LEGAL GUILT, NORMATIVE INNOCENCE, AND THE EQUITABLE DECISION NOT TO PROSECUTE

Josh Bowers*

Charging discretion is no monolith. Instead, prosecutors consider three sets of reasons to decline or pursue charges: legal reasons, administrative reasons, and equitable reasons. The conventional wisdom is that prosecutors are best positioned to evaluate these reasons. Consequently, prosecutors are granted almost unfettered charging discretion. More narrowly, when prosecutors decline or pursue charges for equitable reasons, they exercise their prerogative unchecked. This is defensible only if, all else equal, prosecutors are the most competent actors to exercise equitable discretion. That question is almost never asked or critically analyzed. Instead, case law and commentators justify prevailing institutional design with reference only to uncontroversial understandings that prosecutors know the most about legal merits and strategic priorities. In fact, several reasons exist to believe that prosecutors are ill-suited to consider the normative merits of potential charges. First, professional prosecutors fail sufficiently to individualize cases, lumping them instead into legal boxes. Second, professional prosecutors prioritize institutional concerns over equitable particulars. Notably, prosecutors are the least competent actors to adequately consider the equities in the precise types of cases in which commonsense discretion matters most. Specifically, in the petty crime context, absolute enforcement of expansive code law is both undesirable and impossible, and, consequently, measured exercises of equitable discretion are warranted and anticipated. Put simply, petty crime enforcement should turn on thoughtful evaluation of equitable considerations that bear on relative blameworthiness. Legal guilt, by contrast, is often peripheral (or, in any event, presumed). In this way, easy legal cases may raise tough normative questions, and prosecutors have no special claim to know the answers, as the novel data that I provide help to show.

* Associate Law Professor, University of Virginia School of Law. The following people provided helpful insights and feedback on earlier drafts: Charles Barzun, Stephanos Bibas, Graham Boyd, Darryl Brown, Rachel Harmon, Brandon Garrett, Mike Gilbert, Risa Goluboff, John Jeffries, Jody Krauss, Dan Markel, Kim Forde-Mazrui, Greg Mitchell, John Monahan, Jim Ryan, Fred Schauer, Glen Staszewski, Rip Verkerke, and Bob Weisberg. I also appreciate the constructive comments and questions that I received at the Stanford Faculty Workshop, the Michigan State Faculty Workshop, and the Virginia Student Scholarly Lunch Series. Finally, I would like to thank Kristin Glover for her phenomenal research assistance.
INTRODUCTION

This is an article about easy cases. More narrowly, this is an article about the discretionary decision not to charge defendants with petty crimes, notwithstanding readily demonstrable guilt.1 An article about discretion is nothing new. But I wish to explore an underappreciated fact about prosecutorial charging discretion: that it is no undifferentiated whole. Rather, a prosecutor's decision about what and whether to charge is guided by three separate categories of reasons for discretion's exercise: legal reasons, administrative reasons, and equitable reasons.2 Specifi-

1. The term "charge" is somewhat amorphous, as it may refer to what either police or prosecutors do. See Samuel Walker, Taming the System: The Control of Discretion in Criminal Justice, 1950–1990, at 87 (1995) ("[T]here are at least three decision points that could properly be described as the 'charging' decision: booking, the filing of initial charges, the filing of formal charges."). For the purposes of this Article, I use the term "charge" to refer only to the prosecutorial decision to file charges.

2. See Abraham S. Goldstein, The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea 3 (1981) [hereinafter Goldstein, Passive Judiciary] ("In making [charging] decisions, [the prosecutor] acts not only on 'legal' grounds but on equitable and practical ones as well."); Kent Greenawalt, Conflicts of Law and Morality 349 (1987) (discussing various reasons prosecutors may not press charges, including moral reasons based "on judgments about the gravity of offenses or the character of actors"). Other scholars have segregated discretion in a somewhat similar fashion. For example, Austin Sarat and Conor Clarke have offered two broad categories: "[I] predictions about success ('can I prosecute
cally, a prosecutor may decide not to charge because (i) she feels she may lack sufficient proof of legal guilt, (ii) she wishes to preserve limited resources, or (iii) she concludes that the prospective defendant is insufficiently blameworthy.

The conventional wisdom is that the prosecutor is best situated to exercise charging discretion.\(^3\) The argument has two parts. First, it makes sense to leave legal reasons for charging (or not) principally to the prosecutor, because she knows most about the evidentiary support for a given charge.\(^4\) Second, it makes sense to leave administrative reasons for charging decisions exclusively to the prosecutor, because she knows most about her strategic priorities and limitations.\(^5\) This assumption of prosecutorial competency holds as far as it goes. The problem is that it does not go far enough. Left unaddressed is the harder, further question

\(^{3}\) See Wayte v. United States, 470 U.S. 598, 607 (1985) (listing factors making prosecutors best suited for charging decision); United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965) ("The courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."); Goldstein, Passive Judiciary, supra note 2, at 5 ("The tone has been less one of judicial restraint than of judicial withdrawal, treating the prosecutor as so integral and expert a part of the executive branch that he may not be interfered with by the judiciary."); Kate Stith, The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion, 117 Yale L.J. 1420, 1481 (2008) (describing "prosecutor's nearly plenary discretion to charge"); James Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521, 1540 n.71 (1981) (describing "an almost unbroken line of cases upholding prosecutors' powers to decide who and how to charge," and collecting cases); see also infra notes 13-14, 31-34, and accompanying text (giving examples of aspects of prosecutorial discretion embraced by courts).

\(^{4}\) See, e.g., Wayte, 470 U.S. at 607 (stating ability to assess "strength of the case" among factors militating toward allocation of discretion with prosecutor).

\(^{5}\) See United States v. Lovasco, 431 U.S. 783, 790–96, 793 n.14 (1977) (observing that robust judicial oversight of executive charging decisions "would impose an [undue] administrative burden on prosecutors[\ldots] and \ldots an even greater burden on the courts"); Rachel E. Barkow, The Ascent of the Administrative State and the Demise of Mercy, 121 Harv. L. Rev. 1392, 1354 (2008) ("[P]rosecutors are seen as making an 'expert' determination about priority-setting when they choose not to bring charges.").
of whether prosecutors are also better situated (than laypersons or some other screening body) to reach commonsense determinations of whether defendants normatively ought to be charged. Significantly, such determinations turn not on legal or factual guilt or innocence, but on evaluations of relative blameworthiness or, put differently, what Akhil Amar once dubbed "normative guilt or innocence." Specifically, a defendant may be normatively innocent where he "did it . . . [but] did not thereby offend the public's moral code."7

The following are a few examples from my former practice as a public defender: A sixteen-year-old runaway is arrested for prostitution; a mother is arrested for leaving her eleven-year-old home alone for the afternoon; an indigent man is arrested for hopping a turnstile to get to his first day of work; an elderly man is arrested for selling ice pops without a license on a hot summer day. It is up for debate whether prosecutors normatively should charge any or all of these arrestees. My claim is not that these arrestees lack blameworthiness or that they normatively should face no charges. I only argue that blameworthiness is an open question. Indeed, it is often the only open question in a petty case because prosecutors cannot know the strength of a case when they initially charge a defendant.

As these examples demonstrate, the need for equitable discretion tends to rise as crime severity falls. Most people anticipate something approximating categorical enforcement of very serious felonies but anticipate nonenforcement of some nontrivial number of petty crime incidents. However, there is no general consensus about the optimal level of petty crime enforcement, or, specifically, about whether a charge nor-


7. Id.

8. For the purposes of this Article, my conception of equity is consistent with what Aristotle called epinkeia or "fair-mindedness." Lawrence B. Solum, Virtue Jurisprudence: A Virtue-Centered Theory of Judging, 34 Metaphilosophy 178, 205 (2003) [hereinafter Solum, Virtue Jurisprudence].


10. William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 570–71 (2001) [hereinafter Stuntz, Pathological Politics] ("Legislators have good reason to criminalize more than they (or the public) would want punished . . . . [Thus,] [t]here is no reason to believe criminal law, on its face, accurately captures the range of behavior the public thinks worthy of serious sanction. Indeed, there is good reason to believe the opposite."); see also infra notes 25–35, 39–45, and accompanying text
matively should be filed in any given case. This is all the more true of petty crimes that typically lack concrete victims—crimes like disorderly conduct, public urination, unlicensed street vending, prostitution, aggressive panhandling, and simple drug possession. Such petty (and commonly public order) offenses produce diffuse social harms that may not constitute sufficient reasons to punish, when viewed in light of a persuasive equitable excuse or justification.11 Conversely, harms caused by more serious crimes against identifiable victims tend to be concentrated and readily identifiable. As a result, the moral value of punishing an offender for any such crime is subject to less dissensus over where and how enforcement and punishment lines should be drawn. This is not to say that petty “victimless” offenses (even mala prohibita petty offenses) lack moral components. Instead, I only mean to suggest that the immorality and consequent blameworthiness of the forbidden conduct are debatable and are more likely to be ameliorated by countervailing, case-specific equitable arguments. Thus, in petty public order cases, criminal conduct may be borderline conduct not because it falls “at the fuzzy edges of law,”12 but because it falls closer to the normative margins of blameworthiness.

Significantly, when it comes to critical determinations of normative blameworthiness in petty public order cases, prosecutors enjoy almost unbridled equitable discretion. Their prerogative to pursue easy legal cases is essentially plenary: They may, but need not, consider normative guilt; they may, but need not, exercise equitable discretion.13 Laws are shells,
and prosecutors retain almost unfettered discretion to decide how to fill the void within.\textsuperscript{14}

Prosecutors enjoy not only a lack of oversight concerning determinations of equitable sufficiency, but also a somewhat unchallenged assumption that this is as it should be. Indeed, the very concept of a check on executive exercises of equitable discretion probably would strike many institutional actors (executive and otherwise) as strange. But this deference to perceived prosecutorial supremacy is defensible only if, all else equal, the prosecutor is most competent institutionally to exercise equitable discretion. At least when it comes to certain charging decisions, this is far from clear. In fact, prosecutors fail to adequately consider the equities when reaching decisions about whether to charge the precise types of cases where commonsense discretion is most crucial—specifically, petty public order cases.\textsuperscript{15}

For several reasons, prosecutors may be ill-suited to adequately consider relevant equitable factors in petty cases. Significantly, none of these reasons arises out of bad faith or ill will on prosecutors' parts. Instead, prosecutors' limitations are attributable to their institutional perspectives and incentives. First, based on their experience and training, prosecutors, like many lawyers, come to think primarily in terms of legal boxes, categories, and types, and not in terms of equitable specifics.\textsuperscript{16} Second, to the extent prosecutors are competent to evaluate equitable considerations, they are motivated to charge petty offenses reflexively and to consider the equities as part of summary plea bargains only. Prosecutors adopt near-categorical charging strategies in petty cases, because petty charges provide cover to the police for consummated arrests and institutional advantages to prosecutors in the form of cheap and expeditious plea convictions.\textsuperscript{17}

\begin{flushright}
\textsuperscript{14} See Josh Bowers, The Void Within the Shell: Legality, Vagueness, and the Problem of Equitable Discretion 1 (Aug. 24, 2010) (unpublished manuscript) (on file with the Columbia Law Review) (noting that beyond extant legal checks "prosecutors are free"). This expansive discretion is a prime reason why, in the words of Robert Jackson, "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America." Kenneth Culp Davis, Discretionary Justice 190 (1969) [hereinafter Davis, Discretionary Justice] (quoting Robert H. Jackson, U.S. Att'y Gen., The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), reprinted in 24 J. Am. Judicature Soc'y 18, 18 (1940)). Likewise, Kenneth Culp Davis explained: "[T]he American legal system seems to be shot through with many excessive and uncontrolled discretionary powers but the one that stands out above all others is the power to prosecute or not to prosecute." Id. at 188.

\textsuperscript{15} See infra Parts III, IV, and V (discussing ways in which individual and institutional factors discourage prosecutorial exercise of equitable discretion in petty public order cases).

\textsuperscript{16} See infra Part III (discussing how prosecutorial professional experiences and legal training affect their exercise of equitable discretion).

\textsuperscript{17} See infra Part V.A (noting that prosecutors exercise equitable discretion more readily in post-charge context).

\textsuperscript{18} See infra Part IV.B, notes 222–228, and accompanying text (noting how police and prosecutorial office incentives militate against exercise of equitable discretion).
\end{flushright}
Notably, prosecutors face fewer institutional pressures to file perfunctory charges in more serious cases. In high-stakes cases, prosecutors cannot so readily generate expedient and expeditious convictions, and therefore they are more likely to carefully evaluate ex ante the equitable and legal wisdom of charging.19 This is not to say that prosecutors are particularly attuned to equitable considerations in serious felony cases, only that they are motivated to exercise caution before dedicating finite resources toward costlier endeavors that cannot as readily be cut short with summary pleas to lenient bargains. These considerations partially explain the seeming anomaly that prosecutors tend to charge petty public order offenses at rates higher than serious and violent felony offenses (as illustrated by the novel data that I provide at the end of the Article).20

Because prosecutors are less likely to charge high-stakes cases reflexively, there may be greater reason to leave undisturbed the prevailing allocation of authority over equitable discretion to the professional prosecutor in these types of cases. Thus, this Article focuses narrowly on charging decisions in petty public order cases. While such cases tend to raise more pressing normative questions, prosecutors fail to critically address these questions because of keen institutional pressures to charge reflexively. And the aims of this Article are modest, too. I intend to defend equitable charging discretion in petty crime cases while challenging the assumption that prosecutors are most competent or best positioned to exercise such discretion exclusively. Ultimately, then, I plan to do no more than to raise doubts about the allocation of equitable discretion in our criminal justice system and thereby to start a conversation about how we might otherwise approach institutional design—a question I take up in a separate article.21

19. See infra notes 276–290 and accompanying text (arguing that prosecutors more readily consider equities in high-stakes cases than in petty crime cases).
20. Infra notes 291–316 and accompanying text (analyzing data from New York and Iowa demonstrating that prosecutors decline to charge petty offenses less than they decline more serious crimes).
21. See Josh Bowers, Outsourcing Equitable Discretion 8 (Aug. 24, 2010) [hereinafter Bowers, Outsourcing] (unpublished manuscript) (on file with the Columbia Law Review) ("[A] lay equitable screen . . . could provide a quasi-political check on equitably (but not legally) unfounded charges."). Admittedly, it is something of a theoretical construct to speak of the optimal allocation of equitable discretion and, more generally, to break apart discretion into three separate strands—the equitable, the legal, and the administrative. Practically speaking, the decision to charge often will be based on some admixture of considerations. For example, a prosecutor might consider the equities only if (i) administrative constraints demand declination of some number of cases, or (ii) the legal merits of a given case are at least nominally dubious. Likewise, a prosecutor might decline to pursue a mediocre legal case against a somewhat sympathetic defendant over (i) a legally specious case against an equitably reprehensible defendant, or (ii) a legally solid case against an equitably attractive defendant. Accordingly, I do not contend that the system can always effectively isolate the equitable strand. But, notably, petty cases offer the likeliest opportunities to segregate equitable considerations because other considerations tend to fall away in these normatively borderline cases. See infra Part IV (arguing legal, administrative, and political concerns are less central in petty cases than in high-stakes
This Article has five Parts. In Part I, I tease apart conceptually the three strands of discretion and focus narrowly on the equitable strand. I defend the exercise of equitable discretion as necessary—at least in a criminal justice system defined by substantive overcriminalization. I make the case that equitable discretion is inevitable and desirable, particularly when it comes to the adjudication of petty public order cases. Additionally, I respond to the objection that equitable discretion contravenes the principle that like cases should be treated alike. In Part II, I describe different types of equitable discretion and explore whether and to what extent each type is compatible with justice. Then take up the concern that equitable discretion may just be nullification by another name. In the next three Parts, I challenge the conventional assumption that equitable charging decisions are best left to the unquestioned and opaque discretion of the professional prosecutor. I provide reasons why professional prosecutors may be ill-suited to adequately evaluate equitable considerations when charging public order cases. Specifically, in Part III, I highlight certain unexplored disadvantages and tradeoffs endemic to prosecutorial training and experience. In Part IV, I discuss the dependent relationship of prosecutors to police, and I explain that prosecutors, therefore, may too reflexively accept police output. In Part V, I examine the adjudicatory criminal process in petty cases, which I concede facilitates some exercise of equitable discretion, but only at the bargaining stage. I conclude that such post hoc equitable evaluation is too little, too late. Additionally, I provide data that back up my insights. These data are significant, not only because they are supportive, but also because they are rare. Finally, I explore the collateral costs of prosecutors' under-exercise of equitable charging discretion in petty cases. Put differently, I explain why even minor normative errors in less serious cases matter.

I. THE PERIL AND PROMISE OF EQUITABLE DISCRETION

There is a dated notion—both untenable and unattractive—that executive actors in the criminal justice system should be stripped of all dis-

---

cases). For example, the legal merits of petty public order prosecutions are often relatively unimportant for the simple reason that they are unknown or unknowable during the short life of the typical case. See infra Part V.A (indicating legal complexities of petty cases are often unapparent even to prosecutors). And, comparatively, equitable considerations tend to predominate. See infra Part I (arguing expansive codes and broader equitable margins, among other considerations, warrant greater exercise of equitable discretion in petty crime cases). In any event, the tripartite divide is a conceptually useful mechanism to start thinking dynamically about the optimal institutional architecture that is most likely to foster reasoned commonsense exercises of equitable charging discretion. The current institutional architecture bestows absolute equitable authority to insulated professional prosecutors who are motivated to forego contextualized deliberation on the equitable wisdom of proceeding.
cretion.22 Even in its day, it was a controversial proposition.23 Today, the argument is almost wholly rejected.24 Instead, case law and commentary tend to agree that “[i]t is undoubtedly part of the prosecutor’s job to individualize justice.”25 In Warren Burger’s words, the prosecutor “is expected to exercise discretion and common sense.”26

22. See In re Voss, 90 N.W. 15, 19 (N.D. 1902) (“[H]e who administers [the state attorney’s office] in deference to sentiment opposed to the law is unfit to hold that office or to be an attorney at law.”); Thurman W. Arnold, Law Enforcement—An Attempt at Social Dissection, 42 Yale L.J. 1, 18 (1932) (stating as basic assumption of criminal law that “[i]t is the duty of the prosecuting attorney to enforce all criminal laws regardless of his own judgment of public convenience or safety”); Joseph Goldstein, Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice, 69 Yale L.J. 543, 586 (1960) (“[P]olice should not be delegated discretion not to invoke the criminal law.”); Tracey L. Meares & Dan M. Kahan, When Rights Are Wrong, Boston Rev., Apr./May 1999, available at http://bostonreview.net/BR24.2/meares.html (on file with the Columbia Law Review) (describing Warren Court’s vagueness jurisprudence as “discretion skepticism”).


25. People v. Byrd, 162 N.W.2d 777, 782 (Mich. Ct. App. 1968) (Levin, J., concurring); see McCleskey v. Kemp, 481 U.S. 279, 295 n.15 (1987) (“D]ecisions whether to prosecute and what to charge necessarily are individualized and involve infinite factual variations.”); Goldstein, Passive Judiciary, supra note 2, at 3 (explaining prosecutor’s role is to “individualize[ ] justice . . . and mitigate[ ] the severity of the criminal law”); see also Mortimer R. Kadish & Sanford H. Kadish, Discretion to Disobey: A Study of Lawful Departures from Legal Rules 43, 73, 75 (1973) (arguing executive exercises of equitable discretion are “widely regarded by responsible sources as both inevitable and desirable”); Sarat & Clarke, supra note 2, at 389, 392 (discussing argument that “discretion is a part of the prosecutor’s responsibility to ‘seek justice’ and ‘an individual and legally unconstrained decision must be made’”). See generally infra notes 29–54 and accompanying text (discussing equitable considerations in prosecuting minor crimes).

26. Newman v. United States, 382 F.2d 479, 482 (D.C. Cir. 1967) (Burger, J.); see Hassan v. Magistrates Court, 191 N.Y.S.2d 238, 243 (Sup. Ct. 1959) (“Just because a crime has been committed, it does not follow that there must necessarily be a prosecution for it lies with the district attorney to determine whether acts which may fall within the literal letter of the law should as a matter of public policy not be prosecuted.” (emphasis omitted)); see also Kadish & Kadish, supra note 25, at 82 (“[I]t is widely accepted that a vital part of the prosecutor’s official role is to determine what offenses, and whom, to prosecute, even among . . . provably guilty offenders . . . [and] the prosecutor must . . . balance . . . inflexible punishment against the greater impulse of the quality of mercy.” (internal quotation marks omitted)); Vorenb erg, supra note 3, at 1531 (“Much of the accepted wisdom about why the charge decision must be discretionary relates to the need to deal with the large number of [minor] offenses.”).
A. Expansive Codes

It is necessary and desirable for prosecutors to exercise a measure of discretion because codes are too expansive to do otherwise.\(^{27}\) Legislators have habits of crafting wide-ranging, often overlapping, criminal codes that come to cover even "a good deal of . . . marginal . . . misbehavior."\(^{28}\) Legislators pass broad and deep criminal codes not only to appear tough on crime, but also for efficiency's sake: They seek to leave determinations of optimal enforcement to the executive.\(^{29}\) They purposefully avoid

\(^{27}\) See Davis, Discretionary Justice, supra note 14, at 87 ("[L]egislation has long been written in reliance on the expectation that law enforcement officers will correct its excesses through administration."); Malcolm M. Feeley, The Process Is the Punishment: Handling Cases in a Lower Criminal Court 23–25 (1979) ("Decisions made under a strict application of rules often lead to outcomes that few find palatable."); Kadish & Kadish, supra note 25, at 73–75 (listing reasons law enforcement officers might choose not to prosecute actions forbidden by statute); Miller, supra note 2, at 151 ("Full enforcement of the criminal law . . . has probably never been seriously considered a tenable ideal."); Breitel, supra note 2, at 427 ("If every policeman, every prosecutor, every court, and every post-sentence agency performed his or its responsibility in strict accordance with rules of law, precisely and narrowly laid down, the criminal law would be ordered but intolerable."); Stuntz, Pathological Politics, supra note 10, at 519 ("Because criminal law is broad, prosecutors cannot possibly enforce the law as written: there are too many violators. Broad criminal law thus means that the law as enforced will differ from the law on the books."); William J. Stuntz, The Virtues and Vices of the Exclusionary Rule, 20 Harv. J.L. & Pub. Pol'y 443, 445 (1997) ("[G]iven the enormous scope of criminal liability in our system, we rely heavily on the police to exercise discretion not to search and arrest."); Vorebenberg, supra note 3, at 1531 ("Prosecutors exercise the greatest charging discretion when dealing with minor offenses . . . . [I]ndecent exposure is a good example. Few people would want to eliminate the offense, but few would want to prosecute in every case either . . . .").

\(^{28}\) Stuntz, Pathological Politics, supra note 10, at 509; see also Harvey A. Silverstone, Three Felonies a Day: How the Feds Target the Innocent, at xxx (2009) (arguing average busy professional may unwittingly commit several federal crimes in a day under expansive federal criminal law); Ian Weinstein, The Adjudication of Minor Offenses in New York City, 31 Fordham Urb. L.J. 1157, 1162–63 (2004) ("Public order policing is a wonderful fit with overcriminalization . . . . On any given day, if you drive a car, walk, or stand on a sidewalk or public road, you likely subject yourself to the legal possibility of arrest.").

\(^{29}\) Davis, Discretionary Justice, supra note 14, at 87 ("[L]egislation has long been written in reliance on the expectation that law enforcement officers will correct its excesses through administration, [and further,] the legislation often reflects unrealistically high aspirations of the community and hence compels the law enforcers to temper the ideals with realism . . . ."); Goldstein, Passive Judiciary, supra note 2, at 3 ("The public prosecutor . . . chooses[ ] from a mass of overlapping and redundant criminal statutes, . . . [a]nd he is the one who decides how many offenses to charge and whether the evidence will support a conviction."); Stuntz, Pathological Politics, supra note 10, at 510 ("[T]he story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges, who alone are likely to opt for narrower liability rules rather than broader ones."); see also Vorebenberg, supra note 3, at 1531 ("[T]here is a natural temptation to 'have it both ways' by not prosecuting misconduct that most people are usually willing to let go unpunished, while still defining the conduct as criminal in order not to appear to condone it or weaken society's ability to intervene if it desires."); Darryl Brown, Desert Theory, Retribution, and Enforcement Practice 1 (Aug. 9, 2010) [hereinafter Brown, Desert Theory] (unpublished manuscript) (on file with the Columbia
the particulars, anticipating case-specific, back-end equitable intervention. As a consequence, prosecutors are granted “a menu” of statutory options to make opaque choices about whom to arrest and charge and for what. With this choice comes responsibility, for prosecutors shoulder the burden of determining when to use axes, scalpels, some other weapon, or no weapon at all. Put succinctly, substantive overcriminalization increases not only the need for equitable discretion, but also the risk of its misuse or abuse.

In theory, a state could craft a fair and efficient justice system that required prosecutors to charge every legally and administratively sustainable violation of law. Such a system, though, would likely consist of shorter criminal codes, more moderate sentencing laws, and more robust judicial sentencing discretion—an imaginary state of affairs that is almost wholly contrary to the qualities that typify modern American criminal justice. Rather, in the contemporary justice system, questions of legal and administrative sufficiency are not dispositive. Instead, they are merely threshold inquiries antecedent to the question of whether criminal prosecution is

Law Review (“[C]riminal codes are expansive and designed to be under-enforced. That is, criminal statutes apply to much more conduct than anyone—the legislators who drafted them, prosecutors who enforce them, or the public—would want them applied to.”; supra notes 27–28, infra notes 30–35, and accompanying text (discussing legislatures’ passage of expansive criminal codes and subsequently broad prosecutorial discretion).

30. Frederick Schauer, Profiles, Probabilities, and Stereotypes 44 (2003) [hereinafter Schauer, Profiles] (“These omissions [of specifics from statutes] are . . . sometimes voluntary[ ] on the part of legislators . . . when, being unable to define for all cases, they are obliged to make a universal statement, which is not applicable to all, but only to most, cases . . . . If then no exact definition is possible, but legislation is necessary, one must have recourse to general terms.” (quoting Aristotle, The “Art” of Rhetoric 145, 147 (John Henry Freese trans., 1967))); see also Davis, Discretionary Justice, supra note 14, at 25 (“Discretion is a tool, indispensable for individualization of justice. . . . Rules alone, untempered by discretion, cannot cope with the complexities of modern government and of modern justice.”); Kadish & Kadish, supra note 25, at 77 (“The legislature necessarily writes the rules with a broad brush. It cannot for a variety of reasons set out all the appropriate exceptions and qualifications. Nonenforcement decisions . . . . serve in some measure to compensate for this inability.”).


32. See Davis, Discretionary Justice, supra note 14, at 25 (“Discretion is a tool only when properly used; like an axe, it can be a weapon for mayhem or murder.”); Herbert Packer, The Limits of the Criminal Sanction 290 (1968) (“The basic trouble with discretion is simply that it is lautes . . . .” (emphasis added)).

33. See supra notes 27–31 and accompanying text (describing how expansive codes governing American criminal justice fail to constrain prosecutorial charging discretion).
normatively appropriate.\textsuperscript{34} A prosecutor is expected to determine, first, whether she can meet her burden and has the resources to proceed and, second, whether she normatively ought to proceed and in what fashion.\textsuperscript{35}

B. Equitable Peripheries

The peril and promise of equitable discretion are particularly apparent in the inferior criminal courts that play host to most of American justice.\textsuperscript{36} Many of the cases in these courts (perhaps the majority in most urban jurisdictions) are petty public order cases—cases that are products of order maintenance arrests for offenses like public urination and intoxication, aggressive panhandling, prostitution, simple drug possession, evading bus and subway fares, trespassing in public housing units, disorderly conduct, graffiti, and unlicensed vending.

Most (but not all) of these offenses are mala prohibita offenses—offenses that by definition lack inherent blameworthiness.\textsuperscript{38} This is not to say that these offenses are wholly amoral. It simply stands to reason that less consensus exists over whether, when, and how a criminal justice system should punish such violators.\textsuperscript{39} In this way, legal and equitable questions have a propensity to run crosswise: Legal questions tend to grow more complex with the seriousness of offenses, but equitable ques-

\textsuperscript{34} See supra notes 25–27 and accompanying text (describing public expectation that prosecutors will exercise equitable discretion to individualize justice).

\textsuperscript{35} Harry Kalven & Hans Zeisel, The American Jury 259 (1966) (arguing it "must be a chief aspect of the prosecutor's discretion that trivial complaints are screened out of the system"); Paul H. Robinson & John M. Darley, Justice, Liability, and Blame: Community Views and the Criminal Law 83 (1995) ("Even if a person violates one of the criminal law's rules, it does not follow that liability is appropriate . . . . Liability is properly reserved for violations of sufficient seriousness committed with sufficient culpability to justify condemnation as criminal."); Brown, Desert Theory, supra note 29, at 4 (arguing prosecutors' consequentialist goals moderate charging decisions made under broad criminal codes). Martha Nussbaum and Dan Kahan have identified a similar two-stage process at play in discretion ary sentencing: Legal conviction requires a mechanistic determination of the applicable rule, but equitable sentencing requires an evaluative determination of appropriate punishment in light of the particulars. Dan M. Kahan & Martha C. Nussbaum, Two Conceptions of Emotion in Criminal Law, 96 Colum. L. Rev. 269, 368–69 (1996) [hereinafter Kahan & Nussbaum, Two Conceptions].

\textsuperscript{36} See Josh Bowers, Punishing the Innocent, 156 U. Pa. L. Rev. 1117, 1119, 1122 (2008) [hereinafter Bowers, Punishing] (observing that most cases are petty nonfelony cases).

\textsuperscript{37} See Feeley, supra note 27, at 40–41 tbl.2.1 (describing random study of Connecticut criminal court in which fifty-eight percent of cases were "crimes against public morality" or "crimes against public order"); Bowers, Punishing, supra note 56, at 1119 (noting "typical case" involves individual "facing petty charges").

\textsuperscript{38} Evading bus and subway fares (as a form of theft) does not qualify as mala prohibita. Nor, potentially, does prostitution. See infra note 45.

\textsuperscript{39} See Stuntz, Disappearing Shadow, supra note 31, at 2563 ("[T]he principle is universal: the less serious the crime, the more likely it is that the legislature has authorized punishments no one really wishes to impose."); infra notes 44–45 and accompanying text (noting that while some consensus exists for punishment of serious core crimes, much less exists for victimless crimes).
tions of blameworthiness become more facile.\textsuperscript{40} This is not a universal proposition. Issues like self-defense and euthanasia present both complex legal and equitable questions even in serious cases,\textsuperscript{41} capital sentencing decisions are profoundly equitable,\textsuperscript{42} and First Amendment and vagueness questions tend to raise the toughest legal issues in the context of petty street-sweeping statutes.\textsuperscript{43} But in the main, the proposition is somewhat uncontroversial: Greater agreement exists about the wrongfulness of conduct that violates core criminal statutes.\textsuperscript{44} According to Paul Robinson:

[A]s a matter of common sense, the law's moral credibility is not needed to tell a person that murder, rape, or robbery is wrong. The criminal law's influence in this respect as a moral authority has effect primarily at the borderline of criminal activity, where there may be some ambiguity as to whether the conduct really is wrong.\textsuperscript{45}

\textsuperscript{40} See Vorenberg, supra note 3, at 1526, 1531 (indicating "[p]rosecutors exercise the greatest charging discretion when dealing with minor offenses" and "least discretion over those crimes that most frighten, outrage, or intrigue the public"); supra note 21 and accompanying text (noting legal issues have more time and space to develop in more serious cases); infra Part V.A (same).

\textsuperscript{41} See supra note 9 and accompanying text (noting equitable questions arise over homicide statute enforcement in cases of euthanasia and anticipatory self-defense by battered spouses).

\textsuperscript{42} See Theodore Eisenberg et al., But Was He Sorry? The Role of Remorse in Capital Sentencing, 83 Cornell L. Rev. 1599, 1631-37 (1998) (noting significant effect jurors' beliefs about defendant's remorse have on sentence they impose); Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 Colum. L. Rev. 1538, 1551-66 (1998) (discussing variety of equitable factors jurors consider in capital sentencing decisions, including future dangerousness and whether defendant was remorseful).

\textsuperscript{43} Notably, however, even though vagueness is a legal doctrine, it is a legal doctrine designed to constrain discretion, which is consistent with the observation that the potential for use, misuse, and abuse of discretion rises as charge severity drops. See generally Bonnie et al., supra note 9, at 99-106 (describing vagueness doctrine).

\textsuperscript{44} Debate rages over how deep the consensus is for even core index crimes like murder, and, in any event, whether any such consensus is biological, socially constructed, or the product of something else entirely. Compare Donald Braman, Dan M. Kahan & David Hoffman, Some Realism About Punishment Naturalism, 77 U. Chi. L. Rev. (forthcoming 2010) (manuscript at 3), available at http://ssrn.com/abstract=1443552 (on file with the Columbia Law Review) (arguing moral judgments "are not innate" but rather "depend crucially on social meaning that varies across cultural groups"), with Paul H. Robinson, Robert Kurzman & Owen D. Jones, The Origins of Shared Intuitions of Justice, 60 Vand. L. Rev. 1633, 1664 (2007) (arguing "intuitions about morality and justice" develop naturally "[i]n the same way that baby teeth grow from gums and adult teeth replace baby teeth"). But, surely, even punishment realists, who believe perceptions of blame are almost wholly socially constructed, would agree that a community is more likely to demand criminal condemnation for a given killer than a given graffiti artist, prostitute, drug possessor, turnstile hopper, or public urinat.

\textsuperscript{45} Paul H. Robinson, Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control, 86 Va. L. Rev. 1839, 1865 n.84 (2000) [hereinafter Robinson, Normative Crime Control]; see also Bonnie et al., supra note 9, at 215 ("Modern laws define a great many crimes that are not mala in se but only mala
Thus, petty crime is peripheral crime. And individual petty offenses tend to have respectively broader equitable margins and smaller equitable cores than the peripheries and cores of more serious crimes. This notion of equitable peripheries and cores brings to mind the famous H.L.A. Hart and Lon Fuller debate over a hypothetical statute prohibiting “vehicles in the park.”\textsuperscript{46} Seemingly, the debate was limited to the question of what constituted the legal core of the ordinance. But, perhaps inadvertently, the debate highlighted the fact that statutes have equitable cores and peripheries too. Specifically, Fuller argued that the hypothetical statute was ambiguous as to whether a functional military truck used as part of a war memorial qualified as a “vehicle” pursuant to the statute.\textsuperscript{47} But Fuller’s legal claim was specious, as Fred Schauer was to point out decades later: “The war memorial made out of a functioning military truck really was a vehicle . . . .”\textsuperscript{48} The problem was not the supposed inapplicability or ambiguity of the statute—at least not in this instance. Indeed, the truck fell within (or close to) the definitional legal core. The problem was that the statute posed a risk of an undesirable and unfair outcome in application.\textsuperscript{49} To allow the punishment—even if only by fine—of some public works administrator for the construction or commission of the memorial would be to take the applied rule far outside its equitable core.\textsuperscript{50} Thus, the case was legally simple, but otherwise hard.

In such circumstances, the executive actor faces a thorny task: She must distill from the rough expanse of legal rules only “the true, the

\textsuperscript{46} See H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 606–15 (1958) (using hypothetical statute to defend positivist school of jurisprudence and insisting on distinguishing law that is from law that ought to be); Lon L. Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630, 661–69 (1958) (rejecting Hart’s theory of statutory interpretation because it erroneously seeks meanings of individual words claimed to have “standard instances”).

\textsuperscript{47} Schauer, supra note 46, at 668.


\textsuperscript{49} Schauer, Thinking, supra note 12, at 156–57.

\textsuperscript{50} Cf. Kyron Huigens, The Jurisprudence of Punishment, 48 Wm. & Mary L. Rev. 1793, 1819 (2007) [hereinafter Huigens, Jurisprudence of Punishment] (noting “granularity” is how law navigates tension in the law between “legal formality [which] bolsters respect for criminal law by reducing arbitrariness and unpredictability in the legal system . . . [and] moral particularity . . . [which] accommodates a public that has little tolerance for counterintuitive legal judgments”).
good, and the beautiful.” But, like beauty, blameworthiness is to a significant degree in the eye of the beholder. It is easy enough to say that a prosecutor should abide by the maxim de minimis non curat praetor: “[T]he law does not concern itself with trifles.” It is harder to act on the maxim when there is no fixed notion of what constitutes a trifle.

C. Perfecting Law

What is required of prosecutors in the lower criminal courts could be called a kind of particularism. Moral particularism is an aretaic theory that—in its strongest form—endorses no general principle but one: Reasons for moral action are not to be found in generally applicable rules and principles, but rather through the exercise of human intuition and practical deliberation applied to the specifics of concrete cases. Particularism focuses internally on incidents, and, as such, it is skeptical of deontological theories that require obedience to and fulfillment of externally set duties.

51. Davis, Discretionary Justice, supra note 14, at 20 (“[A] legislative body sees a problem but does not know how to solve it; accordingly, it delegates the power to work on the problem, telling the delegate that what it wants is the true, the good, and the beautiful.”); see also Vorenberg, supra note 3, at 1531 (“Few people would want to eliminate . . . [minor morals] offense[s], but few would want to prosecute in every case either.”).

52. Feeley, supra note 27, at 167 (noting even amongst prosecutors there exists only “loose consensus” of equitable factors that are relevant to assessing case value, and that outcomes are accordingly “far from predictable”).

53. Kalven & Zeisel, supra note 35, at 258 n.1; see also Kadish & Kadish, supra note 25, at 84 (“[The] public interest is served by the criminal law as modified by the prosecutor’s conscientious exercise of discretion in assessing the merits of the case in view of the circumstances surrounding it.”); Rachel E. Barkow, Federalism and the Politics of Sentencing, 105 Colum. L. Rev. 1276, 1283–84 (2005) (arguing adjudicatory individualization by judiciary may serve to temper overcriminalizaton). Even the paradigmatic legal code—the Model Penal Code—exempts from criminal liability conduct “too trivial to warrant the condemnation of conviction.” Model Penal Code § 2.12(2) (1985); see also id. §§ 2.03(2)(b), (3)(b) (finding causation to be lacking where actual result is “too remote or accidental in its occurrence to have a [just] bearing on the actor’s liability); id. § 1.02(2)(e) (noting one purpose of Code’s sentencing provisions is “to differentiate among offenders with a view to a just individualization in their treatment”); Robinson, Normative Crime Control, supra note 45, at 1853–54 (noting Model Penal Code mens rea standards that require finding of “substantial” and “unjustifiable” risk are essentially “asking the juror to apply her own intuitions of justice in assessing liability”).

54. Indeed, in their seminal jury study, Harry Kalven and Hans Zeisel found that the less serious the crime, the greater the disagreement between prosecutor and jury over whether and what to charge. Kalven & Zeisel, supra note 35, at 260–261 & n.6.

55. See generally Jonathan Dancy, Ethics Without Principles 7 (2004) (noting particularists “challenge the crucial assumption that what is relevant in one case is necessarily similarly relevant elsewhere”).

56. Id. at 1 (expressing strong particularist account that “moral judgement [sic] can get along perfectly well without any appeal to principles”); Lawrence B. Solum, Natural Justice, 51 Am. J. Juris. 65, 98 (2006) [hereinafter Solum, Natural Justice] (describing strong form of moral particularism).
Of course, no court of law would or should endorse or adopt such a hard version of particularism. Critics have raised valid concerns that the theory unmoored could devolve into "justice without law" or—worse still—arbitrariness, positive injustice, and lawlessness. But even Holmes understood that the impulse to individualize is an inevitable fact of law's enforcement and administration: "General propositions do not decide concrete cases." And this is perhaps nowhere truer than in the disposition of petty criminal cases where systemic actors must individualize results principally according to equitable reasons, not legal rules. Rules set the outer bounds, but equity guides decisionmaking in discrete cases: "[G]eneral ethical or legal rules are . . . useful as outlines, but [are] no substitute for a resourceful confrontation with all the circumstances of the case."

It is tempting to conclude that even such a hybrid (or bounded) approach to law and equity is contrary to justice and the rule of law. But this is not so. Law and equity can and do coexist harmoniously within justice systems. Law must announce general principles and it must thereafter provide mechanisms to adapt law to life. But it is no sign of the deficiency of law that the system permits—and indeed requires—

57. Roscoe Pound, Executive Justice, 55 Am. L. Reg. 137, 144-45 (1907).
58. See Frederick Schauer, Harry Kalven and the Perils of Particularism, 56 U. Chi. L. Rev. 397, 398 (1989) ("[I]f we think in particularistic terms, we are at a loss to explain . . . why the Nazism of the Nazis and the racism of the White Citizens League are irrelevant to their free speech claims."); Solum, Natural Justice, supra note 56, at 98 (arguing for particularized justice, but noting that in its strongest form "particularism seems to bump against the virtue of justice as lawfulness"); Roscoe Pound, Book Review, 73 Harv. L. Rev. 1422, 1426 (1960) ("When, where, how, and how far to individualize legal treatment of cases and persons is a fundamental problem of the administration of justice.").
59. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting); see also Cass R. Sunstein, Legal Reasoning and Political Conflict 194 (1996) ("General theories do not decide concrete cases, and case-by-case particularism has advantages over the creation and application of broad rules."); Huigens, Jurisprudence of Punishment, supra note 50, at 1819 ("Criminal law does not merely tolerate the specification of its prohibitions in adjudication; it relies on specification to inject a necessary measure of moral particularism into its processes."). See generally Roscoe Pound, The Theory of Judicial Decision, 36 Harv. L. Rev. 802, 816 (1923) (describing penchant of criminal justice toward individualization and mitigation, and explaining "[t]he times call insistently for results in actual cases, not merely for abstractly just general rules").
60. See supra notes 8–12, 38–45, and accompanying text.
63. See Solum, Natural Justice, supra note 56, at 103–05 (describing relationship between legal norms and social norms); Wright, Dreams, supra note 62, at 214 (noting that law, without equity, can become "insensitive, mechanical, morally blind, or 'rule fetishist'" (footnotes omitted)).
some amount of equitable exception (particularly in petty cases). It is, instead, a sign only of the complexity of existence.\textsuperscript{64} Aristotle explained:

\begin{quote}
[T]here are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made. And the law is none the less right; because the error lies not in the law nor in the legislator but in the nature of the case; for the raw material of human behavior is essentially of this kind.\textsuperscript{65}
\end{quote}

Law needs equitable discretion to “mitigate or temper” broad statutes,\textsuperscript{66} and equity needs law to provide the superstructure.\textsuperscript{67} Thus, equity and law are not mutually exclusive; rather, equity may serve to refine law.

This, then, provides a partial answer to the stock claim that equitable discretion is lawless. John Adams is credited with the idiom that ours is “a government of laws and not of men,”\textsuperscript{68} but, with all due respect, the expression is too simplistic. Law forms only the bedrock; man remains to

\textsuperscript{64} Nussbaum, supra note 61, at 93 (“[T]he ‘matter of the practical’ can be grasped only crudely by rules given in advance, and adequately only by a flexible judgment suited to the complexities of the case.”); Solum, Virtue Jurisprudence, supra note 8, at 206 (“[T]he infinite variety and complexity of particular fact situations outruns our capacity to formulate general rules.”).

\textsuperscript{65} Aristotle, The Nicomachean Ethics, 1137b14–20 (J.A.K. Thomson & Hugh Tredennick trans., Penguin Classics rev. ed. 2004); see also St. Thomas Aquinas, 1 Summa Theologica, pts. I–II, q. 94, art. 4, at 1011 (Fathers of the English Dominican Province, trans., Benziger Bros. Inc. 1947) (“[A]lthough there is necessity in the general principles, the more we descend to matters of detail, the more frequently we encounter defects.”); Nussbaum, supra note 61, at 93 (“[T]he law must speak in general terms, and therefore must err . . . . Aristotle says that this is not the fault of the lawgiver . . . .”); Solum, Virtue Jurisprudence, supra note 8, at 206 (“[T]here will always be cases in which the problem is not that the rule was not given its optimal formulation. Rather, the problem is that the infinite variety and complexity of particular fact situations outruns our capacity to formulate general rules.”).

\textsuperscript{66} Schauer, Profiles, supra note 30, at 42 (describing Aristotelian view that “correcting the errors wrought by any generalization” is “a rectification of law in so far as law is defective on account of its generality”); Rachel E. Barkow, Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing, 152 U. Pa. L. Rev. 33, 36–37 (2003) (describing equitable tempering role of juries); Solum, Virtue Jurisprudence, supra note 8, at 206 (arguing that equity tailors law and that a virtuous decisionmaker must have both legal and equitable vision). Likewise, the sixteenth-century common-law scholar Christopher St. Germain noted: “In some cases it is necessary to leave the words of the law, and to follow what reason and justice required . . . to temper and mitigate the rigor of law.” Schauer, Thinking, supra note 12, at 121 (citation omitted).

\textsuperscript{67} Solum, Virtue Jurisprudence, supra note 8, at 205 (“One characteristic of equity is that it involves a departure from rules . . . [but] equity is not identical to the resolution of conflicts between law and morality in favour of the latter.”); Wright, Dreams, supra note 62, at 212 n.96, 217–18 (discussing “the mutual dependence” of equity and law).

\textsuperscript{68} Mass. Const. art. XXX, pt. I; see also Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men.”).
administer it. More than that, the human element of discretion is no unfortunate or inevitable byproduct of law's application. Rather, it is this very discretion that serves to perfect law. As Martha Nussbaum has explained:

Equity may be regarded as a "correcting" and "completing" of legal justice. . . . It seems wrong to make a simple contrast between justice and equity . . . [or] to choose between equity and the rule of law as understandings of what justice demands. The point of the rule of law is to bring us as close as possible to what equity would discern in a variety of cases, given the dangers of carelessness, bias, and arbitrariness endemic to any totally discretionary procedure. But no such rules can be precise or sensitive enough, and when they have manifestly erred, it is justice itself, not a departure from justice, to use equity's flexible standard.

Complete justice demands both the simple justice that arises from fair and virtuous treatment and the legal justice that arises from the application of legal rules. In this way, "evaluative" approaches to law enforcement en-

---

69. Davis, Discretionary Justice, supra note 14, at 17 ("No government has ever been a government of laws and not of men in the sense of eliminating all discretionary power. Every government has always been a government of laws and of men.").

70. Kenneth Culp Davis embraced a modest strain of this argument by concluding that discretion is desirable but by endorsing administrative guidelines to cabin its abuse. Id. at 15 (seeking "optimum point on the rule-to-discretion scale"). Davis recognized that there are insufficient checks over executive abuses of equitable discretion, noting accurately that equitable discretion "is beyond the reach of both judicial review and trial-type hearings." Id. at 4. However, guidelines are not the right fix: Although guidelines may limit abuses, they also curb discretion's benefits, because discretion has a tendency to calcify and become rule-like under the influence of guidelines. Solum, Virtue Jurisprudence, supra note 8, at 206 ("The solution is not to attempt to write the ultimate code, with particular provisions to handle every possible factual variation. No matter how long and how detailed, no matter how many exceptions, and exceptions to exceptions, the code could not be long enough."). As I argue in a separate article, the better fix is an institutional reform that provides a lay equitable check over the executive charging decision, which thereby fights discretion's abuse by placing more discretion in more hands. See generally Bowers, Outsourcing, supra note 21.

71. Nussbaum, supra note 61, at 93, 96 (footnote omitted).

72. Davis, Discretionary Justice, supra note 14, at 19 ("Rules must be supplemented with discretion. . . . For many circumstances the mechanical application of a rule means injustice; what is needed is individualized justice . . . tailored to the needs of the individual case."); Michael R. Gottfredson & Don M. Gottfredson, Decision Making in Criminal Justice: Toward the Rational Exercise of Discretion 51 (2d ed. 1988) ("Individualized judgment, taking account of the immediate circumstances of the behavior in question, is a necessary component of just decision making."); Schauer, Profiles, supra note 30, at 45-48 (rejecting Aristotelian approach but acknowledging that, for Aristotle, "equity serves the purpose of correcting the law and thus of providing 'complete' rather than incomplete justice"); Nussbaum, supra note 61, at 109 (arguing complete justice requires legal justice tempered by equity); Roscoe Pound, Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case, 35 N.Y.U. L. Rev. 925, 928 (1960) [hereinafter Pound, Discretion] ("Unbending rules rigidly administered may not merely fail to do justice, they may do positive injustice.").
hance justice more than “mechanistic” approaches do, by individualizing justice.\textsuperscript{73} Decisionmakers advance the rule of law by tailoring the law to fit the incident and the offender, and by, in some instances, even exercising discretion not to proceed with legally sustainable charges.\textsuperscript{74}

D. On Treating Like Cases Alike and Unlike Cases Unalike

But what of the principle that like cases should be treated alike? A justice system that admits equitable considerations is premised on the fact that legally identical cases should sometimes be handled differently for normative reasons. This does not mean, however, that equitable discretion deviates unduly from a defensible notion of equality. The degree to which equitable discretion either departs from or adheres to equality turns, necessarily, on what precisely is meant by the principle that like cases should be treated alike. This is no facile question, because the principle lacks fixed content and is, instead, frequently invoked but seldom defined. For this reason, Peter Westen has criticized the principle as no more than a tautological makeweight, marshaled readily as an easy objection to some undesired prospective result.\textsuperscript{75} An underlying problem is that the principle is necessarily somewhat fictive in the first instance: At a high level of abstraction, no two cases are absolutely distinct, and at a high level of detail no two cases are exactly alike.\textsuperscript{76} Instead, the principle

\textsuperscript{73} Kahan & Nussbaum, Two Conceptions, supra note 35, at 278–97; see also Nussbaum, supra note 61, at 92–93 (“Aristotle[ ] . . . define[s] equity as a kind of justice, but a kind that is superior to . . . strict legal justice.”). See generally Solum, Natural Justice, supra note 56, at 99–100 (distinguishing between “two styles of rule application, . . . 'mechanical' and 'sensitive'”).

\textsuperscript{74} It is no persuasive response that democratically elected legislators passed the criminal statute in question, and thus, even if the legislators themselves anticipate and desire some executive discretion, the electorate does not. See, e.g., Schauer, Thinking, supra note 12, at 165 (raising democratic accountability argument). First, the electorate typically responds to the substantive criminal law—if at all—as it is enforced, not as it appears in code books. Second, numerous studies show that laypersons claim to favor mechanistic enforcement and harsh punishment when considering criminal justice in the abstract. Nevertheless, they prefer some amount of mitigation when presented with the details of concrete cases. See Rachel E. Barkow, Administering Crime, 52 UCLA L. Rev. 715, 748–51 (2005) (exploring tension between voters’ views about crime and punishment in abstract and jurors’ views in particular cases).

\textsuperscript{75} Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537, 593 (1982) (“[B]ecause the proposition that likes should be treated alike is unquestionably true, it gives an aura of revealed truth to whatever substantive values it happens to incorporate by reference. . . . That is why arguments in the form of equality invariably place all opposing arguments on the ‘defensive.’” (footnote omitted) (quoting Irving Kristol, Equality as an Ideal, in 5 International Encyclopedia of the Social Sciences 108, 110 (David L. Sills ed., 1968))).

remains amorphous and potentially shifting.\footnote{See Westen, supra note 75, at 547–48 (observing vacuous nature of equality principle accounts for its endurance).} Nevertheless, it stands to reason that a mechanical approach to the principle would require only the identical treatment of legally alike cases, while, conversely, moral particularism would mandate a more sophisticated, nuanced, and flexible conception. Specifically, a contextualized approach to criminal justice necessarily demands more than just a rigid application of legal rules pursuant to formal designations. It demands an evaluation of relative blameworthiness to ensure that equitably distinct cases are recognized as such, even if those cases happen to be legally identical under insufficiently discriminating statutes.\footnote{See Kahan & Nussbaum, Two Conceptions, supra note 35, at 357–58 (discussing evaluative method); David A. Strauss, Must Like Cases Be Treated Alike? 12 (Univ. of Chi. Law Sch. Pub. Law & Legal Theory Working Paper No. 24, 2002), available at http://ssrn.com/abstract_id=312180 (on file with the Columbia Law Review) (arguing that, rather than measuring whether like cases are treated alike according to application of legal rules, justice system could measure according to “morally relevant differences” of cases). See generally Davis, Discretionary Justice, supra note 14, at 21 (“[T]he conception of equity that discretion is needed as an escape from rigid rules [is] a far cry from the proposition that where law ends tyranny begins.”).} As Stephanos Bibas has explained:

Treating like cases alike is a value, but not the only one. Equality also requires treating unlike cases unlike . . . . A Procrustean system of fixed penalties or mandatory minima would ensure this equality by sacrificing individualization. Justice demands a balance of many competing values . . . that should keep justice from being inexorable and rigid.\footnote{Stephanos Bibas, Forgiveness in Criminal Procedure, 4 Ohio St. J. Crim. L. 329, 347 (2007) [hereinafter Bibas, Forgiveness].}

Admittedly, a kind of uniformity flows from the rigid enforcement of generally applicable rules, but it is no more than a “crude and artificial uniformity.”\footnote{Vincent Chiao, Luck, Death and Lotteries: Ex Ante Fairness in Criminal Law and Procedure 4 (June 2, 2009) (unpublished manuscript) (on file with the Columbia Law Review).} As David Strauss explained: “No one would say that an official in a genocidal regime should carry out its genocidal purposes because otherwise like cases would not be treated alike.”\footnote{Strauss, supra note 78, at 14; see also id. at 7 (“It may be that the uniformity produced . . . is ‘bad’ uniformity . . . .”).} Such uniformity is bad uniformity. And such a mechanical conception of equality is a bad conception of equality.\footnote{Cf. H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law 80 (2d ed. 2008) (observing that “the ideal of justice” demands “treating morally like cases alike and morally different ones differently” (emphasis added)).} Instead, a more particularistic focus on an actor’s blameworthy conduct “better accounts for common moral intuitions.”\footnote{Kahan & Nussbaum, Two Conceptions, supra note 35, at 358 (observing that “evaluative” approach to criminal justice is “more likely to generate results consistent with notions of individual desert” than mechanistic approach).} Indeed, the formal legal equality of modern mandatory sen-
tencing statutes is precisely what many criticize most about these laws.\textsuperscript{84} The statutes are simply too inflexible to respond to relevant (but extralegal) distinctions across cases.

Moreover, genuine uniformity is illusory in any event. By way of example, under the so-called Bloody Code, which existed in England from the fifteenth until the nineteenth century, the death penalty was the ostensible mandatory sentence for a host of felony convictions. Thus, England had established a punishment regime that was intended to be uniform, but such even treatment could only come at the cost of apportioning punishment on the basis of a defensible conception of blameworthiness.\textsuperscript{85} Ultimately, therefore, the Bloody Code came to be inconsistently bloody in practice, because the death penalty proved to be disproportionately harsh in most cases.\textsuperscript{86}

Finally, there remains a separate concern that case-specific normative evaluation may lead to unequal treatment of even \textit{equitably} alike cases. Specifically, discretionary regimes frequently rely on disaggregated decisionmaking, which may produce variant determinations across like cases.\textsuperscript{87} For instance, we can imagine two identical violations of a public urination statute. We can further imagine that the public agrees concurrently that the conduct should be proscribed but that the statute should not be enforced categorically. Yet, across members of the public (and even from one officer to another and from one prosecutor to another), perspectives undoubtedly will differ over the circumstances that may ne-

\textsuperscript{84} See, e.g., Michael Tonry, Sentencing Matters 14 (1996) ("[T]he result has been both to make punishment more severe and to create disparities as extreme as any that existed under indeterminate sentencing."); James Q. Whitman, Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe 13 (2003) ("[T]he strong tendency of the last twenty-five years has been toward a formal equality of nearly Kantian severity . . . . [W]e display a powerful drive to hit every offender equally hard.").

\textsuperscript{85} See Thomas Andrew Green, Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200–1800, at 286–87 (1985) (describing mechanism used by criminal justice functionaries to circumvent capital punishment); Jerome Hall, Theft, Law and Society 118–32 (2d ed. 1952) ("[B]eginning in the early part of the eighteenth century, the persons, lay and official, who administered the criminal law, invented and indulged in practices which almost nullified the capital penalty in most nonceremonial felonies."); Tonry, supra note 84, at 142–49 ("[E]xperience with ‘mandatory’ capital punishment in eighteenth-century England instructed all who would pay attention that mandatory penalties, especially for crimes other than homicide, elicit a variety of adaptive responses from those charged to enforce the law . . . ."); Josh Bowers, Mandatory Life and the Death of Equitable Discretion 1 (Aug. 24, 2010) (unpublished manuscript) (on file with the Columbia Law Review) ("[U]nder the Bloody Code, the sentencing law may have been rigid, but law enforcement and adjudication were considerably less formal and more flexible.").

\textsuperscript{86} Cf. Lambert v. California, 355 U.S. 225, 229 (1957) ("A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." (internal quotation marks omitted) (quoting Oliver Wendell Holmes, Jr., The Common Law 50 (1909))).

cessitate or justify equitable exceptions from the legal rule. One decisionmaker may consider undeserving of punishment a homeless man who relieves himself in a desolate alley where there are relatively few readily accessible or safe public restrooms. Another decisionmaker may deem the homeless man nonetheless blameworthy, considering that (i) the man’s act negatively impacted the quality of life in an unquestionably public space, and (ii) the man possessed lawful (albeit burdensome) other options. It may seem hard to square principles of equal treatment with the inevitable cacophony that results when different actors (who possess different perspectives) reach different dispositive determinations across equitably alike cases. But the problem is far from insurmountable.88

Two ready responses: First, as haphazard administration of the Bloody Code illustrated, some amount of equitable discretion unavoidably seeps into even ostensibly mechanic enforcement and punishment models.89 Comparatively, a justice system that tacitly recognizes the desirability of contextualization is more transparent and accountable (and thereby more desirable).90 By embracing case-specific equitable valuation, the system is not any less consistent per se (even if the inevitable inconsistencies are more apparent); in fact, such a system may even be more consistent and less arbitrary, especially where normative judgments are made by locally responsive and comparatively more transparent lay collectives.91

88. Indeed, the concern is powerful enough that I devote a substantial portion of a separate article to a thorough exploration of why a lay equitable screen on a prosecutor’s charging discretion does not irreparably harm the principle that like cases should be treated alike. But, for now, it is enough to sketch an alternative vision of what it means to treat like cases alike. See infra notes 92–96 and accompanying text (arguing equal treatment need not be measured according to substantive outcomes only).

89. See supra note 85 and accompanying text (detailing how criminal justice functionaries in England circumvented capital punishment); see also Donald J. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 177–82 (1966) (“Faced with certain mandatory sentencing provisions which are thought undesirable, some judges adopt a policy of always reducing the charge to a lesser offense unless the case is an aggravated one.”); Tony, supra note 84, at 142–53 (discussing ubiquity of executive and judicial circumvention of mandatory sentencing laws).

90. See Kahan & Nussbaum, Two Conceptions, supra note 35, at 363–64 (“Similar appraisals are made, yet concealed, when juries apply the seemingly mechanistic doctrine . . . . [M]echanistic doctrines . . . only drive those assessments underground. . . . [T]he evaluative view forces decisionmakers to accept responsibility for their moral assessments . . . . [T]here ought to be a preference for decisionmakers whose judgments are most fully amenable to public scrutiny.”).

Second, and perhaps more importantly, there is no persuasive reason why equal treatment must be measured according to substantive outcomes only. A justice system could honor the equality principle just as well by adopting procedures that provide roughly equivalent probabilities of receiving some favorable result. Of course, the range of possible outcomes should not exceed that which is normatively justifiable according to at least some reasonable retributive conception. But, in the mine run of cases, the mere fact that differences exist or that the system relies on a degree of randomness is no fatal problem (or any problem at all). After all, some amount of randomness and consequent unequal result is endemic to all phases of criminal justice (as it is to life itself). One driver is stopped by police, another let pass. One defendant has an exceptional public defender, another barely competent counsel. One faces a hard-nosed prosecutor, another a sympathetic adversary. One is held on bail, another released on his own recognizance. As Judge Posner has explained, to object to “ex post inequality among offenders . . . is like saying that all lotteries are unfair because, ex post, they create wealth differences among the players . . . [T]he criminal justice system . . . and the lottery are fair so long as the ex ante costs and benefits are equalized among the participants.”

Indeed, Rawls identified a fair gamble as perhaps the only genuine instance of what he called “pure procedural justice”—defined as a “fair procedure” that produces an outcome that is “likewise correct or fair, whatever it is, provided that the procedure has been properly followed.” AsRawls explained: “If a number of persons engage in a series of fair bets, the distribution of cash after the last bet is fair, or at least not unfair,

92. See Chiao, supra note 80, at 3 (arguing when “chances are roughly equivalent” the system may, consistent with principle of treating like cases equally, leave punishment to “fall where it may”). Such a system necessarily must take care to ensure that discrete groups do not bear disproportionate risks of disparate results.

93. Bernard E. Harcourt, Post-Modern Meditations on Punishment: On the Limits of Reason and the Virtue of Randomization, in Criminal Law Conversations 163, 167–70 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009) (arguing that within reasonable ranges the criminal justice system should “turn to the lottery” in making punishment and enforcement decisions); Chiao, supra note 80, at 3, 8, 11 (“From an ex ante point of view, so long as people are exposed to the possibility of being struck by [a] lightning bolt in a way that is at least roughly proportionate to desert, then one may well think the demands of fairness have been discharged . . . .”)

94. See Strauss, supra note 78, at 21, 25–26 (arguing “different outcomes” even in cases that lack “a morally relevant difference” can be defended where variant outcomes are products of “a justifiable system” and “reasonably just institutions”); see also Neil Duxbury, Random Justice: On Lotteries and Legal Decision-Making 71 (2002) (arguing randomness is appropriate, inter alia, “where decisionmakers struggle with indeterminacies”).

95. See Chiao, supra note 80, at 2–5 (“Saying that there is arbitrariness in a legal regime is not to condemn it.”).


whatever this distribution is."98 Thus, it is no obvious violation of the equality principle that a justifiable institutional design happens to produce some disparity across cases.

II. Strands of Equitable Discretion

Individualization, by itself, is no definitive good, however. Systemic actors may individualize for wholly improper reasons.99 By contrast, defensible equitable discretion is narrower. It is a specific type of individualization. Martha Nussbaum described equity as "a gentle art of particular perception, a temper of mind that refuses to demand retribution without understanding the whole story."100 But this invites questions of what the "whole story" consists of and what parts may or must be considered. What, in short, is equitably in bounds? To even begin to answer this question, it is necessary to distinguish between two distinct types of potentially permissible equitable individuation: specifically, decisions to forego charge or punishment based on (i) "normative innocence" or (ii) mercy.

A. Normative Innocence

Any well-functioning system of equitable discretion must consider normative innocence. The concept can be thought of as a third (and equitable) category of innocence—a category beyond legal and factual innocence.101 A criminal is normatively innocent where his conduct is undeserving of communal condemnation, even if it is contrary to law.102 Of course, legal and normative guilt typically track one another, but not always, and with far less frequency in the petty crime context.103 Roughly, normative innocence is equivalent to a lack of blameworthiness,

98. Id.; cf. John Thibaut & Laurens Walker, Procedural Justice: A Psychological Analysis 75–74 (1975) (indicating that perceptions of procedural justice and fairness are outcome-independent); Tom R. Tyler & Yuen J. Huo, Trust in the Law: Encouraging Public Cooperation with the Police and Courts 5 (2002) (discussing growing public concern over how “courts handle problems and treat people when they are enforcing the law”).

99. See infra notes 119–121 and accompanying text (discussing discriminatory or arbitrary enforcement decisions and explaining that such exercises of individualization are not exercises of equitable discretion because such decisions are premised on details irrelevant to blameworthiness).

100. Nussbaum, supra note 61, at 92 (describing epieikeia, or equity).

101. Indeed, it is fair to say that there is a hole in the innocence literature because it tends to focus exclusively on the legal and factual strands. See supra note 6 and accompanying text (distinguishing between normative innocence and legal or factual innocence).

102. See supra notes 6–8 and accompanying text (describing situations where defendant violated law but “did not thereby offend public’s moral code” (quoting Amar, supra note 6, at 90)).

103. See supra notes 8–13, 38–45, and accompanying text (discussing how petty crimes typically lack concrete victims, produce diffuse social harms, and therefore involve less blameworthiness).
and, accordingly, it is a retributive concept. But it is a functional breed of retributivism that relies upon particularized exercise of practical intuition and intelligence, not on formal legal designations. Notably, even conventional retributivists, like Jeffrie Murphy, understand that “pure retribution” entails evaluating equitable considerations of normative innocence: “This demand for individuation—a tailoring of our retributive response to the individual natures of the persons with whom we are dealing—is a part of what we mean by taking persons seriously as persons and is thus a basic demand of justice.” Thus, blameworthiness is not synonymous with rule breaking; it demands a separate (and contextualized) evaluation. Simply put, when determining appropriate punishment, adjudicators must take account of salient moral differences between one case and another. In the petty crime context, where absolute enforcement of borderline petty crimes is neither feasible nor desirable, it is vital for law enforcement to reach common sense judgments beyond technical guilt and administrative capacity—judgments as to what constitutes morally virtuous conduct or character. Executive decisions turn on assessments of blameworthiness, because criminal codes are insufficiently calibrated to normative guilt.

---

104. Huigens, Jurisprudence of Punishment, supra note 50, at 1820 (“[D]esert for legal punishment is informal and particularistic.”); Nussbaum, supra note 61, at 92 (describing πεινακεία, or equity, as “a gentle art of particular perception, a temper of mind that refuses to demand retribution without understanding the whole story”).


106. A number of retributivists come close to endorsing the contrary position—that conduct may be blameworthy simply because it is contrary to law, but even these theorists condition the argument on the existence of a criminal code that is the democratic product of “a properly liberal criminal justice system” that reflects “fundamental liberal principles.” Markel, supra note 91, at 1431, 1435 n.46; see also id. at 1445 n.70 (“[T]he array of activities subject to criminalization far exceeds the array of activities that are ‘essentially concerned with wrongdoing and blame.’”).

107. See Murphy, Mercy, supra note 105, at 172 (“The legal rules, if they are just, will base required penal treatment on morally relevant differences, or they will give judges the discretion to do so; and criminal defendants surely have a right that it be this way.”).

108. See supra notes 8–13 and accompanying text (discussing public expectation of nonenforcement of some petty crimes given that such crimes typically lack concrete victims and produce diffuse, abstract harms); supra notes 25–35 and accompanying text (discussing how case law and commentary agree that expansive codes require prosecutors to individualize justice by considering whether, normatively, charge ought to be filed in given petty crime case); supra notes 38–45 and accompanying text (arguing less consensus exists over whether, when, and how criminal justice system should punish petty crime offenders).

109. See Kyron Huigens, Virtue and Inculpation, 108 Harv. L. Rev. 1423, 1425 (1995) [hereinafter Huigens, Virtue and Inculpation] (“The criminal law serves [the greater good of humanity] by promoting virtue; that is, by inquiring into the quality of practical judgment displayed by the accused in his actions.” (footnote omitted)); Nussbaum, supra note 61, at 111 (rejecting notion that defendant should be treated as “a thing with no insides . . . [or as] a machine”).

110. See supra notes 25–35 and accompanying text (discussing need for prosecutorial exercise of equitable discretion given expansive criminal codes).
The result of this is something strange: The practice of discretion may be moralistic, even where the practice of law is not. During the first year of law school, students learn that modern doctrines of legality and mens rea prohibit convictions that depend solely on defendants’ negative characteristics, general malevolence, or wicked disposition. But evaluations of moral guilt remain critical to the exercise or nonexercise of discretion. Put differently, the fact that some malefactor was up to no good in the eyes of some executive official is (in the modern age) irrelevant to legal guilt, but it may prove equitably sufficient to motivate arrest, charge, or hard bargain in circumstances that might otherwise lead to some nominal punishment, a warning, or nothing at all. Of course, this state of affairs poses risks of executive abuse or misuse, but in light of overcriminalization the answer is not to forego considerations of normative innocence (even if that were possible), but to optimally apportion equitable decisionmaking power to provide exceptions for “the virtuous outlaw”—the normatively innocent prospective defendant who has “behaved virtuously, albeit lawlessly.”

B. Mercy

Mercy is a harder case. There is no consensus over whether mercy is a necessary or desirable component of just law enforcement and adjudication. Some retributive theorists find mercy to be, at best, no more than unwelcome, hollow sentimentiality, and at worst a positive injustice (because justice demands punishment for culpable behavior). If mercy entails exceptions from just punishment, then mercy is incompatible with justice. By contrast, some philosophers, like Martha Nussbaum, see

111. See, e.g., Regina v. Faulkner, 13 Cox Crim. Cas. 550, 555 (1877) (Eng.) (rejecting premodern mens rea approach whereby defendant had sufficiently culpable state of mind as long as he was up to no good).


113. See David Dolinko, Some Naive Thoughts About Justice and Mercy, 4 Ohio St. J. Crim. L. 349, 349–51 (describing mercy as infliction of less punishment than deserved and recognizing argument that “a deliberate departure from the requirements of justice [may be] an injustice”); Markel, supra note 91, at 1478 (“The unreviewable sites for mercy are a problem; precisely because they are unreviewable and not subject to predictable interest group maneuvering, these sites pose a problem that typically flies beneath the radar.”); Murphy, Mercy, supra note 105, at 169 (“[M]ercy is either a vice (injustice) or redundant (a part of justice).”); see also id. at 20 (“To be merciful is to treat a person less harshly than . . . one has a right to treat that person.”). To be fair, Markel, for his part, has endorsed some space for justice-enhancing equitable discretion subject to review. See Markel, supra note 91, at 1432 (“This need for justice-enhancing (or equitable) discretion is readily apparent in light of retributivism’s traditional insistence on protecting the innocent from unwarranted punishment.”).

114. See Murphy, Mercy, supra note 105, at 167-70, 188 (“If mercy requires a tempering of justice, then there is a sense in which mercy may require a departure from justice. . . . Thus to be merciful is perhaps to be unjust. But it is a vice, not a virtue, to manifest injustice. Thus mercy must be . . . a vice . . . .”).
mercy as vital to justice. Nussbaum has noted that—for the Greeks and later for the Roman Stoics—equity constituted a “kind of justice,” and equity was synonymous with mercy; ergo, mercy was just. Specifically, the Greeks invoked the same moral term—epiakia—to refer to both equity and mercy. Still other scholars stake out something of a middle ground: A just decisionmaker may, but need not, act mercifully; mercy is “a free gift, a matter of grace.”

A distinction can be drawn between the impulse to unjustly exercise mercy to provide an exception from unquestionably deserved punishment and the impulse to equitably exercise mercy to bridge the gap “between the inflexibility of the law and moral justice.” The difference is subtle, but real. To constitute equitable mercy (which helps complete justice) there must exist some nexus between the reasons for exercising mercy and the evaluation of whether the prescribed punishment accords with just deserts. For example, I may feel sympathetic for an offender and therefore choose to be merciful, because the offender is charismatic or has warm eyes or reminds me of my daughter or shares my race. But these reasons are, at best, arbitrary and, at worst, invidious. A decision based on discrimination or caprice is no exercise of equity, because equi-

115. See Nussbaum, supra note 61, at 103 (heralding “good Senecan judge” who has “both identification and sympathetic understanding”); see also Murphy, Mercy, supra note 106, at 169–72 (discussing that mercy is basic demand of justice); cf. C.S. Lewis, God in the Dock: Essays on Theology and Ethics 294 (Walter Hooper ed., rept. 1995) (“Mercy, detached from Justice, grows unmerciful. That is the important paradox. As there are plants which will flourish only in mountain soil, so it appears that Mercy will flower only when it grows in the crannies of the rock of Justice . . . .”).

116. See Nussbaum, supra note 61, at 85–86 (describing “close connection between equitable judgment—judgment that attends to the particulars—and mercy,” and observing that “flexible particularized judgment is linked with leniency”).

117. Bibas, Forgiveness, supra note 79, at 330; see also Joel Feinberg, Justice and Personal Desert, in Doing and Deserving: Essays in the Theory of Responsibility 55, 80 (1970) (“[A] person’s desert of X is always a reason for giving X to him, but not always a conclusive reason . . . .”); Bibas, Forgiveness, supra note 79, at 330–33 (discussing definitions of forgiveness and mercy, when to apply each, and potential benefits of each); Eric L. Muller, The Virtue of Mercy in Criminal Sentencing, 24 Seton Hall L. Rev. 288, 343 (1993) (“[M]ercy is neither a redundancy of justice nor an indefensible deviation from justice. Instead, . . . mercy is a guarantor of justice.”).

118. Alwynne Smart, Mercy, 43 Philosophy 345, 355 (1968).

119. See Andrew von Hirsch, Proportionate Sentences: A Desert Perspective, in Principled Sentencing: Readings on Theory and Policy 115, 119 (Andrew Ashworth, Andrew von Hirsch & Julian Roberts eds., 3d ed. 2009) (“Equity is sacrificed when the proportionality principle is disregarded, even when this is done for the sake of crime prevention.”).

table justice requires not only a “capacity for sympathetic understanding" but also demands attentiveness to relevant details.\textsuperscript{121}

Conversely, I may decide to be merciful to an offender who negligently kills her own child but not to a second (similarly situated) offender who negligently kills the child of another. The first defendant is no less blameworthy than the second. (In fact, she may be more blameworthy because she had the added moral duty to care appropriately for her child.) Nevertheless, I might exercise mercy to punish her less than the law typically prescribes, not because she deserves less punishment, but because she has already suffered substantially—if not enough—from the mere fact of her child’s death.\textsuperscript{122} Likewise, a ninety-day sentence means something quite different to a terminally ill man with a month to live and to a healthy man. In the case of the terminally ill man, it may be just to exercise mercy, because the objectively appropriate punishment might prove disproportionate as applied in this particular context.\textsuperscript{123}

However, a separate definitional problem arises: On this narrow reading of equitable mercy, the lines begin to blur between it and normative innocence, because both permit only those considerations that bear on whether punishment is retributively justified.\textsuperscript{124} The difference between these two concepts is that normative innocence is determined by whether a defendant is blameworthy in the first instance, while the need for equitable mercy is determined by whether some punishment is—all things considered—disproportionate, notwithstanding the defendant's

\textsuperscript{121} Nussbaum, supra note 61, at 105. Of course, discrimination is an inevitable danger in any justice system that relies on some amount of discretion. Bibas, Forgiveness, supra note 79, at 347 (noting some amount of discrimination is endemic to American criminal justice). However, such abuse of discretion is amenable (and indeed is subject) to legal fixes. See, e.g., United States v. Armstrong, 517 U.S. 456, 464–70 (1996) (subjecting selective prosecution claim to equal protection analysis, but finding that defendant failed to demonstrate discriminatory effect and purpose). It may be the case that more should be done to minimize discriminatory prosecution by relaxing the standard for selective prosecution claims. But this legal question about the adequacy of equal protection doctrine is beyond the scope of this Article.


\textsuperscript{123} See Tasioulas, supra note 122, at 117–18 (describing “leniency towards offenders who have a serious illness”).

\textsuperscript{124} For instance, Stephanos Bibas offers two conceptions of mercy: (i) “humane compassion,” and (ii) “just empathy” that entails an appreciation of “relevant differences between offenders.” Bibas, Forgiveness, supra note 79, at 333 n.14. The latter version sounds much like normative innocence. Id. (“There is no tension between justice and this [latter] variety of mercy; mercy becomes a way to individualize justice.”).
blameworthiness.\textsuperscript{125} Perhaps the differences between normative innocence and mercy are conceptually analogous to the differences between legal defenses premised on justification and excuse: Considerations of normative innocence may serve as justifications for unlawful conduct, while considerations of mercy may provide exceptions from wrongful conduct.\textsuperscript{126} In some ways, then, a discretionary regime that robustly takes account of equitable factors does little more than recognize and accept broader and more amorphous doctrines of excuse and justification that contain no fixed substantive content.\textsuperscript{127}

C. Equitable Discretion and Nullification

To the extent equitable mercy and normative innocence serve to expand excuse and justification defenses without legal authorization, a potential objection arises: Is equitable discretion not just nullification by another name? The answer depends on the timing. At the point of trial, an equitable call for the jury to disregard applicable law is a call for nullification, because the duties of the trial jury (or judge in a bench trial) are to apply facts to law, not to engage in moral valuation—at least not be-

\textsuperscript{125} Donald Newman has provided examples of judicial dismissals that spotlight the differences between normative innocence and mercy. Newman, supra note 89, at 154–55, 166–67. For example, one judge tossed out a gambling charge, announcing, "Why . . . should I send these petty gamblers to jail when so many of my own friends and associates are committing the same crime without being charged?" Id. at 154. This judge’s decision was a pronouncement of normative innocence, because the judge found that the offender was not blameworthy under contemporary community standards. Another judge dismissed a drunk driving charge, noting that "[a]nyone who has reached the honored age of seventy years without so much as a parking ticket should not have his fine record blemished by a single lapse." Id. at 167. This judge’s decision seemed to be more of an exercise of equitable mercy.

\textsuperscript{126} Cf. Whitman, supra note 84, at 35–36 (noting “flexible doctrines of liability, permitting defendants to plead excuse or justification . . . [or] extenuating circumstances, broadly” permit greater space for “a form of authority to exercise mercy”). See generally Paul H. Robinson, Criminal Law 478 (1997) (“Excuses admit that the deed may be wrong but excuse the actor because the actor’s characteristics or situation suggest that the actor is not blameworthy for the violation.”). Indeed, it is unsurprising that scholars have identified excuse and justification defenses as instances in which we incorporate equitable and moral judgment into our legal determinations. See Huigens, Virtue and Inculpation, supra note 109, at 1439 (“[D]efenses are legislated only in bare outline . . . [leaving] the actual, individualized adjudication of a person by a jury . . . [of] [t]welve people judging another person . . . .”); Kahan & Nussbaum, Two Conceptions, supra note 35, at 318–21 (discussing justification and excuse in context of criminal law); Robinson, Normative Crime Control, supra note 45, at 1842, 1856–57 (“Social science research makes clear that . . . excuse defenses are part of laypersons’ intuitions of justice.”).

\textsuperscript{127} Nevertheless, as a practical matter, it may be difficult to tease apart the two strands of equitable discretion. Consider the following example from Harry Kalven and Hans Zeisel’s seminal jury study. Kalven and Zeisel offered the (perhaps apocryphal) story of a defense attorney who offered a successful two-word closing argument in a larceny trial: “[O]ne chicken!” Kalven & Zeisel, supra note 35, at 258. It is unclear whether this brief summation was an appeal to mercy or normative innocence. But it was quite clearly not an appeal to acquit for legal reasons.
yond the moral valuations built into the elements of substantive legal crimes and defenses. But the charging decision is different (as are the arrest, bargaining, and sentencing decisions). As indicated, charging discretion is permitted, anticipated, welcome, and wanted. The prosecutor has no duty to apply a given law in a given context. Just the contrary: The prosecutor has a duty to engage in a contextualized “exercise of judgment” because “problems are not solved by the strict application of an inflexible formula.”

This raises the further question of whether trial juries should have the right (and not just the unsanctioned but irremediable power) to acquit against the weight of evidence for equitable reasons. A number of scholars think so. Most famously (or infamously), Paul Butler argued for race-based exercises of jury nullification in mala prohibita cases. More modestly and less controversially, Bill Stuntz recently suggested that legislatures should draft vague criminal statutes in order to permit juries to uncover the equitable defenses hidden in ambiguous code language. Similarly, Judge Bazelon endorsed equitable defenses based on “physio-

128. See generally Darryl K. Brown, Jury Nullification Within the Rule of Law, 81 Minn. L. Rev. 1149, 1150 (1997) (defining jury nullification as “a jury’s ability to acquit a criminal defendant despite finding facts that leave no reasonable doubt about violation of a statutory”).

129. See Roger A. Fairfax, Jr., Grand Jury Discretion and Constitutional Design, 93 Cornell L. Rev. 703, 717, 720 (2008) [hereinafter Fairfax, Grand Jury Discretion] (arguing charging discretion is compatible with Constitution and rule of law generally, and is therefore distinct from jury nullification); cf. Goldstein, Passive Judiciary, supra note 2, at 3 (noting prosecutor’s charging and bargaining power is “a [permissible] species of pardoning power”); Fairfax, Grand Jury Discretion, supra, at 708 n.10 (“The term ‘grand jury nullification’ is somewhat of a misnomer . . . . [T]he term has pejorative connotations, . . . does not capture the essence of the enterprise of the grand jury’s exercise of discretion, . . . and unfairly yokes grand jury discretion with petit jury nullification without careful consideration.”); Sarat & Clarke, supra note 2, at 390 (referring to equitable prosecutorial declinations as “actions that are legally authorized, but not legally regulated”). But cf. Davis v. United States, 512 U.S. 452, 464–65 (1994) (Scalia, J., concurring) (“The Executive has the power (whether or not it has the right) effectively to nullify some provisions of law by the mere failure to prosecute—the exercise of so-called prosecutorial discretion.”).


131. Butler, Black Power, supra note 120, at 679 (arguing there exists “moral responsibility of black jurors to emancipate some guilty black outlaws” through use of jury nullification).

132. Stuntz, Unequal Justice, supra note 31, at 1974, 2038–39 (advocating juror use of judgment “instead of rubber-stamping prosecutors’ charging decisions”). See generally Ronald Jay Allen, Joseph L. Hoffman, Debra A. Livingston & William J. Stuntz, Comprehensive Criminal Procedure 1495 (2d ed. 2005) (positing every defendant should be “entitled to one potential ‘nullifier’” before which defendant has “some opportunity to make nonlegal arguments (e.g., whatever the law says, this conduct does not deserve to be criminally punished)”).
logical, psychological, environmental, cultural, educational, economic, and heredity factors." \(^\text{133}\)

I am sympathetic to many of these arguments, but I think they are ultimately misguided. Equitable discretion is necessary and proper, but it also should be kept in its proper place. Trials should remain principally about legal questions; by contrast, other adjudicatory stages—arrest, charge, bargain, and sentence—can appropriately accommodate exercises of equitable discretion. \(^\text{154}\) Nullification sullies law with equity. It dilutes law and muddies its shape. Equitable discretion, by contrast, tempers and thereby perfects broad laws. \(^\text{135}\) Thus, the nullification label is not only inappropriately freighted, \(^\text{136}\) it is descriptively wrong as applied to the discretionary charging decision. Moreover, a significant problem with nullification is its finality. Equitable charging discretion is not legally dispositive, because double jeopardy does not attach to charge decisions. Hence, discretionary decisions to decline charges can be revisited, subject to statutes of limitations and due process constraints. \(^\text{137}\) Finally, even if the system were to grant jurors an express equitable role, jury trials occur too infrequently to function as an effective post hoc check on the insufficient prosecutorial exercise of equitable charging discretion. \(^\text{138}\)

\(^\text{133}\) David L. Bazelon, The Morality of the Criminal Law, 49 S. Cal. L. Rev. 385, 396 (1976) (noting consideration of various factors would allow for "a deeper understanding of the causes of human behavior in general and criminal behavior in particular").

\(^\text{134}\) Nussbaum and Kahan endorsed such a "two-step" approach to decisions of law and equity (although they also favored some amount of equitable valuation even in the trial phase):

In determining an offender's guilt or innocence . . . the law evaluates her actions, . . . and at that point, the law . . . is ordinarily unconcerned with how the defendant came to be the way she is. But during the sentencing process, the law has traditionally permitted the story of the defendant's character-formation to come before the judge or jury in all its narrative complexity . . . .

Kahan & Nussbaum, Two Conceptions, supra note 35, at 368.


\(^\text{136}\) Cf. Fairfax, Grand Jury Discretion, supra note 129, at 717 (discussing "long shadow cast by petit jury nullification" and how "deep skepticism" toward this type of nullification animates much of relevant scholarship and law).

\(^\text{137}\) There is, however, one type of charging decision that might qualify as nullification: the blanket decision not to enforce a particular statute. But, notably, this is an exercise of individualized discretion. According to Lawrence Solum:

Judges might nullify a statute that legalized the practice of human slavery on the grounds that slavery is always morally wrong. This is not an example of the practice of equity, because such a decision would not involve a departure from the rule on the basis of the facts of the particular case . . . . Equity is the tailoring of the law to the demands of the particular situation.

Solum, Virtue Jurisprudence, supra note 8, at 205-06; see also Whitman, supra note 84, at 36 ("A system that issues pardons automatically, without regard to individual deserts, is not . . . exercising mercy . . . [or] discretion."). Categorical nonenforcement serves to dodge law, not perfect it. It is tantamount to relegislation, not equitable justice.

\(^\text{138}\) Josh Bowers, Grand Jury Nullification: Black Power in the Charging Decision, in Criminal Law Conversations 561, 564–69 (Paul H. Robinson et al. eds., 2009) (arguing that
In any event, petty crime trials are bench trials, and thus could be the subject of judicial nullification only.139

* * *

In the preceding two Parts, I have defended the exercise of equitable discretion, but that leaves open the second-order question of how the criminal justice system should allocate discretionary power. In the charging context, courts and scholars take it as something of an article of faith that the prosecutor should enjoy principal—or even exclusive—authority. This deference is premised on "the relative competence of prosecutors" to evaluate enforcement strategy and to assess resource constraints and evidentiary sufficiency.140

The conventional wisdom is correct when it comes to legal and administrative questions: Prosecutors are best positioned to gauge evidentiary merit and to set and negotiate administrative priorities.141 But, significantly, prosecutors enjoy the same—if not greater—deference over the normative questions of what they equitably ought to charge. Prosecutors have been granted this privilege almost as an afterthought—unsubjected to much considered scrutiny of any kind.142 This lack of critical analysis is perhaps not so surprising. It is consistent with two characteris-

in mala prohibita crimes "there should be a presumption in favor of nullification"); see also infra Part V.A (discussing prevalence of summary guilty pleas, particularly in petty cases).


141. See supra notes 3-5 and accompanying text (describing ability of prosecutors to evaluate legal and administrative factors in charging decisions and burdens associated with robust judicial oversight).

142. Davis, Discretionary Justice, supra note 14, at 188-91 ("[N]o one has done any systematic thinking to produce the assumptions [underlying exclusive prosecutorial discretion] . . . . Nor will the . . . usual justification for uncontrolled discretionary power of prosecutors stand analysis—that the intrinsic nature of the prosecuting function is such that the only workable system is uncontrolled discretion."); see also supra notes 13-14 and accompanying text (describing unfettered discretion of prosecutors in petty cases and burden faced by defendants making selective prosecution claims). Admittedly, the academy today is more attentive to prosecutorial discretion than in Kenneth Culp Davis's time. See, e.g., Marc L. Miller & Ronald F. Wright, The Black Box, 94 Iowa L. Rev. 125, 127-28 (2008) (noting scholars' varied and "magnified . . . concerns about prosecutorial discretion"). Nevertheless, comparatively less attention has been paid to questions of whether and why prosecutors should possess almost unfettered equitable discretion, as opposed to discretion generally. But cf. Markel, supra note 91, at 1467-68 (arguing for "meaningful distinction between factors about someone's background that, in the main, should not mitigate the sentence, and factors surrounding someone's criminal action with which retributivism is properly concerned"); Roger A. Fairfax, Jr., Prosecutorial Nullification 7-22 (Jan. 15, 2010) [hereinafter Fairfax, Nullification] (unpublished manuscript) (on file with the Columbia Law Review) (distinguishing forms of prosecutorial discretion).
tics of modern criminal justice: that enforcement practices are relentlessly equitable, and that the system keeps this pervasive feature well hidden.\textsuperscript{143} Perhaps this systemic discomfiture derives from a conviction (that I challenge\textsuperscript{144}) that equitable discretion is somehow antithetical to the rule of law.\textsuperscript{145} Perhaps, questions of normative guilt are considered just too messy. In either event, efforts to pretend away equitable discretion serve merely to channel it to the justice system’s least transparent actors (prosecutors)—a state of affairs that prosecutors have a vested interest in propagating.\textsuperscript{146}

But deference to perceived prosecutorial competence may well be undeserved. Like all of us, prosecutors possess the human capacity for practical reason. But, in their professional roles, they are first and foremost legally trained institutional actors. And their position and profession may profoundly limit the degree to which they are willing and able to exercise equitable discretion—particularly in the petty cases where such discretion is most warranted.\textsuperscript{147}

\textsuperscript{143} Dan M. Kahan, Ignorance of Law Is an Excuse—But Only for the Virtuous, 96 Mich. L. Rev. 127, 153 (1997) [hereinafter Kahan, Ignorance of Law] ("[T]he criminal law is intensely moralistic. . . . But . . . the law is ambivalent—indeed, almost embarrassed—about exactly this kind of moralizing. . . . Stealthy moralizing is in fact endemic to criminal law.").

\textsuperscript{144} See supra Part I C–D (arguing moral particularism, equitable discretion, and individualism can coexist harmoniously with general propositions of law, equality, and justice); see also Bowers, Outsourcing, supra note 21, at 3 ("[E]quitable discretion (properly bound) is not counter to, but instead may help to perfect, the rule of law.").


\textsuperscript{146} See Davis, Discretionary Justice, supra note 14, at 189 (noting assumptions of prosecutorial supremacy “are the product of unplanned evolution,” but that “[w]hatever caused the[m,] . . . prosecutors usually assert that everybody knows that they are necessary”). See generally Kahan, Ignorance of Law, supra note 143, at 153 (arguing American criminal justice is uncomfortable with equitable considerations even as it commonly engages in them). This migration of equitable authority to the professional executive may be merely one part of the larger, well-documented phenomenon whereby attempts to mechanize criminal justice—through, for instance, the adoption of determinate sentencing laws—have the tendency to just relocate discretionary decisions to earlier adjudicatory stages (like charging and bargaining) and to prosecutors who exercise discretion “out of public view—in the hallways of the courthouse, in the prosecutors’ offices, or on the telephone.” Vorenberg, supra note 3, at 1522; see also Tonry, supra note 84, at 145–47 (discussing inability of mandatory sentencing laws to constrain discretion); Malcolm M. Feeley & Sam Kamin, The Effect of “Three Strikes and You’re Out” on the Courts: Looking Back to See the Future, in Three Strikes and You’re Out: Vengeance as Public Policy 185, 142–45 (David Shichor & Dale K. Sechrest eds., 1996) (same). Put simply, discretion is a hydraulic force. An effort to eradicate it may play out like an attempt to squeeze air out of a partially inflated balloon: What disappears from one spot pops up in another.

\textsuperscript{147} See infra Parts III–V (challenging conventional wisdom that prosecutors are best situated to exercise equitable discretion).
In the next three Parts, I explain several reasons why this is so. I concede that my account is conjecture to some degree, but it is plausible conjecture. I only wish to poke a hole in the conventional assumption of professional competence.

III. BOXES, CATEGORIES, AND TYPES

Besides efficiency, the strongest argument in favor of leaving commonsense discretion to prosecutors is their training and on-the-ground experience (and consequent situation sense). But there are reasons to believe that the advantages of expertise are somewhat chimerical and that there are, in any event, unperceived drawbacks and tradeoffs.

A. Dulled Sense

The dark side of experience is indifference. Newcomers to inferior criminal courts first notice the filth, the wretched conditions, and the frenetic pace—in short, the human drama. By contrast, the seasoned litigator’s first focus is that day’s work. Even the Supreme Court has recognized this, noting that “for most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way.” Perhaps G.K. Chesterton put it best in his essay, The Twelve Men, a reflection on jury duty:

And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it.

148. This nuts-and-bolts objection to any equitable-discretion screen is sufficiently powerful that it is a principal subject of a separate article. Bowers, Outsourcing, supra note 21, at 8 (proposing efficient lay equitable screen).


150. President’s Comm’n on Law Enforcement and Admin. of Justice, The Challenge of Crime in a Free Society 128 (1967) (describing “shock[ ]” at “disquieting” findings of “cramped and noisy courtrooms [and] undignified and perfunctory procedures” in lower criminal courts); Feeley, supra note 27, at 3 (describing conditions in lower criminal courts); Roscoe Pound, Criminal Justice in America 190–91 (Leonard W. Levy ed., Da Capo Press 1972) (hereinafter Pound, Criminal Justice) (describing “the confusion, the want of decorum, the undignified offhand disposition of cases at high speed” that characterizes case processing in lower criminal courts).

Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop.\footnote{152}

In this way, law practice in inferior criminal courts is not so different from medical practice in emergency rooms: The professionals' priority is to take care of cases. Lawyers and doctors are not hardhearted. Rather, callousness is a coping mechanism: Professionals must detach from the persistent misery surrounding them and engage clinically with technical puzzles.\footnote{153} Judge Posner made this point in a related context:

Just as doctors tend to be callous about sick people, judges tend to be callous about pathetic litigants because they have seen so many of them. This is true of liberal as well as conservative judges, because setting aside one's natural sympathies is a big part of playing the judicial game.\footnote{154}

The professional prosecutor develops an eye for equitably atypical cases, but she is, at the same time, somewhat more hesitant to gaze through it. Thus, although experience is a value, it is not the only value; "freshness" is another, and the institutionalized professional necessarily lacks it.\footnote{155}

B. \textit{Thinking Like a Lawyer}\footnote{156}

The problem is not just a product of professional experience; legal training plays its part. In law schools, students are taught to find the legal

\begin{itemize}
  \item \footnotetext[152]{G.K. Chesterton, \textit{The Twelve Men}, in \textit{Tremendous Trifles} 80, 85–86 (1910).}
  \item \footnotetext[153]{Milton Heumann, \textit{Plea Bargaining: The Experiences of Prosecutors, Judges and Defense Attorneys} 58–59, 99 (1981) (describing adaptation process whereby prosecutors and public defenders "become veritable cynics" over time). Heumann quoted one prosecutor, who remarked: It's like nurses in emergency rooms. You get so used to armed robbery that you treat it as routine, not as morally upsetting. . . . The nature of the offense doesn't cause the reaction in me that it would cause in the average citizen. Maybe this is a good thing; maybe it isn't. Id. at 99.}
  \item \footnotetext[156]{Apologies to Fred Schauer. Schauer, \textit{Thinking}, supra note 12.}
\end{itemize}
hooks—to take the complexities of life and distill them into legal boxes and categories.157 Indeed, first-year law students are often frustrated to find themselves ill-served by liberal arts educations that emphasized deep exploration of the intricacies of ostensibly simple questions. Persuasive legal arguments are made of different stuff: They require the lawyer to take the occasionally inscrutable particulars of real-world incidents and recast controversies as clear-cut examples of certain types of favorable cases.158 Thus, lawyers learn to think inside the proverbial legal box—a type of thinking that is critical when it comes to evaluating the legal merits of charges, but that may be antithetical to considering adequately equitable merits, because equitable discretion has “nothing to do with obeying a rule given by others.”159 Instead, it requires “practical judgment that enables one to act amid the contingencies of everyday life.”160 Admittedly, lawyers experience everyday life just like the rest of us, but, as the Michigan Supreme Court explained over a century ago: “[P]rofessional persons are under a constant temptation to make the law symmetrical by disregarding small things.”161

Legal proficiency, therefore, comes at a cost of some loss of practical wisdom, or, at least, some loss of capacity to freely exercise it. Conversely, a one-off lay perspective entails a “simple ordinariness” that may prove superior to professional perspective in equitable contexts.162 The layman learns of a criminal case and envisions the intricacies of the criminal incident; by contrast, the lawyer envisions the most suitable legal repository.163 In this way, Jerome Frank might have said that legal training has

157. Id. at 127 (discussing “the classifications of the law, . . . the relatively concrete boxes into which sophisticated lawyers could place the events of the world”).

158. Id. at 110 (“[I]mplicit in the common-law method is the belief that the case before the court may be representative of cases of that type.”); cf. Johnson v. Zerbst, 304 U.S. 458, 468 (1938) (“That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious.”).

159. Huigens, Virtue and Inculpation, supra note 109, at 1467.

160. Id.


162. Kahan et al., Cognitive Iliberalism, supra note 155, at 883 (discussing divergence of laymen and legal professionals’ perceptions of social reality, based on their differing backgrounds and experiences).

163. Bibas, Transparency, supra note 31, at 931 (noting professional criminal justice “insiders may take too narrow a view when evaluating what factors matter to outsiders”);
a tendency to infantilize. Frank considered legal formalism to be the product of an immature mind—one that remained unwilling or unable to recognize the intuitive and subjective aspects of decisionmaking, but sought, instead, false comfort in legal rules and absolutes. Thus, legal formalism may produce a kind of childishness—an inability to interact with the uncertainties of the real world and an eagerness to retreat to “structures of authority” that substitute hollow make-believe for life in fact. Put simply, legal training facilitates incuriosity by emphasizing hierarchical and rule-bound thinking. Left to technically skilled professionals, common sense reasoning may fall prey to “rigid forms and arbitrary classes.”

This is no new insight. The jury system is built partially on the notion that a defendant—in the words of the Supreme Court in Duncan v. Louisiana—may prefer “the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge.” Indeed, Duncan is a telling case. In Duncan, the Court held that the defendant was entitled to a jury trial, and thereby reversed an


165. Jerome Frank, Law and the Modern Mind 178 (Transaction Publishers 2009) (1930) (“The constant effort to achieve a stable equilibrium . . . is regressive, infantile, and immature.”); see also Davis, Discretionary Justice, supra note 14, at 20 (noting it is “through case-to-case consideration, where the human mind is often at its best,” not in formulation or execution of generally applicable rules); Barzun, supra note 164, at 31 (arguing Frank endorsed virtue-centered theory of adjudication by championing, in Frank’s words, “new ways of manipulating protean particulars,” rather than “the quest of undeviating universals”); cf. Nussbaum, supra note 61, at 110-15 (comparing particularist to good novelist, each of whom possesses capacity to draw upon relevant fine-grained details).

166. Posner, How Judges Think, supra note 154, at 99 (describing Jerome Frank’s view that “[t]he child becomes fearful and later in life intolerant of challenges to accepted modes of thought or structures of authority”). But see E-mail from Frederick Schauer, David & Mary Harrison Professor of Law, Univ. of Va., to author (Mar. 26, 2010) [hereinafter Schauer E-mail] (on file with the Columbia Law Review) (“I would be happy to substitute hollow make-believe for some people’s understanding of life in fact . . . And that’s why although I want my great chefs to be creative, I would rather the bad cooks stick to the recipes.”).

167. Hamilton v. People, 29 Mich. 173, 190 (1874); see also supra notes 155, 161, and accompanying text (“[P]rofessional persons are under a constant temptation to make the law symmetrical by disregarding small things.” (quoting People v. Warren, 81 N.W. 360, 365 (Mich. 1899))).

assault prosecution and bench-trial conviction that bore hallmark indicia of Jim Crow injustice.\textsuperscript{169} Notably, the defendant may well have been \textit{legally} guilty of at least some offense: By all accounts, the defendant appeared to have made unwanted contact with the complaining witness.\textsuperscript{170} But the Court did not seem to be as concerned with legal error as it was with equitable or common sense error—the failure to put technical legal guilt in context. Thus, when the Court posited that a jury may have provided a better check against “unfounded criminal charges,” the Court was focused apparently on the equitable sufficiency (or lack thereof) of the criminal charge.\textsuperscript{171} Indeed, the Court frankly acknowledged the government’s argument (supported by social science studies) that professional technicians may reach technically more accurate factual determinations and also may do better applying law to facts.\textsuperscript{172} Nevertheless, in a somewhat enigmatic statement, the Court noted that “when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.”\textsuperscript{173} Thus, the Court seemed to have recognized that legally guilty defendants may nevertheless be normatively innocent and that this equitable determination (as opposed to strictly legal determinations) entails “a pragmatic analysis of ‘everyday life on which reasonable and prudent men, not legal technicians, act.’”\textsuperscript{174}

\section*{IV. The Costs of Collaboration}

There are also institutional reasons—specific to the arrest, prosecution, and adjudication of petty public order offenses—to question the

\begin{itemize}
\item \textsuperscript{169} Id. at 162.
\item \textsuperscript{170} Id. at 146 n.1, 147 (defining simple battery as “battery, without the consent of the victim, committed without a dangerous weapon” and indicating “appellant slapped Herman Landry, one of the white boys, on the elbow” (quoting La. Rev. Stat. § 14:95 (1950))); see also State v. J.L., 945 So. 2d 884, 889 (La. Ct. App. 2006) (finding that because “defendant intentionally touched [victim] without her consent, . . . rational trier of fact could have found the essential elements of [offense] proven beyond a reasonable doubt”)
\item \textsuperscript{171} \textit{Duncan}, 391 U.S. at 156.
\item \textsuperscript{172} Id. at 157 (acknowledging criticisms “as to the wisdom of permitting untrained laymen to determine the facts in civil and criminal proceedings”); see also Kahan et al., Cognitive Illiberalism, supra note 155, at 882 (“If accuracy were the goal, it seems unlikely the law would use ordinary citizens to decide facts in a one-off fashion; it would almost certainly rely instead on professionals, whose expertise in ‘getting it right’ would reflect both prior training and experience from repeated decisionmaking.”); Bruce D. Spencer, Estimating the Accuracy of Jury Verdicts, 4 J. Empirical Legal Stud. 305, 305 (2007) (estimating high rates of error in jury verdicts).
\item \textsuperscript{173} \textit{Duncan}, 391 U.S. at 157.
\item \textsuperscript{174} United States v. Davis, 458 F.2d 819, 821 (D.C. Cir. 1972) (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949)); see also Maher v. People, 10 Mich. 212, 222 (1862) (noting jurors are much more qualified than judges to determine “what constitutes the average of ordinary human nature”); State v. Schoenwald, 31 Mo. 147, 155 (1860) (indicating jury decisions require “experience and knowledge of the common concerns of life”).
\end{itemize}
assumption of prosecutorial competence over equitable matters. The first concern is that prosecutors are beholden to police and may therefore show undue deference to perceived police preferences.

A. Order Maintenance Policing

Over the past two decades, many urban police forces—most notably the New York City Police Department—have embraced order maintenance policing strategies that focus on low-level, public order crimes. The strategies are based on “broken windows theory”—the idea that public disorder, if tolerated, has a tendency to breed more serious crime.175 I take no position on the wisdom or value of order maintenance policing strategies. Advocates credit it with significant reductions in urban crime rates and with concomitant increases in the quality of inner-city life.176 Critics question the statistical significance of these crime rate reductions and counter that order maintenance policing has distracted attention from more serious crime and has needlessly exacerbated racial and economic disparities in criminal justice.177

Conceptually, broken windows theory emphasizes innovation and flexibility,178 but in practice these ostensibly discretionary strategies result in high rates of arrest for low-level offenses.179 Police come to make so

175. James Q. Wilson & George L. Kelling, Broken Windows, Atlantic Monthly, Mar. 1982, at 24. Commentators have a bad habit of using the terms “broken windows” and “order maintenance” interchangeably, such that, over time, the terms have blurred. See Bernard E. Harcourt, Illusion of Order: The False Promise of Broken Windows Policing 23 (2001) [hereinafter Harcourt, Illusion of Order] (“Order Maintenance, broken windows, zero tolerance, community policing, social norms, social meaning, social influence: the terms begin to bleed into one another.”). See generally David Weisburd & Anthony A. Braga, Introduction, in Police Innovation: Contrasting Perspectives 1 (David Weisburd & Anthony A. Braga eds., 2006) (describing period of “significant change and innovation” in policing over past three decades). For present purposes, I refer to order maintenance policing as the tactic or strategy and broken windows as the theory or rationale that underlies order maintenance policing. This seems to be how Wilson & Kelling used the terms in their seminal Atlantic Monthly article. Wilson & Kelling, supra.


177. See Harcourt, Illusion of Order, supra note 175, at 176 (criticizing goals and impact of order maintenance policing).


179. See Harcourt, Illusion of Order, supra note 175, at 2 (describing order maintenance policing as “proactive enforcement of misdemeanor laws and zero tolerance for minor offenses,” and noting New York City added between 40,000 and 85,000 additional misdemeanor arrests each year between 1994 and 1998); Josh Bowers, Grassroots Plea Bargaining, 91 Marq. L. Rev. 85, 95–96 (2007) [hereinafter Bowers,
many public order arrests because arrests present opportunities to advance other policing ends.

First, police make arrests because attendant searches may turn up evidence of more serious crime. Specifically, arrests enable police to search even in circumstances where they lack authority to do so by conventional investigatory means. In this way, constitutional protections may motivate a double deprivation—an intrusion on liberty interests to

Grassroots Plea Bargaining] (noting that authorities began "prosecuting lower-level offenses in order to catch more serious criminals" (quoting Zeidman, Policing the Police, supra note 178, at 26)); Tim Newburn & Trevor Jones, Symbolizing Crime Control: Reflections on Zero Tolerance, 11 Theoretical Criminology 221, 226 (2007) ("Although . . . the main players in the New York policing story distanced themselves from the term Zero Tolerance, it became inextricably associated with the policing approaches developed under [Police Commissioner] Bill Bratton.").

I rely principally on New York City misdemeanor enforcement and adjudication data not only because the city maintains better records than most urban jurisdictions, but also because the city's order maintenance approach is commonly considered a paradigmatic example of broken windows theory in action. See, e.g., Harcourt, Illusion of Order, supra note 175, at 47–51 (discussing New York City's order maintenance policing approach); Bowers, Grassroots Plea Bargaining, supra, at 89 (noting "New York City wholeheartedly adopted a particularly vigorous brand of order-maintenance policing in the 1990s" and kept meticulous data on its results). Notably, however, the City is not the only urban jurisdiction over the past two decades to have adopted an aggressive approach to order maintenance policing. See, e.g., Ct. on Race, Crime and Justice at the John Jay Coll. of Crim. Just., Stop, Question & Frisk Policing Practices in New York City: A Primer, at 5 (2010), available at http://www.jjay.cuny.edu/web_images/PRIMER_electronic_version.pdf (on file with the Columbia Law Review) (describing order maintenance policing efforts in Los Angeles and Philadelphia); Philip B. Heymann, The New Policing, 28 Fordham Urb. L.J. 407, 422–40 (2000) (discussing order maintenance policing efforts in New York, Boston, and Chicago).

180. Joshua Dressler & Alan C. Michaels, 1 Understanding Criminal Procedure: Investigation 1–2 (4th ed. 2006) (describing "spillover" phenomenon whereby police enforce minor crimes as a mechanism "to expand police authority to investigate more serious crimes"); Harcourt, Illusion of Order, supra note 175, at 48 (quoting Bill Bratton as explaining that "many of those caught committing these small crimes were also guilty of larger crimes"); Bowers, Grassroots Plea Bargaining, supra note 179, at 95–96 ("Public order policing, thus, became no mere end in itself but an investigatory means . . . ."); Zeidman, Policing the Police, supra note 178, at 517 ("No longer were the police targeting low-level offenses to restore social order; instead, their modus operandi was to catch more serious criminals. The motivation to arrest even more criminals grew accordingly." (footnote omitted)); Rosen, supra note 178, at 26 ("Instead of prosecuting lower-level offenses to encourage an atmosphere of social order that would prevent more serious crime, [authorities] began prosecuting lower-level offenses in order to catch more serious criminals."); id. at 24 ("Zero tolerance focuses not on deterring crime but on discovering it . . . ." (emphasis omitted)). NYPD Commissioner William Bratton even observed: "Every arrest was like opening a box of Cracker Jack. What kind of toy am I going to get? Got a gun? Got a knife? Got a warrant? . . . It was exhilarating for the cops." Harcourt, Illusion of Order, supra note 175, at 10 (quoting Bratton & Knobler, supra note 176, at 154).

facilitate an otherwise forbidden intrusion on privacy interests. Put more generally, police may use arrest to circumvent modern procedural rules that require police to deal professionally with situations that, in the past, they might have handled with a measure of “rough justice.” Second, police make arrests to collect and catalogue pedigree information—including fingerprints, mug shots, and sometimes even DNA samples—that could be used to fight more serious offenses in high-crime areas. Third, police make arrests because local forces are strapped for cash, and the arrests may be used to trigger forfeiture laws and to demonstrate a record of productivity that may be used to support applications for sizable federal grants. Notably, jurisdictions have even been known to subsidize (and thereby motivate) arrests directly by providing monetary awards to police for arrests that result in convictions—a practice that courts have held constitutional in certain contexts. Fourth, police make public order arrests because the arrests provide cheap on-the-ground training and experience to new police recruits. Fifth, police make arrests because department heads are aware of these advantages, and accordingly have been known to set quotas or otherwise pressure rank-and-file officers to keep arrest numbers high.

182. See Stuntz, Unequal Justice, supra note 31, at 1977, 2004 (discussing increased professionalism of police force); Lance Morrow, Rough Justice, Time, Apr. 1, 1991, at 17 (describing how over time a career in law enforcement “drives police officers deeper into the solidarities of their professional tribe”).


185. See, e.g., Brown v. Edwards, 721 F.2d 1442, 1452–53 (5th Cir. 1984) (“[T]he Mississippi fee statute is not [unconstitutional] . . . . where the arrest is otherwise validly made without a warrant and on probable cause . . . . [A]n arrest which is valid . . . is not rendered unconstitutional . . . simply on account of the officer’s motives in making the arrest.”). In the same vein, some evidence indicates that New York City police are motivated to make order maintenance arrests to generate easy overtime pay—the so-called “collars-for-dollars” phenomenon. Harry G. Levine & Deborah Peterson Small, N.Y. Civil Liberties Union, Marijuana Arrest Crusade: Racial Bias and Police Policy In New York City 1997–2007, at 19–20 (2008), available at http://www.nyclu.org/files/MARIJUANA-ARREST-CRUSADE_Final.pdf (on file with the Columbia Law Review).

186. See generally Levine & Small, supra note 185 (discussing usefulness of marijuana arrests as safe and easy way to show police force productivity and earn overtime pay).

187. See Jonathan Rubinstein, City Police 50 (1973) (“Arrest quotas are rigidly enforced for vice arrests . . . . Regardless of their success in fulfilling other departmental
Thus, order maintenance policing based on broken windows theory devolves into something approximating zero tolerance for petty crime, not because police normatively desire absolute enforcement of broad peripheral public order offenses, but because the arrests themselves help police meet institutional objectives. But this perhaps proves too much. Arguably, police could engage in a search without also making an arrest (provided, of course, that they had sufficient cause for the underlying search).\textsuperscript{188} Nevertheless, police are motivated to make an arrest once they have consummated a search (regardless of whether the search uncovers additional evidence of more serious crime), because nonarrest can be taken as a signal that the underlying search was unwarranted, and this perception poses an obvious political problem for police.\textsuperscript{189} Put simply, arrests provide cover and opportunity for searches. Thus, proprivacy rules and norms may counterintuitively reduce aggregate liberty by motivating police to make formal legal cases out of incidents that police ini-

\textsuperscript{188} See, e.g., Terry v. Ohio, 392 U.S. 1, 24–26 (1968) (holding police may conduct reasonable search for weapons absent probable cause for arrest).

\textsuperscript{189} By way of illustration, in New York City, community activists and the media recently highlighted differences between search and arrest rates as evidence of perceived police misconduct. See Baker, supra note 183 (discussing lawsuits against NYPD that claim that high numbers of arrestless searches are indicia that stop-and-frisk is “racially driven” tactic with only relatively modest achievements in fighting crime); Sean Gardner, Frisk Management: How the NYPD’s Blackly Grim Stop-and-Frisk Numbers Got Whitewashed, Village Voice, Dec. 4, 2007, at 32 (discussing racial disparity in stop-and-frisk rates in New York and highlighting low percentage of stop-and-frisks that lead to arrests); Michael Powell, Police Polish Image, but Concerns Persist, N.Y. Times, Jan. 3, 2009, at A21 (spotlighting fact that, in 2008, only four percent of more than 500,000 police stop-and-frisks in New York City ended in arrest); Letter from N.Y. Civil Liberties Union to Raymond Kelly, Comm’r, N.Y.C. Police Dep’t (Feb. 5, 2007) (on file with the Columbia Law Review) (raising concerns about “the privacy rights of persons who are stopped and frisked but not given a summons or arrested”); see also Illinois v. Wardlow, 528 U.S. 119, 133 n.8 (2000) (Stevens, J., concurring in part and dissenting in part) (noting high rates of stops that do not result in arrests “indicate that society as a whole is paying a significant cost in infringement on liberty” as a result of such presumably unwarranted police conduct). See generally Brady, supra note 183, at 8–9, 36 (arguing “the reasonableness of thousands of arrests, when measured against the Fourth Amendment, is in doubt” based on rate of arrests that result in no charge).
tially confronted for other reasons and that they otherwise might have terminated by lesser means. 190

This highlights two separate police functions: Police perform what, for simplicity’s sake, might be called a control function and a law function. 191 All else being equal, police might not want a given control case to become a legal case. 192 But all else is not equal. Police have incentives to fit traditionally casual forms of intervention into law boxes—even where the police impetus and objective may have been control only. And the significant number and breadth of public order offenses—like disorderly conduct—make for a multiplicity of relatively big boxes. 193 In short, modern procedural and political constraints may dictate that police can no longer administer rough justice but can manufacture arrests. 194 And even if an arrest makes little normative sense in a given context, it makes instrumental sense. So, police make arrests.

190. See supra notes 180–182 and accompanying text (discussing police use of arrests to facilitate searches, as well as police incentives to take a case further than they would have otherwise).

191. See Gottfredson & Gottfredson, supra note 72, at 48 (discussing “dominance of the responsibility of the police for maintenance of order in relation to that of enforcing the law”); Walker, supra note 1, at 10 (noting study finding “criminal law was frequently used for purposes unrelated to the punishment of criminals” and in order to “maintain[ ] order” police, prosecutors, and judges rely on highly discretionary “informal and largely hidden decision-making process”).

192. See Davis, Discretionary Justice, supra note 14, at 5 (arguing that police sometimes wish to forego arrest, notwithstanding probable cause); Kadish & Kadish, supra note 25, at 138–39 (same); Breitel, supra note 2, at 429–30 (same).

193. See Allen et al., supra note 132, at 609, 621 (discussing “proliferation” of public-order offenses and observing that “police may employ commonly violated but relatively clear laws to pick and choose among the violators they will stop”); supra notes 25–32 and accompanying text (discussing expansive criminal laws and subsequently broad discretion of law enforcement officials); see also Bonnie Rochman, The Gates Case: When Disorderly Conduct Is a Cop’s Judgment Call, Time, July 25, 2009, at http://www.time.com/time/nation/article/0,8599,1912777,00.html (on file with the Columbia Law Review) (discussing disorderly conduct charge against Henry Louis Gates and noting “broadly worded” state statutes afford police broad discretion to determine its scope). Indeed, the Supreme Court has insisted that constitutional law is not implicated by the breadth of criminal codes. Cf. Whren v. United States, 517 U.S. 806, 818 (1996) (“[W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infractions itself can no longer be the ordinary measure of the lawfulness of enforcement.”).

194. See Atwater v. City of Lago Vista, 552 U.S. 318, 354–55 (2001) (holding that police may, at their discretion, constitutionally conduct warrantless arrest of individual for even non-jailable petty offenses); Feeley, supra note 27, at 161 (“Traditional police practice encourages officers to administer rough justice on the street in lieu of arrest, but modern police professionalism dictates that an arrest should be made whenever there is any basis for doing so.”); see also N.Y.C. Comm’n to Investigate Allegations of Police Corruption and the Anti-corruption Procedures of the Police Dep’t, Commission Report 39 (1994), available at http://www.parlinfo/client_files/Special%20Reports/4%20-%20Mollen%20Commission%20-%20NYPD.pdf (on file with the Columbia Law Review) (describing ex-post mechanisms used by police to legally justify intervention and arrest); Levine & Small, supra note 185, at 20, 41, 82 n.39 (describing strategies and tools used by NYPD to
It may seem odd to cast in a pejorative light professional and legalistic policing (and, in the main, legalism and professionalism are good things), but the qualities do produce a popcorn effect that leads to more arrests and less temperance for informal (and possibly more lenient) intervention. James Q. Wilson, one of the scholars who developed the broken windows theory, expressly acknowledged this: “A legalistic department will issue traffic tickets at a high rate . . . and make a large number of misdemeanor arrests . . . . The police will act, on the whole, as if there were a single standard of community conduct—that which the law prescribes . . . .” Legalistic departments underutilize their discretion—equitable or otherwise—to stop short of formal arrest, and, instead use arrest as “a convenient way of avoiding or ending trouble . . . [,] a bookkeeping ritual, a formality necessary to terminate a problem which for all practical purposes has already been resolved.” Arguably, then, the resultant pool of petty crime arrestees is somewhat larger than the pool of normatively guilty offenders, even in the eyes of the officers who made the arrests.

"manufacture" order maintenance arrests, and citing retired NYPD officer); Freda F. Solomon, N.Y.C. Criminal Justice Agency, Summary and Analysis: Trends in Case and Defendant Characteristics, and Criminal Court Processing and Outcomes, in Non-Felony Arrests Prosecuted in New York City’s Criminal Courts 3 tbl.1, 12 (2002), available at http://www.cjareports.org/reports/fnrep02.pdf (on file with the Columbia Law Review) (finding more than two-fold rise in number of nonfelony arrests in New York City between 1989 and 1998, from 86,822 to 176,432; and finding more than seven-fold rise in number of drug arrests between 1975 and 1998, from 17,207 to 121,661). Notably, police professionalism is a product not only of constitutional doctrine, but also of institutional hierarchy. See Jerome H. Skolnick & David H. Bayley, Community Policing: Issues and Practices Around the World 51 (1988) (discussing how "street-wise cops" must conform behavior to policies set by "management cops," who "tend to be more legalistic and rule oriented"); Stuntz, Unequal Justice, supra note 31, at 1997, 2004 (discussing "[t]oday's more professionalized urban police forces and fact that more professionalism has led to less equitable discretion, not to arrest). 195. James Q. Wilson, Varieties of Police Behavior 172 (1968); see also Harcourt, Illusion of Order, supra note 175, at 6, 8 ("The broken windows theory, aggressive misdemeanor arrests, and intensive stop and frisks have become not a substitute [for existing severe criminal penalties] but a supplement—a supplement that . . . itself produces a dramatic increase in detentions, arrests, and criminal records."). See generally Weisburd & Braga, supra note 175, at 11 (noting "concerns about the legitimacy of police actions" may have driven ascendency of order maintenance policing over past three decades). 196. Feeley, supra note 27, at 24; see also Brady, supra note 183, at 8 (describing certain arrests as "end[s] unto themselves"). 197. In this way, there is a policing pathology that stands apart from the prosecutorial-charging pathology that is the subject of this Article. Admittedly, the discussion above is a too-brief account of the policing problem, but anything more is beyond the scope of this multi-article series on equitable discretion in the charging decision. In any event, my bottom-line proposal—to share equitable discretion with a lay body—does not map well onto the policing context where arrest decisions are necessarily much more immediate than charge decisions and therefore cannot await case-specific lay oversight. Bowers, Outsourcing, supra note 21, at 54–55, 59.
Worse still, public order arrests take on something of racial and classist castes.198 This outcome is almost certainly unintended; in fact, by focusing on traditionally neglected high-crime neighborhoods, police may be providing something of a much-needed subsidy to historically disadvantaged and oft-ignored communities.199 As Bill Stuntz has argued, the most persuasive explanation for why authorities target poor and minority communities for order maintenance policing is that disorder is disproportionately found there, and resources being finite, enforcement dollars are best spent on geographically targeted policing.200 Public order policing yields the cheapest and best results when it is localized (even if public order crime is, to some degree, everywhere).201

Thus, police are motivated to exercise administrative discretion in ways that exacerbate unequal arrest rates (by concentrating on poor and minority neighborhoods instead of affluent white ones). But, concurrently, police are motivated not to exercise equitable discretion to forego arrest in normatively borderline cases, thereby largely foreclosing a potential corrective that might have counterbalanced (at least somewhat) the inevitable systemic racial and economic “tilts” that infect the administration of criminal justice.202

---

198. Sec, e.g., Powell, supra note 189 (“Police officers frisked more than 500,000 New Yorkers in 2008, more than 80 percent of them young black or Latino men.”).

199. See William J. Stuntz, Race, Class and Drugs, 98 Colum. L. Rev. 1795, 1833 (1998) [hereinafter Stuntz, Race, Class & Drugs] (“[R]acism always has a tendency to produce not too much law enforcement but too little. Law enforcement is, after all, expensive. . . . It follows that when we see plausible claims of overenforcement and overpunishment, we should suspect that we are seeing something more complicated than racism, something more like misguided paternalism.”); cf. Randall Kennedy, The State, Criminal Law, and Racial Discrimination: A Comment, 107 Harv. L. Rev. 1255, 1261–70 (1994) (arguing harsher punishments for crack-cocaine offenses benefit African American communities). But see Bob Herbert, Op-Ed., Jim Crow Policing, N.Y. Times, Feb. 2, 2010, at A27 (characterizing stop-and-frisk as “a despicable, racially oriented tool of harassment,” and describing NYPD’s use of stops as “nonstop humiliation of young black and Hispanic New Yorkers”).

200. See Stuntz, Race, Class & Drugs, supra note 199, at 1820–22 (1998) (“Looking in poor neighborhoods tends to be both successful and cheap. . . . Street stops can go forward with little or no advance investigation. . . . [T]he stops themselves consume little time, so the police have no strong incentive to ration them carefully.”); Stuntz, Unequal Justice, supra note 51, at 1971–72, 1980 (“Drug cases in poor city neighborhoods are cheap for police and prosecutors; investigating and prosecuting drug crime in well-off suburbs is a good deal more expensive.”); cf. Levine & Small, supra note 185, at 19–20 (indicating police may find it prudent to avoid stopping and frisking middle-class persons who may have “the political and social connections that might make the arrests troublesome or embarrassing for the arresting officers and their commanders”).

201. See Stuntz, Race, Class & Drugs, supra note 199, at 1819 (“[N]ot only must the police look for the crimes, they must decide where to look, in a world where the crimes are happening everywhere. . . . [W]hom they catch depends on where they look.”).

202. William J. Stuntz, Self-Defeating Crimes, 86 Va. L. Rev. 1871, 1893 (2000) (“[P]olice and prosecutorial discretion have produced [racial and economic] tilts . . . [via] too much focus on crack cases in poor black neighborhoods—and the only way to undo the tilts is to cabin the discretion.”).
B. Fealty and Cover

Once police have made arrests, it falls to prosecutors to pick up the discretionary slack and determine equitably in which cases to decline prosecution.\textsuperscript{203} And prosecutors have significant authority to decline charges for equitable reasons (possibly more so than even police),\textsuperscript{204} but their professional position leaves them overcautious. They have power, but they may lack \emph{will} and \emph{perspective}.

Police put a high premium on solidarity.\textsuperscript{205} They expect it from each other and from the prosecutors with whom they work.\textsuperscript{206} Prosecutors and police are teammates, and a smoothly operating prosecution office depends upon a functional relationship with the local force.\textsuperscript{207} This requires mutual support and fidelity.\textsuperscript{208} And cooperation is threatened if prosecutors decline too many police-initiated arrests. Such declinations are not just affronts to police personally; they expose police to media backlash and public outcry that the unprosecuted order maintenance arrests were unwarranted.\textsuperscript{209} Accordingly, police watch prosecutors to en-

\begin{itemize}
\item \textsuperscript{203} See Feeley, supra note 27, at 161 ("An arrest transfers responsibility for handling the case to a prosecutor, who must then assess the ‘seriousness’ of it and dispose of it.").
\item \textsuperscript{204} See id. ("Practices which minimize police discretion may simply shift the burden for informal dispute resolution away from the police and to the court.").
\item \textsuperscript{205} See Skolnick \& Bayley, supra note 194, at 50 (characterizing police culture as typified by solidarity and brotherhood and by "typically magnified" perception of danger).
\item \textsuperscript{206} See id. (noting that police "depend on their partners for cover and assistance").
\item \textsuperscript{207} See George F. Cole, The Decision to Prosecute, reprinted in Rough Justice: Perspectives on Lower Criminal Courts 124 (John A. Robertson ed., 1974) ("The legal system may be viewed as ... a community game. The participants ... share a common territorial field and collaborate ... [and] interact on a continuing basis ... Thus, the need for [police] cooperation ... can have a bearing on the decision to prosecute."); Walker, supra note 1, at 10 (noting survey finding that "various [executive] agencies did not stand alone" and that "[d]ecisions in each one influenced, and were influenced by, those in other agencies").
\item \textsuperscript{208} See Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor 39–41 (2007) [hereinafter Davis, Arbitrary Justice] (discussing dynamics reinforcing prosecutorial deference to police); Feeley, supra note 27, at 165 (noting that when trying to "quietly" decline charge, prosecutor must be circumspect and "responsive to pressures to ‘support’ the police"); Bowers, Punishing, supra note 36, at 1126 ("[I]n the interest of comity, prosecutors must level charges against a great portion of those that police process."); Fairfax, Nullification, supra note 142, at 29 (observing that police "may become aware—and may protest—when prosecutors nullify").
\item \textsuperscript{209} See supra note 189 and accompanying text (discussing political problem resulting where police searches are not followed by filing of criminal charges). By way of example, in New York City in the mid-1990s, arrests for public order offenses skyrocketed, and the relationship between police and affected communities consequently suffered. Bowers, Grassroots Plea Bargaining, supra note 179, at 94–99. Notably, however, prosecutors more than kept pace: Their prosecution rate rose substantially, perhaps reflecting the relative ease of prosecuting comparatively more public order cases. See infra Part V.B (comparing prosecutorial concerns in white collar and public order cases). This
sure that they are charging sufficiently high numbers of arrestees.\textsuperscript{210} Just as police are inclined to make arrests to provide cover for searches, prosecutors are inclined to file charges to provide cover for police arrests.\textsuperscript{211}

Of course, a given beat officer may have no normative stake in the charging of an arrestee in a given case. Indeed, the officer may have made the arrest only to further some control objective.\textsuperscript{212} (In which case, the officer already may have extracted the full value of the arrest once the arrestee has been processed fully through central booking.)\textsuperscript{213} But prosecutors cannot know which cases police want to see in court and which cases police are content to see disappear. Prosecutors know little about the specifics of individual cases—legal or equitable—beyond what police tell them. And police do not tell them much. Police generate skeletal arrest paperwork that conveys little meaningful content to prosecutors beyond brief and conclusory allegations to the effect that some officer observed some perpetrator engaged in some proscribed act.\textsuperscript{214} For their parts, prosecutors tend to take these stripped-down allegations at face value.\textsuperscript{215} After all, prosecutors cannot question the police paperwork rate increase also perhaps reflects prosecutors' impulse to show solidarity with the beleaguered force by accepting police output with higher frequency.

\textsuperscript{210} See, e.g., Feeley, supra note 27, at 46 (describing "police-court liaison officer" who was always present in court and who sought "to maintain a record of court dispositions which are passed on to the Department" and sometimes "to press the prosecutor to take a hard line").

\textsuperscript{211} No doubt, the truth of this assertion is bound to vary across jurisdictions. For idiosyncratic reasons, different prosecution offices will feel more or less compelled to provide cover for the local police force. Arguably, however, the fealty concern may be more pronounced in jurisdictions where police suffer discordant relationships with local communities. And, notably, these are the very jurisdictions that tend to enforce public order offenses more aggressively. See Bowers, Grassroots Plea Bargaining, supra note 179, at 120–21 (noting that order maintenance policing engenders police-citizen disaffection in target communities); Rosen, supra note 178, at 27 (same).

\textsuperscript{212} See supra notes 188–196 and accompanying text (describing separate control and law functions of police).

\textsuperscript{213} See supra notes 180–186 and accompanying text (indicating that police derive advantage from search and arrest).

\textsuperscript{214} See Daniel Givelber, Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?, 49 Rutgers L. Rev. 1317, 1361–62 (1997) ("Typically, the prosecutor will make the charging decision by consulting the report the police have provided. As long as the report contains elements of a prima facie case . . . this report . . . typically will be sufficient to meet the pretrial screening requirements imposed to justify the detention and charging of the defendant.").

\textsuperscript{215} See Brady, supra note 183, at 22 ("[T]he prosecutorial merit of most of those [misdemeanor] cases stand[s] or fall[s] solely on a police officer's judgment about the legal sufficiency of the evidence."); Givelber, supra note 214, at 1361–62 (1997) ("Unless the police report on its face reveals an inconsistency or barrier to conviction, the prosecutor accepts the general conclusion of the police without making an independent investigation or evaluation of the evidence." (quoting Lloyd L. Weinreb, Denial of Justice: Criminal Process in the United States 58 (1977))).
without also questioning the credibility of teammates.\textsuperscript{216} Thus, prosecutors subject the public order arrests to a paper screen only—and a cursory one at that.\textsuperscript{217} The screen is ineffective, because skeletal paperwork masks distinctions; equitably and legally unlike cases end up looking alike.\textsuperscript{218} Prosecutors can proceed with almost everything, because all cases look good enough; and they cannot determine what to cast aside, because no case looks all that bad.\textsuperscript{219} In short, order maintenance cases appear fungible because no consistent or clear signal exists to separate the legally or equitably weak or strong cases.\textsuperscript{220} All petty cases pool at the point of charge. Ultimately, then, prosecutorial-charge decisions are path-dependent on police-arrest decisions.\textsuperscript{221}

The interesting duality is that police actually have the capacity to perceive equitable differences between public order cases, because they often observed the incident firsthand and had the opportunity to talk with the suspect about his motive and circumstances. But police are inclined to disregard the equities and proceed with the arrest, because arrests are advantageous, and, in any event, modern norms of professionalism demand a more legalistic and less discretionary approach to policing. By contrast, prosecutors retain comparatively more discretionary power, but cannot so readily perceive the equitable differences upon brief review of the police paper, so they defer to police and fail to evaluate equitable considerations when charging. This is the paradox of equitable discre-

\textsuperscript{216} See Davis, Arbitrary Justice, supra note 208, at 40 ("It's easier to simply go forward with the prosecution than engage in the thorny exercise of confronting the very police officers on whom they rely to successfully prosecute their cases.").

\textsuperscript{217} See, e.g., Feeley, supra note 27, at 178–79 ("Only in rare cases that involve a particularly serious charge . . . , will the prosecutor carefully read through the file before arraignment or first appearance. . . . His initial judgment of the worth of the case is usually based upon a hurried reading of the police report and little more.").

\textsuperscript{218} Cf. Gerard E. Lynch, Screening Versus Plea Bargaining: Exactly What Are We Trading Off?, 55 Stan. L. Rev. 1999, 1404 (2002) [hereinafter Lynch, Screening] (raising concern that "an aggressive screening procedure" may be rendered ineffectual by prosecutors "automatically adopting the police view of the appropriate charge").

\textsuperscript{219} Cf. Brady, supra note 183, at 22 (noting sparse prosecutorial review in misdemeanor cases "from arrest to disposition").

\textsuperscript{220} See Lynch, Screening, supra note 218, at 1407 (arguing there is little opportunity for prosecutor to consider "defenses and mitigating circumstances" because "at the typical screening stage between arrest and charge," there is no defense attorney to draw prosecutor's attention to such equitable or legal shortcomings). Criminal record is perhaps the only equitable fact that is commonly and readily apparent at the point of charge. See Heumann, supra note 153, at 103 (noting that prosecutors assess criminal record in determining seriousness of current case); Ronald F. Wright, Prosecutorial Guidelines and the New Terrain in New Jersey, 109 Penn St. L. Rev. 1087, 1101 (2005) (explaining revised New Jersey Attorney General prosecution guidelines include criminal record as factor).

\textsuperscript{221} See Feeley, supra note 27, at 178 ("Once a case has been set in motion—and this is activated by the arresting officer, not the prosecutor—the prosecutor proceeds on the case as if his path were clear and obvious.").
tion. The arrest decision influences the charge decision, and neither decision adequately turns on normative guilt.

V. Equitable Adjudication

Prosecution offices must make administrative choices about how to allocate finite resources. And, generally speaking, prosecutors make administrative choices pursuant either to broad policy objectives or to contextualized discretion (or some mix of the two). Specifically, a prosecutor may exercise administrative or practical discretion based on a case-specific evaluation of whether resources are best expended by prosecuting a particular case. Conversely, a prosecutor may decide to pursue a given charge or type of charge based not on an individualized assessment, but on office-wide administrative guidelines that apply across cases.222 When it comes to public order cases, however, prosecutors operate principally at the level of broad policy and not particularization, because—as indicated—prosecutors have little or no ability at the point of charge to distinguish the specifics of one case from another.223 Moreover, there are a number of institutional reasons—beyond prosecutors' undue deference to police decisionmaking—why prosecution offices are motivated to establish near-categorical charging policies in petty cases. First, prosecuting petty cases is an effective way to net a high rate and absolute number of convictions—figures that serve as particularly salient measures of prosecutorial performance.224 Second, prosecuting petty

222. See generally Dressler & Michaels, supra note 180, at 4 ("Prosecutors' offices . . . often have internal guidelines governing such matters as charging decisions and plea bargains."). As indicated, adherence to a policy that applies across cases is no exercise of discretion, which demands a particularized evaluation. See supra notes 217–221 and accompanying text (indicating that categorical decisions, which apply across cases, are not exercises of discretion).

223. See supra notes 214–220 and accompanying text (discussing prosecutors' failure to pursue case facts beyond what has been reported by police).

224. See Stephen J. Schulhofer, Plea Bargaining as Disaster, 101 Yale L.J. 1979, 1987 (1992) [hereinafter Schulhofer, Plea Bargaining] (arguing conviction rate is more likely to affect electoral fortunes of district attorney than "deterrence effects at the margin (whether positive or negative) [that] are likely to be imperceptible to the general public, especially over the short run"); see also Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 Harv. L. Rev. 2463, 2471–72 (2004) [hereinafter Bibas, Shadow] (discussing prosecutorial incentives to pursue high conviction rates); George T. Felkenes, The Prosecutor: A Look at Reality, 7 Sw. U. L. Rev. 98, 114 (1975) ("[A]n individual's success as a prosecutor may be measured by the number of criminal convictions which he has been able to secure."); Alissa Politiz Worden, Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining, 73 Judicature 355, 337 (1990) ("Conviction rates constitute simplistic but easily advertised indicators of success since they appear to measure prosecutors' ability to win cases."); Robert L. Rabin, Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion, 24 Stan. L. Rev. 1036, 1045, 1071 (1972) ("[C]onvictions are the central performance standard, and departures from the average rate raise questions and create anxieties. . . . [N]egotiation of a plea, any guilty plea, is a victory; the conviction rate is a quantitative, not a qualitative, measure of effectiveness.").
cases offers low-stress opportunities for new assistants to gain prosecutorial experience (and, notably, these new assistants are the very prosecutors who are most deferential to supervisory authority and are therefore least likely to buck policy by exercising case-specific equitable discretion in the rare case where the need for such discretion is readily apparent pre-charge). 225

Thus, it is institutionally expedient for prosecutors to adopt indiscriminate petty crime charging policies, and there are few countervailing reasons to disregard institutional expediency. In this way, prosecutors are biased in favor of charging petty cases. But, notably, the biases are not principally the cognitive types that tend to impact decisionmaking in big cases about which prosecutors feel particularly "passionate." 226 Instead, the biases are institutional types that predominate in the small cases about which prosecutors care almost not at all. 227 Institutional concerns crowd out the prosecutorial impulse to entertain case-specific considerations. Charging thereby becomes mechanical and somewhat categorical when and where it should be most contextualized. 228

225. Heumann, supra note 153, at 92–99 (observing that new prosecutors feel most constrained by office policy and are, consequently, least amenable to equitable arguments).

226. Alafair S. Burke, Prosecutorial Passion, Cognitive Bias, and Plea Bargaining, 91 Marq. L. Rev. 183, 189 (2007) (discussing factors that influence prosecutor’s passion for a case); see Goldstein, Passive Judiciary, supra note 2, at 7 (noting that prosecutor is “unavoidably made partisan by his role”); see also Gerstein v. Pugh, 420 U.S. 103, 118 (1975) (discussing need to provide safeguards “against the dangers of the overzealous as well as the despotic” in law enforcement process (quoting McNabb v. United States, 318 U.S. 332, 343 (1943))); Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971) (noting that prosecutor is too involved with “competitive enterprise of ferreting out crime” to analyze cases objectively); Ex parte Bain, 121 U.S. 1, 11 (1887) (observing that grand juries are “a means of protecting the citizen against . . . partisan passion”).

227. This is not to say that prosecutors abandon a win-at-all-costs adversarial mentality in petty cases, see infra note 265 and accompanying text, but only to say that any such cognitive bias is secondary to more pressing institutional biases.

228. See Feeley, supra note 27, at 149 (noting that prosecutors are more sensitive to “external pressures” in petty cases). Remarkably and laudably, some prosecution offices have adopted dynamic reforms intended to improve charge screening and to counteract cognitive and institutional biases that infect prosecutorial charge decisions. For instance, the New Orleans District Attorney’s Office has established a separate screening unit that evaluates all prospective charges. And, according to some scholars, New Orleans’s “hard screening” approach has proven somewhat successful in achieving “early assessment” and a “reasoned selection” of charges. Ronald Wright & Marc Miller, The Screening/Bargaining Tradeoff, 55 Stan. L. Rev. 29, 58–84 (2002) (addressing political and administrative barriers prosecutors face and assessing various reform efforts). I am somewhat skeptical of leaving the fox to guard the henhouse. After all, the prosecutors in the screening unit are subject to many (but, admittedly, not all) of the same biases that affect conventional prosecutors and that interfere with clear-eyed analyses of charging decisions. And, notably, the hard-screening model is a substitute for, rather than a complement to, preliminary hearings and grand jury proceedings. Thus, the reform has taken an insular and opaque executive decision and has made it more professionalized and less transparent. See Lynch, Screening, supra note 218, at 1401, 1404 (“For those who object to . . . less transparent resolution by professional executive-branch law-enforcement officials, the . . . system of
In short, due to systemic pressures and institutional constraints, prosecutors undervalue—or, at least, insufficiently act upon—equitable reasons for charge declination. The problematic result is a fascinating inversion of what Meir Dan-Cohen dubbed “acoustic separation”—roughly, the concept that substantive law broadcasts categorical “conduct rules” to the public that may differ from the “decision rules” that temper enforcement in individual cases.\textsuperscript{229} According to Dan-Cohen, the public expects categorical enforcement but gets something less.\textsuperscript{230} In the petty crime context, however, the public anticipates judicious enforcement\textsuperscript{231} but gets much more. Thus, the disconnect is not between a law’s categorical message and its measured administration, but between a lay expectation of measured administration and the unperceived failure of police and prosecutors to exercise sufficient discretion to decline arrest or charge.

A. Equitable Afterthoughts

Post-charge, little changes when it comes to legal considerations in petty cases. Most petty cases (particularly, public order cases) are settled summarily with some form of guilty plea, often as early in the process as the defendant’s first court appearance, just hours or, at most, days post-arrest—well before any meaningful investigation or discovery can occur.\textsuperscript{232} Prosecutors “expect the defendant to plead guilty” as early as “[o]n arraignment or first appearance.”\textsuperscript{233} And that expectation is often met. Thus, during the short adjudicatory life of the petty case, it is subject to practically no substantive scrutiny or formal process on the question of legal guilt.\textsuperscript{234} The prosecutor—“secure in the knowledge that the

\textsuperscript{229} See Feeley, supra note 27, at 11 (“[T]he overwhelming majority of [petty] cases took just a few seconds” of court time); Heumann, supra note 153, at 69–71 (discussing defendants’ reasons for accepting plea bargains early in adjudicative process); Pound, Criminal Justice, supra note 150, at 190–91 (describing “offhand disposition of cases at high speed” that characterizes case processing in lower criminal courts); Bowers, Punishing, supra note 36, at 1133 n.69 (citing study finding approximately half of all cases in New York City are disposed of at initial court appearance); David Lynch, The Impropriety of Plea Agreements: A Tale of Two Counties, 19 L. & Soc. Inquiry 115, 126 (1994) (describing how prosecutors plea bargain petty cases in “machine-gun fashion”).

\textsuperscript{230} Id.

\textsuperscript{231} See supra Part I.A (discussing expectation that petty public order offenses will not be categorically enforced).


\textsuperscript{233} Id.

\textsuperscript{234} See Brady, supra note 183, at 22–25 (“[A]n individual’s loss of freedom and the prosecutorial merit . . . stand or fall solely on a police officer’s judgment about the legal sufficiency of the evidence . . . .”).
overwhelming percentage of cases will end in a plea bargain”\textsuperscript{235}—has little incentive to investigate unless and until an unlikely trial becomes imminent.\textsuperscript{236} Appointed counsel, too, may develop only a vague sense of the legal merits based on a few hurried words shared with a client she has just met.\textsuperscript{237} In such circumstances, institutional incentives motivate behavior more than legal merit.\textsuperscript{238} The “legal rules” (or the “paper rules”) become little more than the “pretty playthings” that Karl Llewelyn once so casually dismissed.\textsuperscript{239}

But when it comes to equitable questions, all is not lost. A slapdash process does not necessarily mean that equities remain unconsidered throughout the life of the case. Rather, the equities may factor in as afterthoughts: Once disposable cases have been sorted into proper boxes, lawyers may discuss what facts differentiate a given case from the usual case. During the bargaining process, defense counsel uses the equities as the last best tool “to persuade the prosecutor to ‘deviate’ from the normal course of action.”\textsuperscript{240}

When defense counsel first interviews a new client post-charge during a typically hasty visit to the crowded courthouse pen, one of the lawyer’s principal objectives is to learn the social circumstances of the defendant’s life and the equitable particularities of his case so that the lawyer can then—in a similarly succinct conversation\textsuperscript{241}—educate the prosecutor in an effort to reach a disposition better than the standard “going rate.”\textsuperscript{242} Prosecutors base discretionary bargaining decisions on prior record; employment, familial, and educational status and history; the defendant’s character; and his perceived motivation for this and other criminal

\textsuperscript{235} Id. at 22 n.103 (quoting Givelber, supra note 214, at 1361–62).
\textsuperscript{236} See id. at 22 (“For many misdemeanor cases, . . . the prosecutor is likely to see the case file for the first time the day before or the morning of the scheduled trial. This process means that no prosecutorial review occurs at a meaningful time . . . .” (footnote omitted)).
\textsuperscript{237} See Weinstein, supra note 28, at 1157–59 (recounting one particular criminal defense experience involving only brief interview before guilty plea despite presence of contentious legal issues).
\textsuperscript{238} See Feeley, supra note 27, at 149 (noting that prosecutors are more sensitive to “external pressures” in petty cases); Bibas, Transparency, supra note 31, at 914 (“On average . . . [professional] insiders are more concerned with and informed about practical constraints . . . . [Lay] [o]utsiders, knowing and caring less about practical obstacles and insiders’ interests, focus on . . . offenders’ just deserts.”).
\textsuperscript{239} Karl N. Llewelyn, Bramble Bush: On Our Law and Its Study 5 (1930). To be fair, Llewelyn later expressed regret for this characterization. Karl N. Llewelyn, Bramble Bush: On Our Law and Its Study 9 (2d ed. 1951).
\textsuperscript{240} Feeley, supra note 27, at 179.
\textsuperscript{241} See id. at 156–57 (noting most petty cases are terminated after a “backroom exchange” and “one or two” formal appearances in open court).
\textsuperscript{242} See Bowers, Punishing, supra note 36, at 1146 (“Repeat players routinely process similar cases according to intuitively known, market-set prices that are discernible upon quick reference to defendants’ past records and the present charges. From a set starting point, a prosecutor may adjust prices . . . based on information that . . . can be succinctly conveyed to that prosecutor.”).
acts.\textsuperscript{243} Interestingly, then, although character and motive are not elements of substantive crime, they remain central to the bargained-for disposition of petty cases.\textsuperscript{244} Guilt is typically presumed in a process too rough-and-ready for the parties to develop and consider it properly, but space remains for leniency on equitable grounds, because the parties can efficiently convey and absorb these narrative arguments in cursory informal exchanges.\textsuperscript{245} As one prosecutor explained to Malcolm Feeley: "I think the legal factors probably come into play in about one in every twenty-five cases, although they do set the outer boundaries. . . . [M]ost of the appeals are sort of common-sense assessments of the situation . . . ."\textsuperscript{246}

Notably, cheap deals are readily had in petty cases where prosecutors maximize speed—not sentence length. The fastest deals are struck at low prices, so it behooves prosecutors who may have overlooked equitable details at the point of charge to pay attention now—for the sake of efficiency as much as any Aristotelian notion of complete justice.\textsuperscript{247} This is

\begin{itemize}
\item 243. See Feeley, supra note 27, at 284 ("[D]ecisions to prosecute are based on a host of considerations other than the strength of the evidence and applicable law: assessments of the ‘real’ trouble; the defendant’s prior history with the police and court; the assessment of his potential for future trouble; and the availability of supportive alternatives.").
\item 244. See id. at 162–63 (noting that prosecutors consider whether “the current incident is an aberration, a mistake—as opposed to a ‘real’ indication of character”); cf. Newman, supra note 89, at 136 (describing how decisions in petty cases were often reached by “responding to the personality or circumstances of the offender” or some other "set of mitigating circumstances"); Huigens, Virtue and Inculpation, supra note 109, at 1470–72 (discussing role that such equitable factors as criminal record do and should play in assessing moral blameworthiness); Kahan, Ignorance of Law, supra note 143, at 128–29 (noting propensity of criminal justice system toward "legal moralism," pursuant to which “individuals are appropriately judged by the law not only for the law-abiding quality of their actions but also for the moral quality of their values, motivations, and emotions—in a word, for the quality of their characters” (emphasis omitted)).
\item 245. See Feeley, supra note 27, at 156 (narrating typical example of informal plea bargaining exchange); Pound, Discretion, supra note 72, at 929 (1960) (noting equitable considerations predominate “for petty causes where expense of protracted investigation is out of proportion to the advantage of wholly assured [legal] result”).
\item 246. Feeley, supra note 27, at 159–61 ("[T]here is . . . a desire to look beyond the charges, to respond directly to the incident itself and to the character of the defendant. For a charge to assume meaning it must be given substantive content supplied by a description of the incident and information about the defendant’s character, habits, and motivation.").
\item 247. Heumann, supra note 153, at 42, 103 ("The central concern with these nonserious cases is to dispose of them quickly. If the defense attorney requests some sort of no-time disposition . . . the prosecutor . . . is[ ]likely to agree. They have no incentive to refuse. . . . The case is simply not worth the effort to press for greater penalty."); Arthur Rosett & Donald R. Cresse, Justice by Consent 107 (1976) ("[P]rosecutors] routinely grant so-called concessions to many . . . knowing full well that the attorney will not take up their time with a trial if they do not."); Bibas, Shadow, supra note 224, at 2471–72 ("The statistic of conviction . . . matters much more than the sentence. . . . Thus, prosecutors may prefer the certainty of plea bargains even if the resulting sentence is much lighter than it would have been after trial." (footnotes omitted)); Bowers, Punishing, supra note 36, at 1143, 1145 ("[P]rosecutors make frequent offers of pleas to noncriminal violations and time-
not to say that prosecutors fail genuinely to appreciate equitable arguments, only that the incentive structure is different. Pre-charge, prosecutors tend to think reflexively, because the administrative costs of failing to divine legally or equitably weak cases are much lower than the costs of determining the equitably or legally deserving case from the seemingly transposable mass. Post-charge, prosecutors are prone to consider anything legitimate that terminates cases quickly.248 The optimistic take is that this process may achieve—according to Malcolm Feeley—a kind of rough (albeit insufficient) "substantive justice"249 that "respond[s] directly to the incident itself and to the character of the defendant."250 The cynical take is that this is simply the most efficient mode of business. Either way, the prospect for (at least some) equitable bargaining is real.

And defendants are prone to take the lenient pleas that prosecutors offer, because the process costs of proceeding to even bench trials (the only trials even ostensibly available in petty cases)251 are prohibitively high—a state of affairs that led Malcolm Feeley to conclude famously that "the process itself is the punishment."252 Because the parties prefer to "just . . . get it over with,"253 there is little substantive litigation and there

served dispositions. . . . Only a fraction of misdemeanor defendants had to serve any postplea jail time at all. Put differently, many of these defendants were jailed as part of the process and released as part of the bargain." (footnotes omitted)).

248. There is some concern that a prosecutor who prioritizes speedy bargaining might inappropriately respond with lenient offers to even spurious equitable claims, but the concern is probably minimized to a degree by the presence of repeat players who are concerned with maintaining credibility: A public defender can make an equitable argument only so many times before it rings hollow. In any event, my claims do not rise or fall on whether prosecutors consider equitable arguments at the bargaining phase. My central point is that they do not commonly do so at the charging phase.

249. See Feeley, supra note 27, at xix (discussing role of substantive justice in administration of law); infra Part V.C (indicating that lenient bargains are insufficient remedy for charges that normatively should not have been filed).

250. Feeley, supra note 27, at 160.

251. See Duncan v. Louisiana, 391 U.S. 145, 159 (1968) ("It is doubtful true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision . . . ."); supra note 159 and accompanying text (noting most petty crime trials are bench trials).

252. Feeley, supra note 27, at 30; accord Albert W. Alschuler, Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System, 50 U.Chi. L. Rev. 931, 952, 955 (1983) [hereinafter Alschuler, Implementing] ("For it is primarily the process costs of misdemeanor justice that currently cause all but a small minority of defendants to yield to conviction; these process costs are, in practice, more influential than plea bargaining."); Bibas, Shadow, supra note 224, at 2492–93 (observing that because of prohibitive process costs "even an acquittal at trial can be a hollow victory"); Bowers, Punishing, supra note 36, at 1134 (describing Albert Alschuler’s view that "bargains in most misdemeanor cases are unnecessary because the process itself is sufficient to prompt process-cost guilty pleas").

253. Heumann, supra note 153, at 69–71 (observing that "the person who wants to fight his case . . . [has] got to come back . . . and back and back," and consequently "defendants are often eager to plead guilty . . . [because] they contrast the relative ease with which they can plead guilty with the costs in time and effort required to fight a case"); accord Rodney J. Uphoff, The Criminal Defense Lawyer as Effective Negotiator: A
are almost no trials. Likewise, in my own practice as a public defender, I tried not one of hundreds of public order cases. As already indicated, trial nullification is an inappropriate mechanism to check legally sound cases. But, significantly, even if nullification were the right screen, it would be much too little, too late for cases that almost never make it to the trial stage.

For a system ostensibly committed to a robust vision of due process, the infrequency of trials in petty public order cases is startling, even as compared to conventionally low systemic trial rates. In my former practice, public order cases went by the evocative title "disposables," because that is what institutional actors intended for them. For disposable cases, prosecutors' initial decisions of what and whether to charge are somewhat dispositive on the question of whether the defendant will ultimately end up with some type of conviction—even if some equitable play remains in the punishment joints. Thus, arrest shapes charge, and charge shapes disposition. Just as the police-arrest and prosecutorial-charge switches are fused, so too the charge switch is fused with the disposition switch. A charge leads almost inevitably and quickly to some adjudication of guilt. This, then, highlights a somewhat underap-

Systemic Approach, 2 Clinical L. Rev. 73, 81 (1995) ("[A] significant number of defendants just want to plead guilty. Few criminal defendants, even those who are innocent, actually want to go to trial." (footnote omitted)); Weinstein, supra note 28, at 1172 ("[W]ithout any delay by the defense, it is very rare for a case to get to trial before the fifth court date.").

254. See Bowers, Punishing, supra note 36, at 1154 (noting relative ease of pleading guilty to avoid high process costs of trial).

255. See supra Part II.C (arguing for exercise of equitable discretion early in adjudicatory process, prior to trial).

256. See Vorenberg, supra note 3, at 1523 ("[T]he existence of trials cannot check prosecutorial powers not dependent on trial. These powers include the prosecutor's wide discretion in making decisions about charging . . . .").

257. I recall one judge who would introduce disposable cases with the pithy inquiry: "What's the disposition?"

258. See Feeley, supra note 27, at 195 ("If a prosecutor is intent upon securing a conviction, most defendants have no real choice but to plead guilty."); Lynch, Screening, supra note 218, at 1401 ("[T]he prosecutor . . . is the principal adjudicator of guilt and punishment . . . ."); see also supra note 14 and accompanying text (discussing unfettered discretion prosecutors exercise). See generally Walker, supra note 1, at 89 ("The charge-dismiss decision ranks with arrest as one of the two most important decisions in the criminal justice process.").

259. See Feeley, supra note 27, at 293 ("In the lower courts a great many appearances are ritualistic terminations of problems that for all practical purposes were resolved with the arrest itself.").

260. See infra note 352 and accompanying text (describing ideal discretionary regime as gauntlet of independently functioning switches).

261. See supra Part IV.B (discussing dependence of prosecutorial charging decisions on police arrest decisions).

262. See Feeley, supra note 27, at 11 (noting in many instances of petty crime adjudication "the court was not a deliberative body . . . . Instead, the courtroom encounter was a ritual in which the judge ratified a decision made earlier," at points of arrest or charge); Stuntz, Unequal Justice, supra note 31, at 1977 ("The criminal justice system is
preciated plea-bargaining concern: Conventionally, plea bargaining is criticized for insulating criminal charges from trial screens for legal sufficiency,263 but plea bargaining also serves to insulate charges from almost any kind of external screen for equitable sufficiency.264

Of course, the possibility exists that the prosecutor might dismiss (post-charge) the prosecution she neglected to decline (pre-charge). For example, a prosecutor might dismiss a case outright in response to a defense lawyer’s particularly persuasive claim of normative innocence. However, even equitably worthy defendants have little hope of complete dismissal. First, prosecutors operate under a well-documented conviction bias and consequent aversion to the perceived loss that follows a full dismissal.265 Second, prosecutors tend to adopt a presumption of legal guilt, and this may entail a corresponding presumption of normative guilt that might render prosecutors resistant to arguments that a defendant committed no real wrong.266 Third, line prosecutors typically must seek supervisory approval to dismiss, but often may deviate without permission from conventional plea prices (at least somewhat).267 A line prosecutor

not designed to identify marginal convictions that can be overturned at little cost if the need arises.”.

263. See, e.g., Alschuler, Implementing, supra note 252, at 951 (describing why innocent defendants who can identify disputable legal issues still accept plea bargains); Schulhofer, Plea Bargaining, supra note 224, at 1987 (listing factors and incentives, wholly unrelated to legal sufficiency of case, influencing prosecutor’s decision to seek plea bargains).

264. The sole potential exception is inconsistently available grand jury review of felony charges. See supra notes 13–14 and accompanying text (discussing how equitable discretion is allocated to prosecutors without oversight).

265. Albert W. Alschuler, The Prosecutor’s Role in Plea Bargaining, 36 U. Chi. L. Rev. 50, 59 (1968) [hereinafter Alschuler, Plea Bargaining] (“A Chicago prosecutor says, ‘When we have a weak case for any reason, we’ll reduce to almost anything rather than lose.’”); Bibas, Shadow, supra note 224, at 2472 (“[P]rosecutors’ psychology of risk aversion and loss aversion reinforces the structural incentives to ensure good statistics and avoid risking losses.”); Bowers, Punishing, supra note 36, at 1128 ([P]rosecutors consistently function as conviction maximizers even if they only rarely operate as sentence maximizers.”); Felkenes, supra note 224, at 117 (analyzing prosecutors’ conviction psychology”). Jerome H. Skolnick, Social Control in the Adversary System, 11 J. Conflict Resol. 52, 57 (1967) (“[T]he prosecutor’s office cared less about winning than about not losing.”). Albert Alschuler has explored in detail the culture of prosecutors in the modern American adversarial system and has highlighted the degree to which prosecutors take the view that their principal obligation is to win cases and secure convictions, not to evaluate cases impartially. See Alschuler, Plea Bargaining, supra, at 105–08, 110–12 (“Conviction statistics seem to most prosecutors a tangible measure of their success.”).

266. See Heumann, supra note 153, at 103 (noting that prosecutors “assume the defendant guilty” in both serious and nonserious cases); Bowers, Punishing, supra note 36, at 1126–27 (arguing that prosecutors have strong charging presumption that “recidivists are guilty of some crime” and thereby are “unlikely to exercise discretion to decline prosecution”); Andrew D. Leipold, The Problem of the Innocent, Acquitted Defendant, 94 Nw. U. L. Rev. 1297, 1328 (2000) (“[E]ven in the absence of bad faith prosecutors have incentives to resolve nagging doubts about a suspect’s guilt in favor of prosecution.”).

267. Davis, Arbitrary Justice, supra note 208, at 34 (describing how “district attorneys may establish specific policies for certain types of crimes” and may “require
may conclude, therefore, that it is not worth the administrative effort or expense to seek and receive authorization for a dismissal. Fourth, line prosecutors sometimes must seek judicial approval to dismiss for equitable reasons even though their initial charging decisions are subject to no such scrutiny.\textsuperscript{268} A line prosecutor may not want to have to justify her dismissal decision to a judge. Fifth, as indicated, conviction rate is the principal measure of prosecutorial job performance.\textsuperscript{269} Every dismissal lowers that rate, and every guilty plea raises it. Again, this is a big reason why prosecutors charge disposable cases reflexively in the first instance: The cases provide opportunities for expeditious and efficient legal victories.\textsuperscript{270}

Notably, the isolated exceptions to this predominate institutional incentive structure tend to be regressive. Specifically, a prosecutor may be more hesitant to charge the more affluent petty offender, because the prosecutor may perceive such a prospective defendant to have more reason to fight the charge, more resources to do so, and little chance of being held on the kind of insurmountable bail that might well motivate the indigent defendant to plead guilty quickly.\textsuperscript{271} Fred Schauer has identified a telling example: Prosecutors tend to exercise considerable discretion—equitable, legal, and administrative—to decline prosecution of obscenity cases.\textsuperscript{272} Indeed, during the Clinton Administration, federal prosecutors pursued few obscenity charges (a trend that, admittedly, has

\textsuperscript{268} See Goldstein, Passive Judiciary, supra note 2, at 12, 18, 24 (discussing cases that permit some degree of judicial oversight over dismissals “in the interests of justice,” as opposed to pre-charge declinations, and noting “a clear distinction is made between the dismissal of charges and the prosecutor’s initial charging authority”).
\textsuperscript{269} See supra note 224 and accompanying text (discussing prosecutorial incentives to maintain high conviction rates).
\textsuperscript{270} See supra notes 224–228 and accompanying text (discussing institutional incentives to charge disposable cases without entertaining case-specific equitable considerations).
\textsuperscript{271} See Bowers, Punishing, supra note 36, at 1151–52 (discussing greater ability of affluent defendants to bluff willingness to proceed to trial); Stuntz, Unequal Justice, supra note 31, at 2025 (“[C]onstitutional criminal procedure . . . makes it easier for criminal defendants to threaten expensive, drawn-out litigation. Defendants with the money to pay for high-priced lawyers can make that threat credibly. Poor defendants cannot . . . .”).
been reversed somewhat over the past decade).\textsuperscript{273} Schauer has speculated that prosecutors are so reluctant to file obscenity charges because the cases impose substantial risks and administrative costs but few rewards. Defendants in obscenity cases tend to be comparatively well-off and well-defended, and the cases are likely to raise thorny and public constitutional questions.\textsuperscript{274} Thus, with obscenity, the prosecutor is motivated to find and follow equitable, administrative, or legal reasons not to proceed.

Like obscenity, white collar crime is another context where normative questions arise with fair frequency and where the legal issues tend to be more complex. And, like obscenity defendants, prospective white collar defendants are relatively affluent. Consequently, prosecutors have the same regressive incentives to engage in significantly more pre-charge investigation that may uncover equitable facts. Moreover, white collar defendants are often well represented even at the pre-charge stages, and, consequently, counsel can educate the government immediately about any normative reasons to exercise discretion.\textsuperscript{275}

B. Real and Disposable Cases

The examples of obscenity and white collar crime illustrate a more general point: Prosecutors approach big and small cases differently. The comparison carries over to the street crime context as well, where prosecutors tend to be more cautious about charging so-called real felony cases than “Mickey Mouse” disposable cases.\textsuperscript{276}

The reasons for the variant approach are administrative and political. First, high-stakes cases are administratively costlier to pursue. In more serious cases with concrete victims, prosecutors prioritize maximal sentence length.\textsuperscript{277} Consequently, prosecutors cannot so readily offer

\textsuperscript{273} See Fine Report, supra note 272, at tbls.6 & 8 (finding that during Clinton Administration many more obscenity cases were declined than prosecuted and absolute number of obscenity convictions fell sharply throughout 1990s); Larry Abramson, Federal Government Renews Effort to Curb Porn, Morning Edition (NPR radio broadcast Sept. 27, 2005), at http://www.npr.org/templates/story/story.php?storyId=4865348 (on file with the Columbia Law Review) (indicating there were few federal obscenity convictions during Clinton Administration).

\textsuperscript{274} See Schauer E-mail, supra note 166 (“If you prosecute an obscenity case[,] you will have to prosecute against a well-off and very well-defended defendant, you will attract the scorn of most of your educated friends, [and] you will have to surmount an especially formidable array of legal and constitutional hurdles . . .”).

\textsuperscript{275} See generally Brandon L. Garrett, Structural Reform Prosecution, 93 Va. L. Rev. 855, 880–83 (2007) (identifying discretionary factors prosecutors may consider in declining to charge in white collar cases, including previous compliance, collateral consequences, highly paid defense counsel, and factual complexity of case).

\textsuperscript{276} Heumann, supra note 153, at 38 (quoting circuit court practitioners).

\textsuperscript{277} See Bowers, Punishing, supra note 36, at 1153–54 (stating prosecutors “are less willing . . . to provide categorically lenient deals” in serious cases).
cheap bargains to prompt expeditious plea deals. Defendants, for their parts, are more willing to entertain the process costs of moving cases toward trial, because their topmost concern is to avoid potentially catastrophic postconviction prices. Notably, equitable questions also tend to matter comparatively less in these cases that involve core criminal conduct, and questions of legal and evidentiary sufficiency matter comparatively more. This means that cases have a tendency to linger—not too long, but long enough for the parties to learn the legal merits of the pending prosecution. Moreover, even strong legal cases are not guaranteed to lead to convictions, because these prosecutions frequently rely on the vagaries of lay witness cooperation. Unlike police officers upon whom prosecutors can depend to come to court and testify well, lay witnesses are less reliable, easier to impeach, and less certain to cooperate with pretrial investigation and trial preparation or even to appear and testify in the event of trial. Thus, prosecutors must expend substantially more adjudicatory resources to achieve a substantially less certain end. And, significantly, prosecutors must shoulder at least some of these costs immediately: At the outset of felony cases, prosecutors typically must present witnesses and evidence to establish probable cause to grand juries or to judges at preliminary hearings. Conversely, prosecutors generally face no external evidentiary screen of the legal merits of misdemeanor charges.

Second, serious felony cases are potentially politically costly too. In petty cases, executive decisions are largely shielded from public scrutiny. The occasional news story may bubble up about some particularly egre-

278. H. Richard Uviller, Virtual Justice: The Flawed Prosecution of Crime in America 179 (1996) ("Some cases—some homicides or other brutal crimes with more aggravating than mitigating circumstances—got no offer of reduction: plead to the indictment or try it."); Bowers, Punishing, supra note 36, at 1154 (citing "public and managerial oversight of . . . high-profile cases" as among factors leading prosecutors to favor trial over bargaining); Stutz, Disappearing Shadow, supra note 31, at 2563 (noting murder cases have higher trial rates because prosecutors cannot justify offering bargains).

279. See Heumann, supra note 153, at 186 n.15 ("For more serious cases, the defendant’s interest is less likely to be summed up in terms of simply ‘getting it over with.’ He faces substantial prison time, and quick disposition becomes less important . . . .").

280. Cf. Stutz, Disappearing Shadow, supra note 31, at 2564 ("For crimes at the top of the severity scale, law defines both criminal liability and punishment, just as it defines liability and remedies in . . . civil litigation . . . .").

281. See Bowers, Punishing, supra note 36, at 1133 n.69 (citing statistics showing substantially longer disposition times in felony cases).

282. See Brady, supra note 183, at 41 ("Among the most commonly cited factors [for dismissal] are victim and/or witness reluctance [and] unavailability of . . . witnesses . . . .").

283. Significantly, however, prosecutors may present hearsay testimony to grand juries and at preliminary hearings. Costello v. United States, 350 U.S. 359, 363 (1956) (stating Fifth Amendment does not require “indictments . . . to be held open to challenge on the ground that there was inadequate or incompetent evidence [such as hearsay] before the grand jury”). Thus, prosecutors may not need to rely on lay testimony in these proceedings.
igious prosecutorial failure to exercise appropriate discretion, but the chance that the press will pay attention to any given equitable or legal error is insignificant (or, at a minimum, it is significantly lower than the chance that the press will comment on a given high-profile case). Consequently, district attorneys’ electoral prospects rarely rise or fall on their handling of isolated minor cases. In any event, the less affluent urban communities that are typical targets and beneficiaries of order maintenance policing tend to enjoy comparatively less political power. Thus, even if charging decisions in petty cases ultimately undermine optimal crime control or contravene common sense notions of retributive justice, there is not much hope of a robust political check on executive underuse of equitable discretion.

By contrast, high-profile cases are politically salient. Consequently, executive misuse or outright abuse of common sense discretion may generate popular backlash. For example, in 2007, the district attorney of Jena, Louisiana sparked a firestorm when he chose to charge African American students with violent felonies for an alleged attack on a white student but refused to charge white students for earlier, purportedly racist (and quite probably criminal) acts that had precipitated the assault. The public reaction contributed to the ultimate decision to reduce many of the criminal charges against the African American students. Thus, in this context at least, popular opinion provided a somewhat successful check on equitably imbalanced executive charging


285. Walker, supra note 1, at 89; cf. Goldstein, Passive Judiciary, supra note 2, at 13 (noting “[p]olitical responsibility was a check on the prosecutor” in early twentieth century when dockets were small and public trials plentiful). See generally Bibas, Transparency, supra note 31, at 951–53 (considering how general public can influence prosecutorial decisions).

286. Bibas, Transparency, supra note 31, at 914 n.6 (“Residents of high-crime neighborhoods . . . may . . . be a politically powerless group.”); Gerken, supra note 87, at 1144–45 (explaining electoral minorities wield less political power than majority); Stuntz, Unequal Justice, supra note 31, at 1974 (noting lack of power of “residents of high-crime city neighborhoods” to shape criminal justice system).


289. See Coll, supra note 288 (explaining that prosecutors released black student on bail after radio personality and demonstrators demanded his release); Witt, supra note 288 (reporting black student’s release following “mounting political and judicial pressures” to
decisions. And, in future similar cases, it is fair to presume that even a like-minded prosecutor might be more circumspect about trying to divine the equitably appropriate charging path.

This is not to say that prosecutors necessarily exercise a terrific amount of pre-charge equitable discretion in high-stakes cases (nor should they in most major felony cases because, in general, the criminal conduct is normatively less fuzzy). The point is that if there are reasons—administrative, legal, or equitable—to forego prosecution, prosecutors are likelier to perceive and act upon the relevant considerations. Prosecutors are motivated to pay attention, because little missteps on big charges run risks of creating big subsequent adjudicatory and political headaches.

Significantly, the available data readily reflect prosecutors' differential pre-charge treatment of low-stakes and high-stakes cases. Data on misdemeanor case processing are rarely collected and are notoriously difficult to find. More narrowly, data on misdemeanor charge and declination rates are almost nonexistent. The figures are seldom kept or disseminated. However, with the tremendous help of the University of Virginia Law Library, I was able to uncover charge data from two states: New York and Iowa. The New York data finely segregate declination statistics for every criminal statute in the penal code—misdemeanors and felonies. The Iowa data lump crime statutes into five categories—drug, property, public order, violent, and "other"—and then subdivide these categories according to crime severity (in declining order of seriousness: Levels A, B, and C, as well as "other" felonies; aggravated misdemeanors; serious misdemeanors; and simple misdemeanors). Thus, both data sets provide rare opportunities to compare prosecutors’ handling of public order offenses, and victimless offenses more generally,

do so). But see id. ("[The prosecutor] said . . . he had not been swayed by the demonstrators or the national attention.").

290. An exception might be white collar crime, particularly honest-services fraud. See 18 U.S.C. § 1346 (2006) (defining "scheme or artifice to defraud" as "depriving[ing] another of the intangible right of honest services"); see also Skilling v. United States, 130 S. Ct. 2896, 2904-06 (2010) (discussing reach of "honest-services statute" and reviewing its application in various cases).


292. One paradigmatic New York public order offense—disorderly conduct—is not a misdemeanor, but is instead a noncriminal violation. For that reason, it is unfortunately not captured by the New York crime data, even though the offense subjects defendants to arrest, criminal court processing, and the possibility of up to fifteen days in jail. See N.Y. Penal Law § 70.15(4) (McKinney 2010) ("A sentence of imprisonment for a violation . . . shall not exceed fifteen days."); id. § 240.20 ("Disorderly conduct is a violation.").

293. In Tables 1 and 3 below, I aggregated all felony levels into one category, because there are trivial numbers of A-level and "other" felonies, and, in any event, this is an article about misdemeanor charging, so it is somewhat unimportant to parse out potentially differential declination rates for different felony levels. Unfortunately, the Iowa data set does not make clear which specific crimes fall into each of the designated categories.
with prosecutors’ handling of more serious misdemeanors and felonies against concrete victims.

If my insights about police-arrest and prosecutorial-charge behavior are correct, we should expect to see two trends. First, prosecutors should charge more often in cases that tend to rely principally on police observations and allegations, because these are the cases in which prosecutors feel most compelled to show solidarity with, and provide cover to, police. Second, prosecutors should charge pettier offenses more frequently, because these are the charges for which prosecutors can anticipate advantageous, quick-and-dirty pleas with minimal resource outlay. The data bear out these assumptions, demonstrating that prosecutors charge petty public order offenses most frequently.294

For instance, as indicated in the Tables below, Iowa prosecutors declined public order offenses at a substantially lower rate than any other offense category. And prosecutors declined simple misdemeanors at a substantially lower rate than crimes of any other severity level. The fact that prosecutors so rarely declined petty and public order cases reflects prosecutors’ well-substantiated expectation that these cases are likely to be disposed of summarily and successfully.295 Conversely, prosecutors were least quick to charge felonies. Notably, prosecutors declined most frequently violent felonies—the most serious category of crime and the category most dependent on less predictable, lay witness participation. Specifically, violent felonies and misdemeanors were declined almost three times as often as public order felonies and misdemeanors. And all felonies were declined over fourteen times as often as all simple misdemeanors.

### Table 1. Iowa Felony Declination Rates (2008)296

<table>
<thead>
<tr>
<th>Crime Category</th>
<th>Total Cases</th>
<th>Declinations</th>
<th>Declination Rate (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Order Felonies</td>
<td>2,700</td>
<td>101</td>
<td>3.74</td>
</tr>
<tr>
<td>Drug Felonies</td>
<td>6,795</td>
<td>324</td>
<td>4.77</td>
</tr>
<tr>
<td>Property Felonies</td>
<td>9,996</td>
<td>635</td>
<td>6.35</td>
</tr>
<tr>
<td>Violent Felonies</td>
<td>4,769</td>
<td>515</td>
<td>10.80</td>
</tr>
</tbody>
</table>

294. Sull, I do not wish to overstate the importance of these localized and limited data points. This is not intended as a rigorous empirical project, and I cannot say definitively whether and to what degree these data are traceable to prosecutorial solicitude to police, or whether the lower declination rates for petty public order offenses are merely reflective of the expediency of petty cases more generally. Moreover, the data has not been tested for statistical significance. Nevertheless, the data suggest that my premise is at least partially founded: Solicitude seems to be doing at least some of the work. In any event, the data do indicate somewhat clearly my more general observation that prosecutors exercise greater front-end discretion before prosecuting the very types of more serious cases where normative guilt typically presents less of an open question.

295. See supra notes 224–228, 232–239, and accompanying text (discussing institutional advantages of prosecuting petty cases).

296. Div. of Criminal & Juvenile Justice Planning, Iowa Dep’t of Human Rights, Iowa Public Order Cases, Charged and Not Charged, 2008 [hereinafter Iowa Data File]
The New York data show similar trends. Interestingly, prosecutorial charge declinations are largely localized to New York City and its five boroughs. In the rest of the state as a whole, prosecutors charge almost all arrestees, and this holds true across categories of crime. The reasons for this are unclear. It may be that prosecutors in rural, suburban, and smaller urban counties operate under fewer resource constraints. This may indicate that offices with the administrative capacity to mechanically accept police output do so, which is consistent with the point made above about prosecutorial solicitude for police decisionmaking. Or this may indicate that police in these counties are sim-

Table 2. Iowa Misdemeanor Declination Rates (2008)

<table>
<thead>
<tr>
<th>Crime Category</th>
<th>Total Cases</th>
<th>Declinations</th>
<th>Declination Rate (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Order Misdemeanors</td>
<td>61,783</td>
<td>810</td>
<td>1.31</td>
</tr>
<tr>
<td>Property Misdemeanors</td>
<td>24,169</td>
<td>442</td>
<td>1.83</td>
</tr>
<tr>
<td>Drug Misdemeanors</td>
<td>18,248</td>
<td>629</td>
<td>3.45</td>
</tr>
<tr>
<td>Violent Misdemeanors</td>
<td>21,162</td>
<td>680</td>
<td>3.21</td>
</tr>
</tbody>
</table>

Table 3. Iowa Declination Rates by Crime Level (2008)

<table>
<thead>
<tr>
<th>Severity Level</th>
<th>Total Cases</th>
<th>Declinations</th>
<th>Declination Rate (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Simple Misdemeanors</td>
<td>62,076</td>
<td>307</td>
<td>0.49%</td>
</tr>
<tr>
<td>Serious Misdemeanors</td>
<td>41,877</td>
<td>1,415</td>
<td>3.38%</td>
</tr>
<tr>
<td>Aggravated Misdemeanors</td>
<td>22,293</td>
<td>842</td>
<td>3.78%</td>
</tr>
<tr>
<td>Felonies</td>
<td>25,077</td>
<td>1,765</td>
<td>7.04%</td>
</tr>
</tbody>
</table>

(unpublished data set) (on file with the Columbia Law Review). The Iowa data set included figures on the number of cases "charge[d]" and "not filed." I aggregated these figures to derive the total number of cases for each of the crime categories at each of the crime severity levels. Additionally, I aggregated the figures for all severity levels of felonies, as indicated supra note 293. I then divided the number of "not filed" cases by the absolute number of cases to calculate the declination rate.

297. Id. To construct Table 2, I performed the same calculations described supra note 296. However, here, I aggregated the figures for all severity levels of misdemeanors.

298. Id. To construct Table 3, I performed the same calculations described supra note 296. However, here, I aggregated all crime categories for each severity level. The figures include a small number of crimes categorized as "other" (as opposed to "violent," "property," "drug," or "public-order"). Consequently, the total number of all cases in Table 3 is slightly greater than the total number of all cases in Tables 1 and 2, collectively.

299. See infra Table 4.


302. See supra Part IV.B (describing deferential relationship between prosecutors and police and prosecutorial inability to ascertain equitable differences between cases).
ply doing better jobs screening arrests. Order maintenance policing is, after all, something of a New York City phenomenon (at least within the state), so officers in other counties might feel less pressure to show zero tolerance for public order offenses.

In any event, for the purposes of this project, it is more important to focus on the types of charges that city prosecutors decline most frequently. Accordingly, I selected the nineteen crimes for which there were more than 10,000 dispositions in New York City over the four-year period from 2005 through 2008, and then I ranked these crimes according to declination rate. As expected, prosecutors were more willing to charge police-initiated cases. Thus, the data show that, of the eight crimes with the highest declination rates, all eight typically rely on police observation. Resisting arrest is the only one of these crimes that tends to have concrete victims, but, significantly, the victims are police officers. Thus, a high charge rate for resisting arrest is consistent with expected trends. Indeed, the twofold difference in the declination rate between resisting arrest and conventional assault—6.50% versus 13.02%—illustrates the significant degree to which prosecutors are beholden to and rely upon police and are therefore motivated to pursue police-initiated cases.

Perhaps most significantly, in New York City (as in Iowa), the most frequently charged offenses are almost exclusively public order offenses. Specifically, three of the first four crimes with the lowest prosecutorial declination rates (theft of services, prostitution, and trademark counterfeiting) are the only pure public order crimes on the list. Even the third crime in rank order (possession of a forged instrument) is typically used to prosecute individuals who possess fake identification, license plates, or vehicle registration, and it is thus something of an order maintenance policing tool, too. Admittedly, the trend is not universal. Spe-

---

303. See Harcourt, Illusion of Order, supra note 175, at 91–92 ("What is particularly striking is that many [large U.S.] cities did not implement New York-style order-maintenance policing.").

304. See infra Table 4.

305. I consider an arrest police-initiated where it does not typically arise out of a citizen complaint (but is instead the product of police observation on the beat), and where prosecution does not typically depend on a lay witness. See, e.g., Donald J. Black, The Social Organization of Arrest, 23 Stan. L. Rev. 1087, 1102 (1971) (referring to arrests that arise out of police observation as “police-initiated” and arrests that arise out of citizen observation as “citizen-initiated”); cf. Debra Livingston, Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing, 97 Colum. L. Rev. 551, 578 (1997) (comparing proactive, “preventive” public-order policing with conventional “reactive, restrictive” model of policing in which police mobilize in response to crimes that have already taken place). Each of the eight crimes with the highest declination rates listed in Table 4 would seem to meet these criteria.

306. See infra Table 4 and notes 314, 316 (discussing how prosecutors use theft of services and trademark counterfeiting to prosecute fare evasion and unlicensed street vending, respectively).

307. See infra note 315.
cifically, the declination rates are fairly high for trespass and criminal-mischief offenses, notwithstanding the fact that police often use these statutes as order maintenance tools.308 However, both trespass and criminal mischief do, at least sometimes, also feature concrete victims and may depend upon lay-witness cooperation.309 In any event, the more general point seems to hold: Prosecutors tend to charge petty public order crimes more frequently than core felonies.310 Indeed, the first core (or "index") crime to appear on the list is larceny, which prosecutors declined approximately three times more frequently than turnstile hops or prostitution. Remarkably, prosecutors even declined homicide at more than twice the rate (5.01%) that they declined turnstile hops or prostitution.312


309. For instance, under New York law, criminal mischief consists of unlawful damage to the property of another. N.Y. Penal Law § 145 (McKinney 2010). It is worth noting that criminal mischief is not frequently used to prosecute making graffiti, which is a crime expressly covered by another misdemeanor statute. See N.Y.C. Admin. Code § 10-117 (Supp. 2008) (prohibiting "[d]efacement of property, possession, sale, and display of aerosol spray paint cans and broad tipped markers . . . in certain instances").

310. Importantly, with respect to the New York data set, a grand jury decision not to indict is not recorded as a prosecutorial declination. Declinations include only the initial decision by the prosecutor not to pursue charges. E-mails from Marge Cohen, N.Y. Div. of Criminal Justice Servs., to Kristin Glover, Research Librarian, Univ. of Va. Sch. of Law (May 19, 2010) (on file with the Columbia Law Review). With respect to the Iowa data set, a grand jury decision not to indict would be coded as a declination. However, there are likely only a trivial, if not nonexistent, number of failures of Iowa grand juries to indict in that data set, because, in the first instance, Iowa does not require grand jury indictments even for felonies, and prosecutors, therefore, rarely submit prospective charges to grand juries. E-mail from Phyllis Blood, Justice Sys. Analyst, Div. of Criminal & Juvenile Justice Planning, Iowa Dep't of Human Rights, to Kristin Glover, Research Librarian, Univ. of Va. Sch. of Law (May 25, 2010) (on file with the Columbia Law Review). As to both data sets, a decision to charge a felony as a misdemeanor is not recorded as a declination.


312. New York Statewide Data Set, supra note 301 (indicating that prosecutors declined 155 of 3,052 homicide arrests). Homicide crimes were left off of Table 4 because they were not among the nineteen most common offenses (offenses for which there were more than 10,000 total dispositions over a three-year period).


**Table 4. New York City Declination Rates (2005–2008)**

<table>
<thead>
<tr>
<th>Crime</th>
<th>Total Dispositions</th>
<th>Total Declinations</th>
<th>Declination Rate (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Theft of Services(^{314})</td>
<td>64,156</td>
<td>1,441</td>
<td>2.25</td>
</tr>
<tr>
<td>Prostitution</td>
<td>25,904</td>
<td>586</td>
<td>2.26</td>
</tr>
<tr>
<td>Possession of Forged Instrument(^{315})</td>
<td>18,289</td>
<td>710</td>
<td>3.88</td>
</tr>
<tr>
<td>Trademark Counterfeiting(^{316})</td>
<td>10,443</td>
<td>413</td>
<td>3.95</td>
</tr>
<tr>
<td>Marijuana Possession</td>
<td>23,135</td>
<td>1,194</td>
<td>5.16</td>
</tr>
<tr>
<td>Drug Sales</td>
<td>62,506</td>
<td>3,643</td>
<td>5.83</td>
</tr>
<tr>
<td>Resisting Arrest</td>
<td>21,346</td>
<td>1,383</td>
<td>6.50</td>
</tr>
<tr>
<td>Drug Possession</td>
<td>172,183</td>
<td>11,395</td>
<td>6.62</td>
</tr>
<tr>
<td>Larceny</td>
<td>104,950</td>
<td>8,159</td>
<td>7.77</td>
</tr>
<tr>
<td>Marijuana Possession</td>
<td>133,346</td>
<td>11,904</td>
<td>8.93</td>
</tr>
<tr>
<td>Burglary</td>
<td>15,912</td>
<td>1,431</td>
<td>8.99</td>
</tr>
<tr>
<td>Robbery</td>
<td>40,556</td>
<td>3,951</td>
<td>9.74</td>
</tr>
<tr>
<td>Contempt</td>
<td>24,532</td>
<td>2,628</td>
<td>10.71</td>
</tr>
<tr>
<td>Trespass</td>
<td>66,166</td>
<td>7,412</td>
<td>11.20</td>
</tr>
<tr>
<td>Criminal Mischief</td>
<td>29,080</td>
<td>3,326</td>
<td>11.44</td>
</tr>
<tr>
<td>Menacing</td>
<td>18,889</td>
<td>2,365</td>
<td>12.25</td>
</tr>
<tr>
<td>Assault</td>
<td>151,241</td>
<td>19,751</td>
<td>13.06</td>
</tr>
<tr>
<td>Possession of Stolen Property</td>
<td>11,215</td>
<td>1,851</td>
<td>16.50</td>
</tr>
</tbody>
</table>

313. Id. The New York data included figures on the “total [number of] disp[osition]s” and on the number of cases that prosecutors “declined to pros[ecute]” for each criminal statute in the penal code. I first determined for which crimes there were over 10,000 dispositions in New York City. To make this determination, I aggregated all grades of any crime that consisted of multiple grades. For instance, the penal code criminalizes three grades of robbery. See N.Y. Penal Law §§ 160.05, 160.10, 160.15 (McKinney 2010) (describing third-, second-, and first-degree murder). Thus, I combined the figures for all three statutes to determine a total number of robbery dispositions and declinations. Then, I divided the number of cases that prosecutors had “declined to pros[ecute]” by the “total disp[osition]s” in order to calculate the declination rate.

314. City prosecutors use theft of services to prosecute fare evasion on the city’s subways. See N.Y. Penal Law § 165.15(3) (“A person is guilty of theft of services when . . . [w]ith intent to obtain railroad, subway, bus, air, taxi or any other public transportation service without payment of the lawful charge therefor, . . . he obtains or attempts to obtain such service . . . by . . . unjustifiable failure or refusal to pay”); Freda F. Solomon, N.Y.C. Criminal Justice Agency, Inc., CJA Research Brief No. 3: The Impact of Quality-of-Life Policing 2 (2003), available at http://www.cjareports.org/reports/brief3.pdf (describing heavy use of theft of services to prosecute subway fare beating).


316. City prosecutors use trademark counterfeiting to prosecute certain types of unlicensed street vending. See Anthony M. DeStefano, Peddlers Uneasy Part of Street, Newsday (N.Y.), Dec. 15, 2009, (detailing rise in use of trademark counterfeiting to prosecute street peddlers and quoting NYPD spokesman that “[p]eddlers can be at some level a quality of life [issue]”); People v. Guan, No. 570677/02, 02-262, 2003 WL 21169478 (N.Y. App. Term May 7, 2003) (peddling counterfeit sunglasses); People v. Thiam, 736
C. The Costs of Normatively Wrongful Nominal Convictions

In the contemporary criminal justice system, the discretionary decision to decline prosecution is perhaps the greatest source of disparate case outcomes. Much of the most consequential action is discretionary inaction. But, disproportionately, arrestees in more serious cases are the beneficiaries of such inaction. And, notably, even if prosecutors happen to charge erroneously (for equitable reasons) a legally guilty serious felon, prosecutors can somewhat readily correct such errors after the fact with pleas to normatively appropriate lesser charges. After all, it stands to reason that most legally guilty serious felons should normatively be charged with at least some crime, albeit perhaps not the top sustainable charge. By contrast, the prosecutor who makes an equitable error when charging a legally guilty petty offender is less likely to effectively remedy the error post-charge, because the error is typically not that the defendant normatively should have been charged with a lesser crime and there often are no lesser crimes. The error is that the defendant should not have been charged in the first instance.

The normatively innocent defendant who receives a somewhat favorable plea may escape with a nominal conviction, but nominal convictions are still convictions—convictions that impact the defendant’s education, employment, immigration, and housing prospects. For instance, even a conviction for a marijuana violation (a noncriminal offense) may result in eviction from public housing. Additionally, a prior arrest, prosecution, and conviction for a minor offense often may serve as a predicate to elevate a subsequent petty charge from a noncriminal violation to a misdemeanor or from a misdemeanor to a felony. More gen-


317. Allen et al., supra note 132, at 1045 (“[P]rosecutorial decisions not to charge, or to charge for a lower offense than the facts might justify, are the primary way in which potential criminal defendants achieve successful outcomes from the system.”); Frank H. Easterbrook, Plea Bargaining as Compromise, 101 Yale L.J. 1969, 1978 (1992) (“[T]he greatest disparity in sentencing is between those convicted at trial and those not prosecuted.”).

318. See Davis, Discretionary Justice, supra note 14, at 4 (surmising “perhaps inaction decisions are ten or twenty times as frequent as action decisions” among discretionary administrative actors); Sarat & Clarke, supra note 2, at 392 (“[D]ecisions not to prosecute . . . are notable for how routine, even banal they are.”); Vorenberg, supra note 3, at 1524 n.10 (citing “[s]udies indicate[ing] that only a minority of matters received by prosecutors result in charges”).

319. 42 U.S.C. § 1437d(k) (2006) (creating possibility of expedited process for “eviction or termination of tenancy that involves . . . any . . . drug-related criminal activity on or off such premises, or any activity resulting in a felony conviction”); see, e.g., Mayes v. Hernandez, No. 402858/07, 2007 WL 4356450, at *5 (N.Y. Sup. Ct. Dec. 6, 2007) (holding that tenant may be evicted even if guest possessed and sold marijuana in tenant’s home, where guest was child of evicted parent unaware of child’s conduct).

320. See, e.g., N.Y. Penal Law § 240.37 (McKinney 2010) (providing that loitering, for purposes of prostitution, is noncriminal violation unless defendant has previously been convicted of prostitution-related offense, in which case offense is elevated to
eral, the collateral costs of petty convictions can effectively limit opportunities and thereby serve as gateways to more serious crime. 

The importance of these potentially debilitating collateral consequences cannot be overstated. Scholars pay significant attention to the incarceration boom and the difficulties former inmates face in their attempts to reenter law-abiding society. Undoubtedly, scholars are right to spill so much ink on such big problems, but not to the exclusion of the injustices and inefficiencies that attend to the much larger cohort of petty convictions. Analogously, in the innocence context, courts and commentators tend to focus myopically on prominent (and comparatively rare) instances of wrongful legal conviction that lead to grievous injustices in serious felonies cases. In the process, it may be that inadequate attention has been paid to normative innocence and, more generally, to the systemic pathologies that predominately affect legally guilty persons. In a recent case, Judge John Gleeson put it better than me:

When people think about miscarriages of justice, they generally think big, especially in this era of DNA exonerations, in which wholly innocent people have been released from jail in significant numbers after long periods in prison. As disturbing as those cases are, the truth is that most of the time miscarriages of justice occur in small doses, in cases involving guilty defendants. This makes them easier to overlook. But when they are multiplied by the thousands of cases in which they occur, they have a greater impact on our criminal justice system than the cases you read about in the newspapers or hear about on 60 Minutes.

Thus, the focus on legal innocence may distract from the very notion of what innocence ought to mean. In the preceding three sections, I have offered a number of previously unexplored reasons for pause—reasons to believe that prosecutors are motivated systematically to underex-

misdemeanor); Ewing v. California, 558 U.S. 11, 17 (2003) (describing "wobbler" offenses under California law, which can be classified as felonies or misdemeanors, contingent on, inter alia, defendant's prior record).


exercise equitable discretion and thereby charge and ultimately punish too many legally guilty petty crime defendants. The proposition may seem odd that punishing any number of legally guilty defendants is, in fact, too many, but the scope of innocence is broader than its legal and factual parts. And a failure to adequately account for the normative innocence of even a legally guilty defendant is nothing less than a type of wrongful prosecution and conviction.325

CONCLUSION

In Before the Law, Kafka offers the story of a man who, for decades, seeks “admittance to the Law[,]” a place the man somewhat foolishly believes “should surely be accessible at all times and to everyone.”326 But a sentry blocks the man at the entrance and ignores his persistent entreaties that continue for decades. When, at the edge of death, the man asks the sentry why, over the many years, “no one but myself has ever begged for admittance?” the sentry replies: “No one else could ever be admitted here, since this entrance was made for you. I am now going to shut it.”327

The meaning of this chilling parable is obscure, but, plausibly, the story highlights two pervasive features of modern justice that make for an uncomfortable fit: Law enforcement and adjudication are intended to be equitably individualized, but professionals are put to the task. In the criminal context, the result is an insider-dominated justice system that leaves laypersons in the dark and allows professional functionaries to act according to idiosyncratic rules, norms, preferences, and biases.328 Significantly, then, even though the modern criminal justice system has seen fit to provide defendants with a veritable suite of legal protections to guard against capricious exercises of state power, the system concurrently has left undisturbed the authority of the professional executive to determine whether and which easy legal cases normatively ought to proceed. This state of affairs is not, however, indefensible: Even if the prosecutor’s decisionmaking is flawed, if it is least problematic (all else equal), then discretionary authority is allocated appropriately. However, the truth of this unstudied assumption is far from clear.

In fact, there are significant reasons to worry about allocating equitable charging discretion exclusively to professional prosecutors, and the

325. See supra Part II.A (discussing need for actors in criminal justice system well-suited to exercise equitable discretion).
327. Id. at 4.
328. See Bibas, Transparency, supra note 31, at 912–14 (describing effects of exclusion of outsiders in justice system); see also Feeley, supra note 27, at 3–4 (describing “chaotic and confusing” pace of urban criminal court in which “officials communicate in verbal shorthand wholly unintelligible to accused and accuser alike”); Pound, Criminal Justice, supra note 150, at 190–91 (describing “frequent suggestion of something working behind the scenes, which . . . create[s] in the minds of observers a general suspicion of the whole process of law enforcement which . . . gravely prejudices the law”); Vorenberg, supra note 3, at 1522 (describing “unreviewable powers . . . vested in the prosecutor”).
institutional problems are particularly pronounced in the context of public order crime enforcement. I do not pretend to know what the optimal charge level is for such cases. Nor do I claim to have some insight into what constitutes valid reasons for the exercise of equitable discretion. No one can know such things. But, as indicated, stakeholders anticipate some exercise of nonprosecution of public order cases.\footnote{See supra Part I (examining three forms of discretion and defending exercise of equitable discretion).} Undoubtedly, then, the optimal declination rate is greater than zero. And it stands to reason that the optimal rate must also be significantly higher than the prevailing (quite low) rate, because the current institutional architecture is pathological.\footnote{I understand that this is something of an argument for leniency, but, in a system of rules, a call for individualization necessarily tends toward leniency. See Nussbaum, supra note 61, at 86 (noting leniency was understood outcome of equity—or epieikeia—as practiced by ancient Greeks). Notably, an unduly high charge rate may undermine deterrence (or what Paul Robinson called “normative crime control”) by weakening lay perceptions of systemic legitimacy. Robinson, Normative Crime Control, supra note 45, at 1840–41. Previously, I explored some of these legitimacy concerns in a symposium essay. See Bowers, Grassroots Plea Bargaining, supra note 179, at 91–94. And I plan to do so again in more detail in a forthcoming article. See Bowers, Outsourcing, supra note 21, at 105.} Specifically, the system is shot through with biases against the pre-charge exercise of equitable discretion in the precise types of cases where individualization is most essential to perfecting justice.\footnote{See supra Part IV (discussing institutional reasons for prosecutorial and police biases).}

Of course, it is no easy task to identify or construct an ideal institutional architecture for any discretionary regime. At a high level of abstraction, such a model system should consist of a division of discretionary power between multiple parties (though not too many) each of whom exercises her discretionary power independently of the others, free from improper professional incentives. Such a discretionary regime could be thought of as a gauntlet of independently functioning switches.\footnote{Kadish & Kadish, supra note 25, at 202, 204 (observing “departures from rules” require “a system so organized that its various discrete parts in the performance of their functions check and balance rather than interlock and reinforce one another”). Such a system has an analogue in constitutional principles of both separation of powers and federalism. See, e.g., Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (“The doctrine of the separation of powers was adopted . . . not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was . . . by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”); Thomas Lundmark, Power & Rights in U.S. Constitutional Law 93 (2d ed. 2008) (“[F]or federal structures like the one in the United States . . . [t]he most frequent justification is roughly the same as the policy underlying the principle of separation of powers: division of the monopoly on governmental powers to avoid tyranny, caprice, and oppression.”).} The suspect who runs the well-structured discretionary gauntlet and finds himself convicted and punished is likely to be the kind of person for whom conviction and punishment is normatively appropriate. The right number of switches is unclear: Admittedly, too many switches could lead
to underpunishment, especially in the core criminal cases that should result in something closer to categorical enforcement.\textsuperscript{333} But, in the petty crime context, the problem is not too many switches; it is too few. Executive bodies are often the only entities that can realistically stand between suspects and somewhat inevitable convictions. But professional police and prosecutors are motivated to stand aside, not in the way.

In a related context, Justice Scalia indicated a systemic need for a "circuitbreaker" capable of interrupting unwarranted use of "the State's machinery of justice."\textsuperscript{334} To combat executive underuse of equitable discretion, it may be necessary to insert an equitable "circuitbreaker"—to add a normative switch. In a forthcoming article, I take up the problem of how to operationalize an effective equitable screen.\textsuperscript{335} Specifically, I propose a lay body—analagous to the grand jury—that would presume evidentiary sufficiency and would, instead, address only normative questions of whether charges equitably ought to be filed. More generally, I highlight certain arguments in favor of sharing equitable power between the professional executive and a lay-dominated institution. In doing so, I do not claim that lay intuition is decidedly superior, only that some lay involvement is better than none when it comes to resolving questions of normative innocence, and, therefore, that the criminal justice system should consider mechanisms to admit lay intuition. Of course, problems remain over how to structure an efficient lay equitable screen and how to minimize the danger of lay discrimination cloaked as equitable discretion. However, such a screen need not unduly sacrifice efficiency, equality, and rule-of-law values. If nothing else, the possibilities for a robust and appropriate lay equitable screen at least deserve attention.

The bottom line is that professionals are not so uniquely competent to reach normative determinations, and lay bodies are not so obviously inept. Accordingly, the criminal justice system should experiment with

\textsuperscript{333} In any event, in these more serious cases, grand juries or preliminary hearings typically exist to screen problematic prosecutions. Grand juries and preliminary hearings ostensibly provide only legal (and not equitable) screens, but numerous scholars have posited that the grand jury’s true and historical function may, in fact, be more equitable. See, e.g., Fairfax, Grand Jury Discretion, supra note 129, at 706 ("[T]he grand jury was never designed as a mere sounding board to test the sufficiency of the evidence . . . Where the grand jury truly adds value is through its ability to exercise robust discretion not to indict where probable cause nevertheless exists . . . ."); Ric Simmons, Re-Examining the Grand Jury: Is There Room for Democracy in Our Criminal Justice System?, 82 B.U. L. Rev. 1, 16 (2002) (noting early grand jury decisions were based on "ever-shifting political grounds," not "immutable legal standards").


\textsuperscript{335} Bowers, Outsourcing, supra note 21, at 59–61.
charging decisions to find some interval for lay participation in the “exercise . . . [of] practical judgment in one of the central events of our political life—the inculpation of another.”336

336. Huigens, Virtue and Inculpation, supra note 109, at 1445.