual procedures has now made the full trial seem a relic of the past, the glamorous public costume of a system that increasingly works in the dark, fashioning judgments that are bereft of the trappings of due process.").

281. One important element of any penal order-type system in the United States would need to be an explicit rejection of a "trial tax": a suspect's decision not to accept a proposed penal order should not—contrary to current plea bargaining practice—subject the defendant to a higher likely penalty. *See* John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549, 1565 (1978).

282. *See* Thaman, *supra* note 40, at 174 (citing MARK GEIS, *ÜBERZEUGUNG BEIM STRAFBEFEHLSERLAß?* 215–16 (2000)).

283. *See id.*

difference is the lack of a criminal conviction, or a finding of guilt.[284] To be effective in moderating the size and undue influence of the criminal justice system, any adoption of a system of penal orders within the United States criminal legal system should explicitly not constitute a finding of guilt and should not allow for incarceration (active or suspended).[285] A proposed system of penal orders for low-level offenses would differ from diversion because it would be authorized, codified, and structured by the legislature, with little discretion given to the prosecution.[286]

CONCLUSION

As the size of the criminal justice system continued to increase throughout the second half of the twentieth century and first part of the twenty-first century, legislatures and courts looked for efficient shortcuts around the due process guarantees that had been given to criminal defendants. Since the Warren Court's Revolution, formal trial rights for criminal defendants had expanded, even if the actual exercise of those rights had not, as courts and defendants grew ever more comfortable with the resolution of almost all criminal charges with plea bargaining. Some commentators concluded that the full adversarial trial had simply become too expensive to survive.[287] The plea bargain, with its associated trial tax, was by far the most common way around the costly alternative of an adversarial trial: the prosecution agrees to allow the defendant to "trade in" some of his procedural rights in exchange for a reduction in charge or in sentence. The reliance on consensual relinquishment of procedural rights in exchange for some valuable consideration has come to be seen as unremarkable, as the vast majority of criminal cases are resolved by plea.

The central argument against requiring prosecutors for all criminal prosecutions is economic: the high volume of low-level cases coursing through our misdemeanor courts make it impracticable to

---

284. In some instances, however, a mere arrest that never results in conviction can trigger collateral consequences. *See* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 820–25 (2015).

285. Another important provision to any system of penal order would be the assurance that a defendant's rejection of a penal order would not—contrary to current American plea bargaining practice—subject the defendant to a higher likely penalty. *See* Langbein & Weinreb, *supra* note 281, at 1565.

286. *See* Bowers, *supra* note 269, at 271 & n.52 ("In essence, penal orders are no different than American traffic citations, except that they apply to petty criminal charges. Several scholars have persuasively argued that penal orders or similar systems may be an appropriate partial solution to the problem of prohibitively high process costs for certain defendant submarkets." (footnote omitted)).

287. *See, e.g.*, Thaman, *supra* note 40, at 156 (the "full-blown trial . . . is no longer affordable.").

staff each of them with a licensed lawyer to act as prosecutor. This expense, however, should be seen as a feature of the system rather than a bug. An ever-expanding focus on efficiency in our courts leads inexorably to an expansion of the system, a result that has been increasingly the subject of well-placed criticism. If it is expensive and difficult to convict someone of a crime, that is because the system was designed with this in mind.[288] Allowing law enforcement and prosecutors easy access to inexpensive convictions renders it unnecessary to evaluate whether pursuing criminal charges is necessary.[289] Justice Brennan made this point in *Scott v. Illinois*[290] when addressing the argument that appointment of counsel in misdemeanor cases would be too costly for states. This expense, he wrote, "would lead state and local governments to re-examine their criminal statutes. . . . [They] might determine that [they] no longer desired to authorize incarceration for certain minor offenses in light of the expense of meeting the requirements of the Constitution."[291] Rather than seeking ways to make criminal convictions less expensive and more common, prosecutors and legislators should seek creative alternatives that address concerns of public safety while simultaneously shrinking the size of the criminal justice system.

288. In response to arguments that increased funding for prosecutors would improve the quality of justice, Professor (now Judge) Stephanos Bibas countered that such an increase in resources would instead lead only to more and more prosecutions. *See* Stephanos Bibas, *Sacrificing Quality for Quantity: Better Focusing Prosecutors' Scarce Resources*, 106 NW. U. L. REV. COLLOQUY 138, 138 (2011) (increased funding for prosectors' offices because of high caseloads "would only pour fuel on the fire, encouraging prosecutors to widen their nets in the inexhaustible sea of potential cases.").

284. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 571 (2001).

290. 440 U.S. 367 (1979).

291. *Id.* at 388 (Brennan, J., dissenting); *see also* Irene Oritseweyinmi Joe, *Regulating Mass Prosecution*, 53 U.C. DAVIS L. REV. 1175, 1241 (2020) ("Instead of charging a broad swath of offenses, prosecutors could turn to a targeted practice that considers more accurately the offenses or offenders that most plague the communities they serve and focuses their charging decisions on those offenses.").