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Charging on the Margin

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ABSTRACT

The American criminal justice system has experienced a significant expansion in the number and severity of penalties triggered by misdemeanor convictions. In particular, legislatures have increasingly attached severe collateral consequences to misdemeanor offenses—penalties such as requirements to register as a sex offender, prohibitions on owning or possessing a firearm, and deportation. Although there is a wealth of scholarship studying the effect this development has on defendants and their attorneys, little attention has been paid to the impact collateral consequences have on prosecutorial incentives. This Article starts to remedy that gap by exploring the influence that collateral consequences exert on initial charging decisions in low-level prosecutions.

Critically, the ability to impose certain collateral consequences through a misdemeanor conviction unlocks an array of additional charging options for prosecutors. As a result, prosecutors are now more likely to engage in a practice I term "strategic undercharging." A prosecutor engages in strategic undercharging when she charges

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a lesser offense than she otherwise could, but does so for reasons that advance her own prosecutorial aims—and not as an act of grace or leniency. In other words, prosecutors can sometimes gain more by charging less. By explaining why (and when) prosecutors are likely to engage in strategic undercharging, this Article complicates the conventional wisdom that prosecutors reflexively file the most severe charges available.

This Article also proposes that collateral consequences be factored into the determination of what procedural safeguards are afforded a criminal defendant. Under existing law, collateral consequences are generally deemed irrelevant to that inquiry; the degree of procedural protection provided in a given case turns exclusively on the threatened term of incarceration. Changing this approach could have several salutary effects on the administration of collateral consequences. At a minimum, it would honor a basic principle underlying our criminal justice system: the threat of serious penalties warrants serious procedures.

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INTRODUCTION

Misdemeanor or felony? That is a question prosecutors routinely ask themselves when deciding what charges to file in a given case. And the answer is important, for misdemeanor prosecutions and felony prosecutions differ in significant ways. Among other things, felonies threaten more severe penalties than misdemeanors, but they also trigger more procedural safeguards.

Accordingly, when a prosecutor is deciding whether to bring a felony or misdemeanor charge, she generally must determine whether the ability to impose heightened penalties is worth the costs generated by the more demanding procedures. Sometimes the answer is obvious—homicide will be charged as a felony, jaywalking as a misdemeanor. But often the answer is not so clear. For many cases, the alleged conduct could plausibly be charged either as a felony or as a misdemeanor. In those circumstances, prosecutors must decide whether the ability to impose felony penalties is worth enduring felony procedures.

That, at least, is the choice prosecutors traditionally faced when charging on the margin. Over the last two decades, however, the American criminal justice system has experienced a significant expansion in the number and severity of penalties triggered by misdemeanor convictions.[1] Specifically, legislatures have increasingly attached severe collateral consequences to misdemeanor offenses—consequences that formerly were triggered only by felonies.[2] For example, misdemeanor convictions can now lead to a defendant being required to register as a sex offender, prohibited from owning or possessing a firearm, or deported.[3]

This Article's primary claim is that attaching those sorts of collateral consequences to misdemeanor offenses provides prosecutors with strong incentives to charge a borderline case as a misdemeanor

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1. *See infra* note 43 and accompanying text.

2. Collateral consequences are sanctions that fall outside the sentencing authority of the trial court. Some prominent examples include disenfranchisement, sex offender registration, and firearm prohibitions. They are distinct from a conviction's so-called direct consequences, which include incarceration, fines, and terms of probation. For more on the difference between collateral and direct consequences, see *infra* Part I.A.

3. *See infra* notes 57-59 and accompanying text.

rather than a felony. This claim rests principally on two widely accepted facts.

First, in many criminal cases, the most significant penalty at stake is a collateral consequence rather than incarceration.[4] This is especially true for cases involving relatively low-level prosecutions, which I consider for the purposes of this Article to be prosecutions for either a low-grade felony or a misdemeanor. In those cases, a collateral consequence will often be a prosecutor's most potent and enduring sanction.

Collateral consequences can frequently be used to further a prosecutor's sentencing aims, including the standard goal of reducing threats to public safety.[5] Such consequences take on even more significance in low-level prosecutions given their relative duration. Although incarceration terms for low-level convictions typically top out at a couple of months—and rarely more than a few years—several key collateral consequences last for decades or even life.[6] For example, the obligation to register as a sex offender lasts for a minimum of fifteen years and sometimes for life.[7] Firearm prohibitions are typically lifetime bans.[8] And deportation results in permanent exclusion from the United States.[9] In short, as the drafters of the Uniform Collateral Consequences of Conviction Act

4. Many criminal defendants are sentenced to little or no jail time upon conviction. *See* Gabriel J. Chin, *What Are Defense Lawyers For? Links Between Collateral Consequences and the Criminal Process*, 45 TEX. TECH L. REV. 151, 153 nn.19-21, 54 n.22 (2012) (observing that 79 percent of all convictions are for misdemeanors and that approximately only 20 percent of those cases result in any term of incarceration; also observing that 60 percent of all felony convictions result in little or no incarceration). But nearly every conviction carries with it one or more collateral consequences. *See* Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1214 (2010) ("All individuals convicted of criminal offenses, regardless of their sentences, are forced to confront the various collateral consequences—additional legal penalties—that result from their convictions.").

5. *See infra* notes 83, 90 and accompanying text.

6. Chin, *supra* note 4, at 153-54.

7. Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1087 (2012).

8. Conrad Kahn, *Challenging the Federal Prohibition on Gun Possession by Nonviolent Felons*, 55 S. TEX. L. REV. 113, 113-14 (2013).

9. *See* Heidi Altman, *Prosecuting Post-*Padilla*: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 9-11 (2012).

correctly observed, "collateral consequences in many instances are what is really at stake, the real point of achieving a conviction."[10]

The second key point involves the relationship between collateral consequences and adjudicatory procedures. Collateral consequences are generally deemed irrelevant for determining what procedural safeguards must be afforded a criminal defendant.[11] Felony defendants possess a bundle of heightened procedural entitlements—such as rights to a grand jury, a preliminary hearing, increased discovery, and a jury trial—that misdemeanor defendants are often denied.[12] Critically, the fact that a misdemeanor conviction will result in a severe collateral consequence does not trigger any heightened procedural protections.[13]

Given these two facts—that collateral consequences are often the most important component of a criminal prosecution and that they do not trigger heightened procedural protections—it should become clear how the attachment of severe collateral consequences to misdemeanor offenses affects prosecutorial incentives. Prosecutors are more likely to file misdemeanor charges because they can still achieve the penalty they desire without having to endure the greater costs generated by felony prosecutions.[14]

At first blush, the choice to file a misdemeanor charge involving a severe collateral consequence may appear to be a win-win for both sides: prosecutors can pursue the case in a more efficient manner,

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10. UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT, Prefatory Note at 4 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010) [hereinafter UNIF. ACT]; *see also* Chin, *supra* note 4, at 161-62 ("Congress and state legislatures have made imposing collateral consequences on individuals one of the central functions of the criminal justice system."); Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699 (2002) ("[T]he imposition of collateral consequences has become an increasingly central purpose of the modern criminal process.").

11. *See infra* note 254 and accompanying text.

12. *See infra* Part II.B. To be clear, not all misdemeanor defendants are deprived of all such safeguards. For example, some misdemeanor defendants enjoy a constitutional right to a jury trial. *See* Blanton v. City of N. Las Vegas, 489 U.S. 538, 542 (1989) (holding that defendants charged with an offense that threatens more than six months imprisonment have a right to a jury trial).

13. *See* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1325 (2012).

14. The incentive to file misdemeanor charges can be further strengthened by the fact that misdemeanors are often easier to prove than felony offenses. Among other things, misdemeanor offenses tend to have fewer elements and relaxed mens rea requirements. *See infra* notes 174-78 and accompanying text.

and the defendant is exposed to less potential incarceration.[15] But, as is frequently the case with first glances, the full picture is more complicated—especially for criminal defendants. The decision of what charge to initially file can have a domino effect on nearly every other aspect of the case: the procedures afforded the defendant, the identity of the prosecutor handling the case, the identity of the defense attorney charged with holding the government to its burden (or negotiating a favorable plea), and the identity of the judge managing the case to its conclusion.[16] On each of those fronts, the defendant who is charged with a misdemeanor may be left at a greater disadvantage than if he had been charged with a felony.

Felony defendants enjoy a bundle of procedural safeguards that misdemeanor defendants typically do not.[17] These safeguards are designed not only to ensure fair and accurate adjudications but also to provide defendants with meaningful bargaining chips during negotiations.[18] Moreover, misdemeanor prosecutors are usually the most junior members of the office and tend to be harsher than their felony colleagues.[19] They are accordingly less likely to bargain away potential penalties on equitable grounds alone.[20] As for misdemeanor defense attorneys, they tend to be the least experienced while carrying the most voluminous caseloads.[21] Consequently, a meaningful vetting of the government's case is usually the exception and not the rule. Finally, misdemeanor courts suffer the most acute docket pressures, meaning that those judges are likely to prioritize speed and docket clearance above all else.[22]

This Article proposes that collateral consequences be considered when determining what procedural safeguards must be afforded defendants. Under existing law, that determination rests almost entirely on the maximum term of incarceration authorized by the charged offense. But this longstanding approach fails to reflect an

15. *See* Chin, *supra* note 4, at 153-54.

16. *See infra* Part II.B.

17. *See infra* Part II.B.

18. *See* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1151-52 (2008).

19. *See infra* Part III.C.

20. *See* Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1087-88 (2014).

21. *See infra* notes 237-39 and accompanying text.

22. *See infra* notes 229-32 and accompanying text.

important new reality: severe penalties in the form of collateral consequences are no longer reserved for felony convictions but are now triggered by misdemeanor convictions as well. As detailed below, adoption of this proposal could have several salutary effects on the administration of collateral consequences. At a minimum, it would honor a basic principle underlying our criminal justice system: the threat of serious penalties warrants serious procedures.

By examining how the attachment of certain collateral consequences to misdemeanor offenses influences prosecutorial charging decisions in low-level prosecutions, this Article makes two contributions to the scholarly literature.

The first is to enrich our understanding of the various charging options available in a prosecutor's toolbox. Much ink has been spilled—and rightly so—about the strategy known as overcharging.[23] This Article identifies an additional charging tactic that has eluded scholarly attention thus far—a practice I term "strategic undercharging." A prosecutor engages in strategic undercharging when she charges a lesser offense than she otherwise could, but she does so for reasons that advance her own prosecutorial aims and not as an act of grace or leniency. The conventional wisdom, which is rooted in the lessons of overcharging, is that prosecutors file the most severe charges available.[24] This Article complicates that narrative by explaining why, at least in certain contexts,

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23. At the risk of oversimplification, a prosecutor engages in overcharging when she charges a case more severely than she ultimately thinks is warranted—by filing either more charges or a single charge at a higher level than she ultimately thinks the case merits. The prosecutor can then use the threat of "unduly harsh potential punishments" as "leverage in bargaining, offering substantial so-called concessions that merely lead to convictions and sentences only on the *warranted* charges." Bowers, *supra* note 18, at 1155.

For a very small sampling of the extensive literature examining overcharging, see Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85-105 (1968) (explaining the difference between horizontal overcharging and vertical overcharging); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 862-73 (1995); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1960-65 (1992).

24. *See, e.g.*, ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 31 (2009) ("Prosecutors routinely engage in overcharging, a practice that involves 'tacking on' additional charges that they know they cannot prove beyond a reasonable doubt or that they can technically prove but are inconsistent with the legislative intent or otherwise inappropriate."); Meares, *supra* note 23, at 868-69 (claiming that "[o]vercharging is systemic" and that prosecutors "often believe that it is in [their] best interests to charge the defendant with the most serious and as many crimes at the outset of the case").

prosecutors will not reflexively file the most serious charge possible.[25] Prosecutors will sometimes exercise their charging prerogative by filing a lesser charge and, in so doing, gain the strategic advantage that comes from significantly reducing a defendant's procedural entitlements.

The second contribution that this Article makes is to shine a light on the relationship between collateral consequences and procedural safeguards. Scholars have thoroughly examined collateral consequences and the right to counsel, including the advice defendants are constitutionally entitled to receive about potential consequences of conviction.[26] But whether potential collateral consequences should impact a defendant's procedural entitlements has escaped sustained scholarly scrutiny. This Article begins to remedy that gap by interrogating the continued wisdom of relying solely on potential imprisonment as the metric for determining the procedural safeguards afforded a defendant.

The Article proceeds in four Parts. Part I provides background information about collateral consequences, their expansion into the universe of misdemeanor offenses, and their relative importance to prosecutors in low-level cases. Part II examines the incentives that

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25. *See infra* Part II.

26. *See generally* Gabriel J. Chin, *Making* Padilla *Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675 (2011); Chin, *supra* note 4; Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585 (2011); Chin & Holmes, *supra* note 10; John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 28 n.170 (2013); Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119 (2009) [hereinafter Roberts, *Ignorance*]; Jenny Roberts, *Proving Prejudice, Post-*Padilla, 54 HOW. L.J. 693 (2011); McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOLEDO L. REV. 479 (2005). The recent scholarly focus on defense counsel and advice is unsurprising given that it was the subject at issue in *Padilla v. Kentucky*. *See* 559 U.S. 356, 359-60 (2010).

By contrast, examination of the influence that collateral consequences have on prosecutors and their charging decisions has been minimal. *See, e.g.*, MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE § 8:3 (2013) ("[T]here has been little attention paid to whether prosecutors should take collateral consequences into account when making charging decisions."); Altman, *supra* note 9, at 8 ("The role of the prosecutor ... has been largely unaddressed in the literature and advocacy materials that have emerged since *Padilla*."). Altman's article appears to be the main exception to this trend. However, her article focuses exclusively on the role deportation plays during plea bargaining and not its impact on initial charging decisions. *See id.* at 7.

lead prosecutors to engage in strategic undercharging when a severe collateral consequence is triggered by a misdemeanor offense. Part III explores some of the ripple effects caused by a decision to file a misdemeanor instead of a felony. Part IV explains why collateral consequences should be considered when determining what procedural safeguards are afforded a defendant.

I. THE SIGNIFICANCE OF COLLATERAL CONSEQUENCES

This Part describes the key role collateral consequences often play in low-level criminal prosecutions. Section A summarizes the distinction between collateral and direct consequences. Section B explains that misdemeanor offenses increasingly trigger significant collateral consequences, thereby eroding the sharp felony-misdemeanor divide that previously existed for collateral consequences. Section C identifies the collateral consequences that have the most salience from the perspective of prosecutors. Finally, Section D describes why prosecutors often view the imposition of one or more collateral consequences as the core objective of many low-level prosecutions.

A. Collateral Consequences vs. Direct Consequences

The legal consequences that flow from a criminal conviction are often divided into two groups: direct and collateral.[27] Although there

27. *See* Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 MINN. L. REV. 670, 678 (2008). Of course, criminal convictions can also have significant *nonlegal* consequences, including adverse effects on private employment prospects and various forms of social stigma. *See* John Bronsteen et al., *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1049-55 (2009) ("Researchers have discovered that any amount of incarceration creates a significantly higher likelihood that ex-inmates will suffer a variety of health-related, economic, and social harms with substantial negative hedonic consequences."). *See generally* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002) [hereinafter INVISIBLE PUNISHMENT]; Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103 (2013); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 624 n.1 (2006) (collecting sources). Although the term "collateral consequences" has occasionally been used to refer to nonlegal consequences, my use of the phrase is limited to a conviction's legally-imposed consequences. *See* LOVE ET AL., *supra* note 26, § 1:8.

is some dispute over how to define each category precisely,[28] the best rule of thumb—and the one that the Supreme Court suggests in its landmark decision in *Padilla v. Kentucky*—is that direct consequences are limited to those matters "within the sentencing authority of the state [or federal] trial court."[29] A collateral consequence, by contrast, is any sanction or disability imposed by law as a result of a criminal conviction that is *in addition to* the conviction's direct consequences.[30] In other words, collateral consequences "are not part of the explicit punishment handed down by the court; they stem from the fact of conviction rather than from the sentence of the court."[31]

There is general consensus that incarceration, fines, criminal forfeiture, and terms of probation or supervised release are all direct consequences of conviction.[32] Collateral consequences are generally understood to include sex offender registration, civil commitment, civil forfeiture, firearm prohibitions, disenfranchisement, preclusion from juror service, bans on running for public office, disqualification from public benefits (such as public housing or food assistance), ineligibility for business and professional licenses, termination or limitation of parental rights, and—for noncitizen defendants— deportation.[33]

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28. *See Padilla*, 559 U.S. at 364 n.8; Roberts, *supra* note 27, at 689-93 (detailing how courts have used at least three different formulations when articulating the line between direct and collateral consequences).

29. 559 U.S. at 364. Commentators have similarly emphasized the role and authority of the sentencing court when attempting to delineate the realm of collateral consequences. *See* LOVE ET AL., *supra* note 26, § 1:8 ("[W]e endorse 'collateral consequences' as a generally serviceable (if not entirely precise) term to describe the range of legal penalties and disabilities that flow from a criminal conviction over and above the sentence imposed by the court."). A focus on the sentencing authority of the trial court makes particular sense given the origins of the collateral consequence rule. *See infra* notes 34-36 and accompanying text.

30. *See, e.g.*, Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 510(d), 121 Stat. 2534, 2544 (2008); UNIF. ACT, *supra* note 10, § 2(1)-(2).

31. Pinard, *supra* note 27, at 634.

32. *See* Roberts, *Ignorance*, *supra* note 26, at 124.

33. *See* Chaidez v. United States, 133 S. Ct. 1103, 1108 n.5 (2013); *Padilla*, 559 U.S. at 376 (Alito, J., concurring); Chin & Holmes, *supra* note 10, at 705-06.

Some collateral consequences are mandatory in nature, whereas others afford the pertinent decision maker some degree of discretion when determining whether to apply them. The former, which are also known as "collateral sanctions," typically apply immediately and automatically upon conviction. *See* Court Security Improvement Act of 2007 § 510(d)(2). Common examples include sex offender registration, disenfranchisement, and firearm prohibitions. Discretionary "disqualifications," on the other hand, involve penalties

The distinction between direct and collateral consequences first gained legal prominence following the Supreme Court's decision in *Brady v. United States*.[34] *Brady* established that, in order to comply with the Due Process Clause's voluntariness requirement, a trial court needs to ensure only that a defendant is aware of the "direct consequences" of conviction before entering a guilty plea.[35] In other words, a trial court has no obligation to inform a defendant of a conviction's potential collateral consequences before it accepts the plea as valid.

Although *Brady* involved only a trial court's constitutional duties during plea colloquies, it reflected a view that later took root in several other criminal law domains: a conviction's collateral consequences do not warrant the same degree of procedural attention as a conviction's direct consequences.[36]

B. The Erosion of the Felony-Misdemeanor Line

The classification of offenses as felonies or misdemeanors has long been a foundational aspect of the American criminal justice system.[37] Among other things, the penalties facing the defendant typically turned on that classification.[38] In most jurisdictions, felonies are defined as offenses that authorize more than one year of imprisonment, whereas misdemeanors are offenses that authorize no more than one year of imprisonment.[39]

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or disabilities "that an administrative agency, official, or a court in a civil proceeding is authorized, but not required, to impose on an individual convicted" of an offense. *Id.* § 510(d)(3); *see* STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS & DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, § 19-1.1 (AM. BAR ASS'N 2004).

34. 397 U.S. 742 (1970); *see also* Chin & Holmes, *supra* note 10, at 706, 726-30 (discussing *Brady*). *Brady* was not, however, the first time that the Supreme Court had considered the potential relevance of collateral consequences. In a line of cases beginning in the 1940s, the Supreme Court held that a criminal defendant's appeal of his conviction was not rendered moot by the completion of his sentence of incarceration, so long as he remained subject to potential collateral consequences from the challenged conviction. *See* Sibron v. New York, 392 U.S. 40, 53-55, 57-58 (1968) (summarizing earlier decisions); Fiswick v. United States, 329 U.S. 211, 222 (1946).

35. *Brady*, 397 U.S. at 755 (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957)).

36. *See* Chin & Holmes, *supra* note 10, at 703-08.

37. *See* 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.8(c) (3d ed. 2007).

38. *See id.*

39. *See id.*

Although the line formally dividing felonies and misdemeanors is a prison-centric one, a substantial part of what previously distinguished felonies from misdemeanors was the number and severity of collateral consequences that flowed from a conviction.[40] Until relatively recently, only a felony conviction could trigger the majority of collateral consequences.[41] As Chief Justice Warren observed in 1960, "[c]onviction of a felony imposes a *status* upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities."[42]

Since the 1990s, however, more and more collateral consequences are triggered by misdemeanor convictions.[43] As a result, the sharp

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40. Indeed, this historic divide dates back to the English common law, where "[n]o crime was considered a felony which did not occasion a total forfeiture of the offender's lands, or goods, or both." United States v. Watson, 423 U.S. 411, 439 (1976) (Marshall, J., dissenting) (quoting Kurtz v. Moffitt, 115 U.S. 487, 499 (1885)).

41. *See* King, *supra* note 26, at 32 ("Conviction of serious crime has long carried the consequence of 'civil death,' by which the offender ... forfeited certain fundamental social rights. But whereas the historical phenomenon of civil death was limited in the past to the most serious categories of criminal activity, the current trend over the last quarter-century has been to alienate and exclude offenders through collateral consequences, even when convicted of very minor convictions.") (footnote omitted); *see, e.g.*, Walter Matthews Grant et al., Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 955-56 (1970) (outlining the breadth of civil disabilities statutes imposing collateral consequences on convictions). To be sure, some misdemeanor offenses resulted in collateral consequences as well. *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25, 48 n.11 (1972) (Powell, J., concurring) ("A wide range of civil disabilities may result from misdemeanor convictions, such as forfeiture of public office, disqualification for a licensed profession, and loss of pension rights.") (citations omitted). But the increase in collateral consequences attaching to misdemeanors and minor convictions is relatively recent. *See* Pinard, *supra* note 4, at 1214-15 ("[W]hat is relatively new is the scope of collateral consequences that burden individuals long past the expiration of their sentences and which ... frustrate their ability to move past their criminal records. At no point in United States history have collateral consequences been as expansive and entrenched as they are today."); *see also* King, *supra* note 26, at 17-33 (describing the dramatic increase in scope and severity of collateral consequences of minor criminal convictions).

42. Parker v. Ellis, 362 U.S. 574, 593-94 (1960) (Warren, C.J., dissenting); *see also* Baldasar v. Illinois, 446 U.S. 222, 227 (1980) (Marshall, J., concurring) (highlighting the gravity of an offense being "transformed from a misdemeanor into a felony" because of "all the serious collateral consequences that a felony conviction entails"); Blackledge v. Perry, 417 U.S. 21, 28 n.6 (1974) ("Moreover, even putting to one side the potentiality of increased incarceration, conviction of a 'felony' often entails more serious collateral consequences than those incurred through a misdemeanor conviction.").

43. *See* Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154-55 (1999) (discussing

ness of the distinction between felonies and misdemeanors—at least in terms of post-conviction consequences—has been dulled.[44]

C. Collateral Consequences and Prosecutors

Although scholars have primarily focused on how collateral consequences impact defendants and defense attorneys,[45] these consequences can also play an important role in how prosecutors charge (and later negotiate) a case. Indeed, the National Prosecution Standards promulgated by the National District Attorneys Association,[46] the United States Attorneys' Manual,[47] and the American

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the history of the scope of collateral consequences); Roberts, *supra* note 27, at 673-74 ("The number and severity of collateral consequences, including increasing bars to employment and housing, have greatly expanded in recent years. Many of these consequences now apply to relatively minor criminal convictions, and even to certain noncriminal convictions.") (footnote omitted).

The recent upsurge in misdemeanor convictions triggering collateral consequences is merely one part of an overall explosion of collateral consequences over the last three decades. *See* Roberts, *supra* note 27, at 701. Extensive literature details how and why legislatures increasingly adopted collateral consequences beginning in the late 1980s. *See, e.g.*, JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 66-68 (2005); Kevin G. Buckler & Lawrence F. Travis III, *Reanalyzing the Prevalence and Social Context of Collateral Consequence Statutes*, 31 J. CRIM. JUST. 435, 451 (2003); Demleitner, *supra* note 43, at 154-55; Pinard, *supra* note 4, at 1217-19.

44. *See* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 292 (2011) ("[H]owever a particular crime is labeled, the collateral consequences of misdemeanor convictions render less significant the line between felonies—at least low-level ones—and misdemeanors.").

45. For the effect collateral consequences have on defendants, see generally INVISIBLE PUNISHMENT, *supra* note 27; TRAVIS, *supra* note 43; Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253 (2002); Demleitner, *supra* note 43; Pinard, *supra* note 27; Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010). And for the effect collateral consequences have on defense attorneys, see *supra* note 26.

46. *See* NAT'L PROSECUTION STANDARDS, §§ 4-1.3, 4-2.4 (NAT'L DIST. ATTORNEYS ASS'N 2009), http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf [https://perma.cc/HNX6-WAJR]; *see also* Chin & Holmes, *supra* note 10, at 720 & n.202.

47. *See* U.S. DEP'T OF JUSTICE [DOJ], UNITED STATES ATTORNEYS' MANUAL §§ 9-27.230, 9-27.240, 9-27.250 (2014), http://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution [https://perma.cc/XB9H-RN5X]. Interestingly, the Manual's most extensive discussion of collateral consequences is found in the section titled "Principles of Federal Prosecution of Business Organizations." *Id.* § 9-28.1000.

Bar Association's Criminal Justice Standards[48] all recommend that prosecutors consider potential collateral consequences when making initial charging decisions.[49]

To be sure, prosecutors will not always know every potential collateral consequence facing a defendant when deciding what charges, if any, to file in a given case.[50] But they will know many of them, including several of the most severe ones. This is especially true for those collateral consequences that are automatically triggered by a conviction for a particular offense, and therefore do not vary according to the individual characteristics of the defendant.[51] For example, "a prosecutor will or should know ... which sex offenses lead to registration so that this can be taken into account in the charging decision."[52]

For purposes of deciding what charges to file, prosecutors care about some consequences more than others. For example, prosecutors will be most interested in imposing collateral consequences that further the varied purposes of criminal prosecution, such as deterrence, retribution, rehabilitation, or incapacitation (or some combination thereof).[53] In particular, prosecutors are often animated by a desire to reduce threats to public safety.[54] Collateral consequences that advance that goal are therefore likely to be penalties of particular interest to prosecutors.[55]

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48. *See* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.9(b) (AM. BAR ASS'N 1993).

49. *See* LOVE ET AL., *supra* note 26, § 8:3; Chin & Holmes, *supra* note 10, at 720-21; *see also* Robert M.A. Johnson, *Collateral Consequences*, 16 CRIM. JUST. 32, 33 (2001) (advising all prosecutors to "comprehend this full range of consequences that flow from a crucial conviction").

50. *See* LOVE ET AL., *supra* note 26, § 8:3.

51. *See id.* ("There are some cases where a prosecutor will or should know about potential collateral consequences even before filing formal charges."); Robert M.A. Johnson, *A Prosecutor's Expanded Responsibilities Under* Padilla, 31 ST. LOUIS U. PUB. L. REV. 129, 133 (2011).

52. LOVE ET AL., *supra* note 26, § 8:3.

53. *See* DOJ, *supra* note 47, § 9-27.300 (identifying the "purposes of criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation").

54. *See, e.g.*, Johnson, *supra* note 51, at 131 (explaining that the "primary objectives" of sentencing "are protecting the public from future crime by the offender and punishing the offender").

55. Prosecutors are typically less concerned with other types of collateral consequences, such as voter disenfranchisement or disqualification from juror service. As one former prosecutor I interviewed explained, "I never thought about voting [rights]" when making charging decisions. Telephone Interview with Individual G, Former Prosecutor (June 5, 2015)

Beginning in the 1990s, legislatures greatly expanded the number and availability of collateral consequences that seek to curtail future risks to public safety.[56] Three prominent examples are sex offender registration, firearm prohibitions, and deportation.[57] Each is aimed, at least in part, at reducing threats to public safety.[58] And, critically, each is now triggered not only by certain felony convictions but also by a variety of misdemeanor offenses.[59]

1. Sex Offender Registration

In 1986, four states had laws requiring certain sex offenders to register with law enforcement.[60] Twelve years later, all fifty states and the District of Columbia "had enacted legislation requiring that convicted sex offenders register with the police upon release from

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[hereinafter Interview with G]. For more details about my interviews with current and former prosecutors, see *infra* note 118. The point, of course, is not that such consequences are trivial (they are not), but rather that, from the prosecutor's perspective, they rarely move the charging needle one way or the other.

56. For example, one quantitative study published in 2003 found a "sharp rise in [legislatures'] use of firearm restrictions, sex offender registration statutes, and the termination of parental rights." Buckler & Travis, *supra* note 43, at 451; *see also* Demleitner, *supra* note 43, at 155.

57. These are not the only collateral consequences aimed at minimizing future threats to public safety. Additional examples include the termination or limitation of a defendant's parental rights and involuntary civil commitment as a "sexually violent predator." For a discussion of the latter, see, for example, Roberts, *supra* note 27, at 703-09 (noting that the first statute authorizing the civil commitment of persons deemed "sexually violent predators" was passed in 1990 and that now the federal government, twenty states, and the District of Columbia permit involuntary commitment on such grounds).

58. For an analysis of whether sex offender registration laws actually promote public safety, see generally Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J.L. & ECON. 207 (2011) (questioning the effectiveness of sex offender registries). For a discussion of whether the federal firearms ban for misdemeanor domestic violence has successfully incapacitated domestic abusers, see Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 CORNELL L. REV. 1411, 1459-60 (2005). And for a thoughtful examination of the public safety rationale commonly offered as a justification for conviction-based deportation, see generally Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000).

59. *See, e.g.*, Stephanos Bibas, *Shrinking* Gideon *and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287, 1299 (2013) ("[S]ome misdemeanors carry grave, nearly automatic collateral consequences such as deportation [and] sex-offender confinement or registration.").

60. TRAVIS, *supra* note 43, at 67; Buckler & Travis, *supra* note 43, at 443.

prison."[61] The obligation to register as a sex offender typically applies automatically upon conviction of a registerable offense, as defined by the pertinent jurisdiction.[62] Today, the vast majority of jurisdictions include some misdemeanors in their lists of registerable offenses.[63] Registration periods range from fifteen years to life, depending on the jurisdiction and qualifying offense.[64]

2. Firearm Prohibitions

Congress first forbade the possession of firearms by certain criminal offenders in 1938,[65] and eventually prohibited all felons from possessing a firearm in 1968.[66] It did not limit the ability of misdemeanants to possess firearms, however, until 1996.[67] Congress made it unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence" to purchase or possess a firearm that has travelled in interstate commerce.[68] In addition to the federal ban, fifteen states and the District of Columbia currently prohibit the possession of firearms by persons convicted of misdemeanor domestic violence offenses.[69] Firearm

61. TRAVIS, *supra* note 43, at 68; *see* Buckler & Travis, *supra* note 43, at 443.

62. For a helpful summary of the numerous and onerous obligations currently imposed on sex offenders, as well as expanded community notification schemes, see Carpenter & Beverlin, *supra* note 7, at 1087-95.

63. *See* King, *supra* note 26, at 28; Roberts, *supra* note 44, at 298-99; *see also, e.g.*, N.Y. CORRECT. LAW § 168-a (McKinney 2011) (listing five misdemeanors as registerable offenses).

64. *See, e.g.*, Carpenter & Beverlin, *supra* note 7, at 1087 ("Today, a tier I offender [the least serious offender] generally must register for a minimum of fifteen years or, often, twenty years. Additionally, many more crimes today have been assigned lifetime registration or recast to require lifetime registration.") (footnotes omitted).

65. Federal Firearms Act, Pub. L. No. 75-785, 52 Stat. 1250 (1938); Kahn, *supra* note 8, at 113.

66. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197; Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213; *see also* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009).

67. *See* Mikos, *supra* note 58, at 1457 & n.153 (discussing Congress's desire to prevent gun possession by misdemeanor domestic violence offenders).

68. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-371 (1996) (codified at 18 U.S.C. § 922(g)(9)); *see* 18 U.S.C. § 921(a)(33)(A) (2012) (defining a "misdemeanor crime of domestic violence" to include state and federal misdemeanor offenses).

69. *See Domestic Violence & Firearms Policy Summary*, LAW CTR. TO PREVENT GUN VIOLENCE (May 11, 2014), http://smartgunlaws.org/domestic-violence-firearms-policy-summary/ [https://perma.cc/W2UH-ADHH].

prohibitions typically apply automatically and immediately upon conviction of a qualifying offense.

3. Deportation[70]

The laws governing deportation were largely overhauled in the 1990s.[71] Among other things, Congress "increased the number of crimes triggering deportation."[72] Most relevant here, Congress significantly expanded the number of misdemeanor offenses that render a noncitizen deportable.[73] For example, Congress made a conviction for any offense "relating to a controlled substance"—subject to one narrow exception involving minor marijuana possession—automatic grounds for deportation.[74] Congress likewise made a wide swath of

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The existence of federal and state firearms bans highlights another notable feature of collateral consequences: they can be imposed by more than one sovereign. Although a conviction's direct consequences invariably are levied by the same jurisdiction that prosecuted the offense, a conviction's collateral consequences are not so limited. For example, a state court conviction may yield both state and federal collateral consequences. This dynamic permits prosecutors to leverage collateral consequences that are imposed by separate sovereigns.

70. The Court in *Padilla* observed that deportation is "uniquely difficult to classify as either a direct or a collateral consequence." Padilla v. Kentucky, 559 U.S. 356, 366 (2010). In my view, however, deportation is still best understood to be a collateral consequence for at least two reasons. First, the great weight of authority preceding *Padilla* consistently classified deportation as a collateral consequence, *see, e.g.*, Roberts, *Ignorance*, *supra* note 26, at 132, and *Padilla* expressly avoided upsetting that nearly uniform precedent. Second, the Supreme Court's reticence to classify deportation as a collateral consequence appeared to dissipate in its subsequent decision in *Chaidez v. United States*, in which it described deportation as a collateral consequence on multiple occasions. *See* 133 S. Ct. 1103, 1108 (2013). In any event, my central claim does not hinge on whether deportation is in fact classified as a collateral or direct consequence, because it is not accounted for when determining which set of adjudicatory procedures are required in a given case.

71. *See, e.g.*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546; Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5050. Congress first made certain criminal convictions a basis for deportation in 1917. *See Padilla*, 559 U.S. at 361 (describing the enactment of The Immigration Act of 1917).

72. Mikos, *supra* note 58, at 1444 n.93; *see also* Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1722-25 (2009).

73. *See* Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1758-63 (2013); Clapman, *supra* note 26, at 591; Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 560-61 (2013). Congress also eliminated most statutory forms of relief and abolished a sentencing court's ability to prevent deportation through a procedure known as a "judicial recommendation against deportation." *Padilla*, 559 U.S. at 361-64; *see also* Mikos, *supra* note 58, at 1444 n.93.

74. *See* 8 U.S.C. § 1227(a)(2)(B)(i) (2012); *see also Padilla*, 559 U.S. at 368; Cade, *supra*

offenses involving domestic violence and child abuse grounds for deportation.[75] In short, a large number of "misdemeanors—a category of crimes where those convicted often serve no jail time—can lead to removal."[76] And they often do.[77]

D. Collateral Consequences and Low-Level Prosecutions

To the extent that the current scholarly literature discusses the impact collateral consequences have on prosecutors, it tends to focus on the exceptional case. Commentators often highlight instances in which the prosecutor believes the imposition of a particular consequence is unwarranted, and the prosecutor is then forced to engage in various charging machinations in order to avoid triggering that consequence.[78]

But that is not the typical case.[79] More commonly, the prosecutor thinks the consequence is not only justified but also important. Indeed, for cases involving only low-grade felonies or misdemeanors, securing one of the aforementioned collateral consequences will

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note 73, at 1760.

75. *See* 8 U.S.C. § 1227(a)(2)(E)(i).

76. Lee, *supra* note 73, at 561.

77. *See, e.g.*, Altman, *supra* note 9, at 14; Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES (Apr. 6, 2014), http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html?_r=0 [https://perma.cc/7P8M-PDVS]. The Obama Administration's recent actions regarding immigration enforcement continues to prioritize the removal of persons convicted of crimes, including several classes of defendants convicted only of misdemeanor offenses. *See* Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, et al., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [https://perma.cc/L5JQ-U9JA]

78. The literature is replete with such anecdotes and hypotheticals. *See, e.g.*, Catherine A. Christian, *Awareness of Collateral Consequences: The Role of the Prosecutor*, 30 N.Y.U. REV. L. & SOC. CHANGE 621, 622 (2006); Smyth, *supra* note 26, at 494-96; *see also* LOVE ET AL., *supra* note 26, §§ 8:3, 8:7. These types of charging decisions are especially pronounced in discussions involving deportation. *See, e.g.*, Lee, *supra* note 73, at 579.

79. *See, e.g.*, Altman, *supra* note 9, at 29-32 (reporting that fewer than 5 percent of the line prosecutors in King's County, New York (Brooklyn) surveyed responded that they "often" or "always" alter a plea offer because of the potential immigration consequences faced by the defendant, but approximately 45 percent responded that they "rarely" or "never" did); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1187 (2013) (finding that "immigration consequences are [often] an express prosecutorial goal of the conviction" in Maricopa County, Arizona).

likely be a key—if not *the* key—prosecutorial objective. This is true for several reasons.

First, the collateral consequence almost always lasts longer than the defendant's term of incarceration, which for low-level offenders is usually short or nonexistent.[80] For example, the obligation to register as a sex offender lasts for a minimum of fifteen years and often for life.[81] The federal prohibition on firearm possession is a lifetime ban.[82] Similarly, deportation amounts to a permanent exclusion from the United States. As a result, a prosecutor may view a collateral consequence of conviction as her most potent and enduring weapon against future public safety risks.[83]

Second, collateral consequences often expose the defendant to a lengthy incarceration term if he violates the pertinent prohibition, thereby bolstering the consequence's specific deterrent effect. For example, if a defendant fails to register properly as a sex offender, he can be charged with a criminal offense punishable by more than a decade in prison.[84] Similarly, an offender found in unlawful custody of a firearm may be sentenced up to ten years in prison.[85] And a deported person who unlawfully reenters the country can be prosecuted and imprisoned for that reentry.[86] For each of these offenses, establishing a violation is usually straightforward and typically much easier to prove than the underlying offense that triggered the collateral consequence.[87]

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80. Most felony convictions result in little or no actual jail time. *See* Bowers, *supra* note 18, at 1145 n.139; Chin, *supra* note 4, at 153-54. And very few misdemeanor defendants spend any time in jail. *See* Chin, *supra* note 4, at 153-54, 154 n.22 (observing that, between 2006 and 2010, approximately 20 percent of persons arrested in New York on misdemeanor charges were ultimately sentenced to prison or jail).

81. *See supra* note 7 and accompanying text.

82. *See supra* note 8 and accompanying text.

83. *See, e.g.*, Demleitner, *supra* note 43, at 154 ("[F]or many convicted offenders ... these 'collateral' consequences 'are ... the most persistent punishments that are inflicted for [their] crime.'" (quoting Velmer S. Burton, Jr., et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, FED. PROB., Sept. 1987, at 52)); Roberts, *supra* note 27, at 674 ("[C]ollateral consequences often far outweigh the direct penal sanction of a conviction.").

84. *See, e.g.*, 18 U.S.C. § 2250 (2012).

85. *See id.* § 924(a).

86. *See* 8 U.S.C. § 1326.

87. Notice how much lighter the government's burden will be in these subsequent cases: Did the defendant fail to register properly? Not did the defendant commit a sex offense. Was the defendant found in possession of a firearm? Not did the defendant commit an act of

Third, many collateral consequences—including two of the three highlighted here—represent a guaranteed penalty upon conviction. In other words, these collateral consequences cannot be circumvented by a sentencing judge, which is significant for prosecutors concerned about controlling the penalties imposed on a defendant.[88] For example, if convicted of a qualifying offense, a defendant will be required to register as a sex offender. Firearm prohibitions work this way, too. Although deportation is not formally guaranteed, a defendant rendered eligible for deportation likely will be removed if he is later detained by Immigration and Customs Enforcement.[89]

In sum, prosecutors will often be attuned to certain collateral consequences that further the goals of criminal prosecution, especially those aimed at reducing threats to public safety. When it comes to low-level offenses, those collateral consequences are often the most important goal of a criminal prosecution.[90]

II. STRATEGIC UNDERCHARGING: WHY LESS IS SOMETIMES MORE

As detailed in Part I, several collateral consequences of considerable interest to prosecutors are now triggered by misdemeanor convictions. This has meaningfully expanded a prosecutor's charging

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domestic violence. Was the defendant found in the country after being removed? Not did the defendant commit the deportable offense.

In addition, the subsequent violations are easier to prove because they typically turn on law enforcement witnesses, not lay witnesses. Compared to police witnesses, "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." Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1713 (2010).

88. *See, e.g.*, Johnson, *supra* note 49 at 33 ("These collateral consequences are simply a new form of mandated sentences. Prosecutors have often favored mandated sentences to counter the tendencies of some judges who seem incapable of giving serious consequences for serious crimes."). In this respect, mandatory collateral consequences operate like mandatory minimum prison sentences, which enhance the prosecutor's relative power as she controls the penalty through her charging discretion. *See* Demleitner, *supra* note 43, at 161; William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2562 (2004).

89. *See* Padilla v. Kentucky, 559 U.S. 356, 363-64 (2010) (observing that deportation "is practically inevitable" in most cases after a defendant who was convicted of a removable offense has been detained).

90. *See* UNIF. ACT, *supra* note 10, Prefatory Note at 4; Pinard, *supra* note 27, at 684 (recognizing "the centrality of collateral consequences to the criminal process").

options. For cases in which imposition of the collateral consequence is a crucial prosecutorial aim, an inability to obtain that consequence through a misdemeanor conviction would effectively force the prosecutor to bring a felony case. The recent attachment of severe collateral consequences to misdemeanor offenses therefore unlocks an array of additional charging options for prosecutors keen on imposing such consequences.

But do prosecutors actually exercise that newfound charging option? In this Part, I explain that there are several reasons why a prosecutor might choose to file a misdemeanor charge instead of a felony charge—that is, why she might engage in strategic undercharging—when a critical collateral consequence is triggered by a misdemeanor conviction. To be clear, I do not claim that prosecutors will choose the misdemeanor option in every case. Rather, my claim is that we should expect prosecutors to file a misdemeanor charge in a significant number of cases and far more often than the conventional wisdom suggests.[91]

The key point is that an offense's collateral consequences, no matter how severe, are generally deemed irrelevant for determining what procedural safeguards apply. In other words, a misdemeanor that threatens a severe collateral consequence is classified the same as any other misdemeanor in a jurisdiction's criminal justice system.

Because misdemeanors are less costly and time-consuming to prosecute than felonies, filing a misdemeanor furthers prosecutorial desires for efficiency.[92] In some cases, the likelihood of conviction is also increased by filing a misdemeanor, and it is generally no less than if a felony were charged.[93] Finally, although prosecutors pursuing a misdemeanor case must surrender the prospect of additional incarceration, the degree of that sacrifice is typically much smaller than one might expect and often not enough to offset the substantial benefits associated with increased efficiency and a higher likelihood of conviction.[94]

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91. *Cf.* Meares, *supra* note 23, at 868-69 (stating that "[o]vercharging is systemic" and that prosecutors "may often believe that it is in [their] best interests to charge the defendant with the most serious and as many crimes at the outset of the case").

92. *See infra* Part II.B.

93. *See infra* Part II.C.

94. *See infra* Part II.D.

A. The Choice

Before examining how prosecutors exercise their charging discretion, it is important to understand who is responsible for the initial charging decision and the lasting impact that decision typically has on a case.

One common practice, especially in larger offices, is to designate a group of prosecutors as having primary responsibility for screening incoming cases and making charging decisions.[95] These prosecutors tend to be relatively senior and most of their time is dedicated to handling the influx of new cases.[96] After the charging decision is made by the screening attorney, the case is then assigned to the pertinent line prosecutor.

Another common practice is for line prosecutors to screen cases on a rotating basis and, if charges are filed, continue to prosecute many of those same cases.[97] For those prosecutors, the process of screening cases is one way new matters are added to their caseload.[98] But those prosecutors do not necessarily keep every case they screen, even if charges are filed. Line attorneys who moonlight as screeners often handle only felony matters. Therefore, if the new matter involves only misdemeanor charges, the case may be assigned to a prosecutor in that office's misdemeanor division.

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95. The screening attorneys studied by Ronald Wright and Marc Miller in their examination of the New Orleans District Attorney's Office generally fit this mold. *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002). As Wright and Miller detail, the New Orleans District Attorney's Office has a dedicated "Screening Section," in which "about fifteen of the eighty-five attorneys in the office" work at any given time. *See id.* at 62-63. In New Orleans, the screening attorney exercises significant authority and discretion on behalf of the office: "The screener reviews the investigation file, speaks to all the key witnesses and the victims (often by telephone, but sometimes in person), and generally gauges the strength of the case." *Id.* at 63. "For the most serious crimes," Wright and Miller report, "the office conducts 'charge conferences' with senior prosecutors and police present to discuss the facts and potential charges." *Id.* at 64. But aside from those cases, which typically involve homicide and rape, the screening attorney makes the charging decision for the office. *Id.* at 63-64.

96. *See id.* at 63 (noting that all screening attorneys in the New Orleans District Attorney's Office "served previously (usually a couple of years) in the Trial Section").

97. *See id.* at 104 n.290 ("In some systems, the same attorney screens and tries (or negotiates) the case."); *see also* Telephone Interview with Individual K, Current Prosecutor (July 8, 2015) [hereinafter Interview with K] (describing such a practice in a large Midwestern county prosecutor's office).

98. *See* Interview with K, *supra* note 97.

Of course, the neat division outlined here oversimplifies matters to some degree. Some offices have both groups, whereas others follow a different model altogether. The main point is that the incentives of the prosecutor making the initial charging decision may vary depending on whether she is a dedicated screener or a line attorney doubling as a screener.

Prosecutors enjoy tremendous discretion when deciding what criminal charges, if any, to pursue in a given case.[99] As one leading scholar put it, "[n]o government official in America has as much unreviewable power and discretion as the prosecutor."[100] The Supreme Court has placed few limits on how prosecutors exercise their charging discretion, concluding that a prosecutor's "decision to prosecute is particularly ill-suited to judicial review."[101]

The primary constraint is that the prosecutor must have "probable cause to believe that the accused committed an offense defined by [the applicable] statute."[102] Probable cause, however, is not a particularly demanding standard. The Court has also imposed two other limitations—prohibitions on "selective prosecution"[103] and "vindictive prosecution"[104]—but neither is particularly confining. In

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99. *See* Wayte v. United States, 470 U.S. 598, 607 (1985) ("In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute.").

100. Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960 (2009); *see also* Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 272 (2013) ("[Prosecutors] have almost unlimited and unreviewable power to select the charges that will be brought against defendants."); Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1243-44 (2011).

101. *Wayte*, 470 U.S. at 607.

102. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). For an interesting discussion about the Supreme Court's "missed opportunity" in *Bordenkircher*, see William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 840-42 (2006).

103. A prosecutor engages in selective prosecution when her decision to prosecute is "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Wayte*, 470 U.S. at 608 (citing *Bordenkircher*, 434 U.S. at 364 (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962))). However, proving such a violation is extremely difficult. Selective prosecution claims are judged "according to ordinary equal protection standards," which means that the defendant must establish that he was treated differently from others and that the prosecutor's decision was "motivated by a discriminatory purpose." *Id.*; *see also* Pamela Cothran, *Prosecutorial Discretion*, 82 GEO. L.J. 771, 774 (1994) ("A prosecutor's decision to bring charges rarely violates the Equal Protection Clause.").

104. The Supreme Court has narrowly defined what conduct qualifies as unconstitutionally vindictive. In *Blackledge v. Perry*, 417 U.S. 21, 28 (1974), the Supreme Court held that the government could not "retaliate" against a defendant for invoking his right to appeal a

short, prosecutors are generally free to exercise their charging discretion, and the "awesome" power such discretion entails, however they please.[105]

Given today's extensive criminal codes, prosecutors will typically have multiple options when choosing how to charge a particular course of conduct.[106] This Article focuses on a prosecutor's decision to file a felony charge or misdemeanor charge. That choice is particularly important. Among other things, this initial decision has a lasting impact: cases usually finish on the same side of the felony-misdemeanor line as where they began.[107]

As Ronald Wright and Rodney Engen detailed in their studies of North Carolina felony prosecutions, prosecutors and defense attorneys in felony cases "treat the felony-misdemeanor line as a major hurdle to cross."[108] According to Wright and Engen, only 25 percent of cases initially charged as felonies end in a misdemeanor conviction.[109] The felony-misdemeanor hurdle is especially high when the

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conviction "by substituting a more serious charge for the original one" upon remand from the appellate court. Critically, the Court has carefully distinguished post-appeal retaliation from "a pretrial decision to modify the charges against the defendant." United States v. Goodwin, 457 U.S. 368, 380 (1982). Specifically, the Court has expressly held that "a prosecutor may file additional charges [before trial] if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded." *Id.* As a result, vindictive prosecution claims are effectively limited to instances of post-trial retaliation. *See id.* at 381-82.

105. United States v. Lovasco, 431 U.S. 783, 794 (1977).

106. *See* Stuntz, *supra* note 88, at 2549.

107. *See* Telephone Interview with Individual A, Former Prosecutor (June 5, 2015) [hereinafter Interview with A]. There are likely several reasons for these phenomena. Among other things, misdemeanor cases and felony cases are often handled by different sets of prosecutors and processed by entirely different trial courts. *See infra* notes 224-28 and accompanying text. In other words, institutional inertia probably plays a role. With respect to cases that start as felony prosecutions, prosecutors likely do not make a habit of reducing felony cases to misdemeanors because of concerns related to the setting of plea market prices. If felonies were routinely reduced to misdemeanors, then that would become the expectation of future defendants charged with felonies (or, more precisely, their attorneys), thereby weakening a prosecutor's standard bargaining position. With respect to cases that start as misdemeanor prosecutions, increasing the charges to a felony would often require satisfying additional procedural requirements—such as approval by a grand jury. In addition, misdemeanor prosecutors would probably need to obtain supervisor approval to bump the case up to a felony. *See* Telephone Interview with Individual D, Current Prosecutor (June 8, 2015) [hereinafter Interview with D]. Both considerations likely have a chilling effect on prosecutors contemplating turning a misdemeanor charge into a felony one.

108. Ronald F. Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecutors*, 91 MARQ. L. REV. 9, 10 (2007).

109. *Id.* at 26-27.

jurisdiction's criminal code contains multiple felony grade options for the same core offense.[110] "In these areas of greatest depth," Wright and Engen observed, "the criminal code is structured to make prosecutors especially reluctant to cross the felony-misdemeanor line."[111] They found that when there were three or more felony grade options for an offense, a mere 12 percent of felony cases ended with a misdemeanor conviction only.[112] Similarly, cases that begin as misdemeanor prosecutions rarely turn into felonies.[113]

B. Efficiency Gains

The strongest incentive prosecutors have for pursuing a case as a misdemeanor rather than a felony is that misdemeanors are typically much less costly to prosecute.[114] Prosecutors and their offices have two obvious reasons for wanting to resolve cases as efficiently as possible.[115] First, efficient resolution "free[s] up prosecutors to

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110. *See generally* Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935 (2006).

111. Wright & Engen, *supra* note 108, at 27-28.

112. *Id.* at 25.

113. As Issa Kohler-Hausmann documented in her discerning study of New York City, only 0.2 percent of cases in that jurisdiction that had a top arrest charge of a misdemeanor ended in a felony disposition. *See* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 651 n.108 (2014) (about 450 out of more than 226,000 dispositions). Kohler-Hausmann's data is keyed off cases in which the top *arrest* charge was a misdemeanor, rather than those in which the top initial charge by the prosecution was a misdemeanor. *See id.* at 630. But there is little reason to think that the latter would meaningfully differ from the former. Indeed, several prosecutors I interviewed confirmed it was "rare" for a case initially filed as a misdemeanor to finish as a felony. *See, e.g.*, Telephone Interview with Individual I, Former Prosecutor (June 5, 2015) [hereinafter Interview with I]; Interview with K, *supra* note 97 (describing a Midwestern urban jurisdiction).

114. *See, e.g.*, Interview with A, *supra* note 107 (explaining that felony prosecutions are more time-intensive and resource-intensive than misdemeanor cases); Interview with G, *supra* note 55.

115. Although prosecutors are surely influenced by concerns about efficiency, I do not mean to suggest that is their only source of motivation. *See supra* notes 53-55 and accompanying text; *infra* notes 164-71, 204-07 and accompanying text (identifying conviction rates, potential penalties, and public safety as additional factors). Indeed, a definitive and comprehensive answer to what prosecutors prioritize has proven elusive. *See* Stuntz, *supra* note 88, at 2554 n.6 ("There is as yet no developed social science literature on what prosecutors maximize, probably because the solution is too complex to model effectively."); Wright & Levine, *supra* note 20, at 1067 ("Unfortunately, even though we understand much about *what* prosecutors do, we know remarkably little about *why* they do it."). The point is simply that efficiency is

pursue many more cases," thereby serving the general mission of the office.[116] Second, all prosecutors—but especially those managing bloated caseloads—have "personal incentives to reduce their workloads."[117]

It is therefore unsurprising that several prosecutors I interviewed[118] acknowledged that concerns about resource constraints often play an important role in charging decisions.[119] For example, a sensitivity to resource constraints is one reason why screeners in some prosecutor's offices are required to seek supervisory approval before

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one of several important considerations.

116. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471 (2004).

117. *Id.*; *see also* Bowers, *supra* note 18, at 1122, 1140-41 (explaining that prosecutors are "interested in reducing their own administrative costs" and "avoid[ing] process and work, where possible").

Notice that if the prosecutor making the initial charging decision is a line attorney moonlighting as a screener, she may have additional incentive to charge a borderline case as a misdemeanor—and thereby shift future responsibility for the case to a separate prosecutor in the office rather than adding another felony case to her own caseload. This is especially likely for cases in which the evidence appears to be relatively weak (and therefore less likely to plead quickly) or if the case appears to require disproportionate time and attention. *See* Interview with K, *supra* note 97 (describing such decisions).

118. I conducted semistructured interviews with eleven current or former prosecutors. *See generally* Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 881 n.103 (2014) (describing semistructured interview technique and citing examples of its use in law review literature). In exchange for their candor, I agreed to keep the interviewees' identities confidential and their responses anonymous. The interviews were conducted over the phone, and each typically lasted about one hour.

To be clear, these interviews do not purport to represent a comprehensive qualitative study. They nonetheless provide an instructive window into the practices followed by a variety of prosecutors' offices. The group of interviewees included prosecutors that had served in federal and state court (and sometimes both); collectively, they had worked as prosecutors in twelve different offices around the country. Eight of the interviewees were male and three were female. Their average tenure as a prosecutor was 6.5 years, with length of service ranging from 1 year to 11 years.

119. When asked what factors prosecutors in their respective offices typically considered when deciding what charges to file in a given case, the prosecutors I interviewed repeatedly highlighted resource constraints as one of three principal considerations. *See, e.g.*, Telephone Interview with Individual F, Current Prosecutor (June 6, 2015) (admitting "surprise" when first serving as a prosecutor about "how much resource constraints and time constraints matter" during charging decisions and plea negotiations); *see also* Interview with A, *supra* note 107; Interview with D, *supra* note 107; Telephone Interview with Individual E, Current Prosecutor (June 5, 2015) [hereinafter Interview with E]; Interview with G, *supra* note 55; Interview with K, *supra* note 97. The other two principal factors cited by the prosecutors I interviewed were strength of the evidence and the defendant's criminal history.

filing a felony charge, but they are not required to obtain such approval before filing a misdemeanor charge.[120]

Misdemeanors are typically less costly and less time-consuming to prosecute because felony defendants possess a unique bundle of procedural guarantees.[121] Critically, those procedural entitlements do not extend to misdemeanor defendants charged with offenses that trigger serious collateral consequences. As a result, prosecutors can pursue a severe collateral consequence by filing a misdemeanor without triggering the costly procedural safeguards associated with felony prosecutions.

1. Initial Felony Costs: Grand Juries and Preliminary Hearings

A key difference between felony and misdemeanor cases is the costs prosecutors "must shoulder ... immediately" in felony cases, but not in misdemeanor ones.[122] "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."[123] Prosecutors have no such obligation in misdemeanor cases, even when a severe collateral consequence is at stake.[124]

120. *See, e.g.*, Interview with D, *supra* note 107.

121. *See* 1 LAFAVE ET AL., *supra* note 37, § 1.8(c) ("Every jurisdiction provides for some procedural differences based upon a distinction between major and minor crimes."); Natapoff, *supra* note 13, at 1315-17. Of course, some criminal procedure entitlements do apply across the board, regardless of an offense's relative severity. For example, in all cases the government must establish each element of an offense beyond a reasonable doubt. *See In re* Winship, 397 U.S. 358, 361 (1970). And several trial rights, such as those guaranteed by the Confrontation Clause, apply to all criminal prosecutions—no matter how minor. *See* Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 520 (2009).

122. Bowers, *supra* note 87, at 1713.

123. *Id.*

124. *Id.*

The federal government[125] and eighteen states[126] provide criminal defendants the right to have felony charges—but only felony charges—initiated by a grand jury. The remaining states provide prosecutors the option of initiating felony charges either by filing an information or by seeking an indictment from a grand jury.[127] In these jurisdictions, prosecutors overwhelmingly prefer the information option—indicating that, when given the choice, prosecutors tend to avoid the more burdensome grand jury process.[128] In all jurisdictions, prosecutors may initiate misdemeanor cases without proceeding before a grand jury.

To be sure, there are many instances when a prosecutor will happily—even thankfully—invoke the powers of the grand jury for investigatory purposes. But for many more cases, the grand jury requirement is just an additional cost of doing felony business. Even in jurisdictions where grand juries rarely decline to indict, the grand jury requirement still imposes meaningful costs on the prosecutor's office, including the costs related to prosecutor time and grand jury time. Even if one accepts the familiar adage that a prosecutor could get a grand jury to indict a ham sandwich, it is nevertheless the

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125. *See* FED. R. CRIM. P. 7(a). Federal Rule of Criminal Procedure 7 tracks the requirements of the Fifth Amendment, which provides that, subject to limited exceptions, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. CONST. amend. V. The Supreme Court has long interpreted "infamous crime" as one that authorizes an "infamous punishment." *See, e.g.*, *Ex parte* Wilson, 114 U.S. 417, 426 (1885). The Supreme Court has further held that infamous punishments include imprisonment in a penitentiary or imprisonment for any period of time at hard labor. *See* United States v. Moreland, 258 U.S. 433 (1922). Because federal law has traditionally limited imprisonment in a penitentiary to offenders sentenced to incarceration for more than one year, only persons convicted of a felony under federal law could potentially be sentenced to a penitentiary. *See* 4 LAFAVE ET AL., *supra* note 37, § 15.1(b); *see also* 18 U.S.C. § 4083 (2012).

126. *See* 4 LAFAVE ET AL., *supra* note 37, § 15.1(d). Although there is some variance in how each state defines the category of offenses requiring indictment by a grand jury, the effective rule for those eighteen states and D.C. is that indictments are necessary only for felony offenses (that is, those offenses in which potential imprisonment exceeds one year). *See id.* (explaining the various ways in which those jurisdictions have defined the category of offenses for which a defendant is entitled to a grand jury).

127. *See id.* § 15.1(g). Because the Fifth Amendment's Grand Jury Clause, U.S. CONST. amend. V, cl. 1, has not been incorporated against the states through the Fourteenth Amendment, state criminal defendants have no federal constitutional right to a grand jury. *See* Hurtado v. California, 110 U.S. 516, 537-38 (1884). It is accordingly up to each state whether to require a grand jury for certain criminal prosecutions.

128. *See* 4 LAFAVE ET AL., *supra* note 37, § 15.1(g).

case that a prosecutor would often prefer to charge that ham sandwich by information rather than indictment. And if an office has thousands of ham sandwiches to process, the more that can be charged by information the better.

Where felony cases can be initiated by information instead of indictment, prosecutors must still bear the cost of a preliminary hearing.[129] A preliminary hearing is an adversarial proceeding conducted by a judicial officer relatively early in the adjudicatory process that inquires whether there is probable cause to believe the defendant committed the relevant offense.[130] The government typically needs to establish probable cause in order for the case to proceed any further.[131] In addition to serving as an initial screening mechanism,[132] preliminary hearings often provide valuable information about the prosecution's case to the defense team at a relatively early stage in the life of a case.[133] However, like the right to a grand jury, the right to a preliminary hearing is typically reserved only for felony defendants.[134]

Critically, no jurisdiction appears to consider an offense's potential collateral consequences when determining whether a defendant has a right to a grand jury or a preliminary hearing. As a result, the fact that a misdemeanor may carry a severe collateral consequence does not trigger the initial procedural costs associated with felony prosecutions.

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129. In those jurisdictions that require felonies to be initiated by a grand jury, or permit prosecutors to choose between information and indictment, preliminary hearings are typically rendered unnecessary once the grand jury has returned an indictment. *See* FED. R. CRIM. P. 5.1(a)(2); 4 LAFAVE ET AL., *supra* note 37, § 14.2(c)-(d).

130. 4 LAFAVE ET AL., *supra* note 37, § 14.1(a).

131. *Id.*

132. *See* Interview with K, *supra* note 97 (identifying preliminary hearings as one of the reasons felonies are more burdensome to prosecute, in part because they are "one more evidentiary hearing" a prosecutor has to do).

133. *See, e.g.*, Bibas, *supra* note 116, at 2494-95 ("[I]n some states, preliminary hearings reveal much of the prosecution's evidence to defense lawyers in time for bargaining.").

134. *See* William A. Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations—Warrantless Entries into Premises: The Legacy of* Welsh v. Wisconsin, 38 KAN. L. REV. 439, 511 n.302 (1990). One exception is Utah, which requires preliminary hearings for some misdemeanors as well. *See* 4 LAFAVE ET AL., *supra* note 37, § 14.2(d), at 307 n.60.

2. Felony Discovery Costs

Defendants charged with felonies typically receive more ample discovery than defendants charged with misdemeanors.[135] This usually occurs because of the additional mandatory discovery requirements that the government is typically subject to in felony cases and the increased mechanisms that defendants have for developing discovery in felony cases.[136] As a result, felony prosecutors are often forced to endure the additional costs of heightened discovery obligations—costs which add up quickly for prosecutors managing swollen caseloads. Additional discovery requirements can also reduce some of the government's bargaining power during plea negotiations, especially if the additional disclosures would force the prosecutor to lay bare evidentiary weak spots—yet another reason why borderline cases with evidentiary concerns might get routed to the misdemeanor track.

The degree to which jurisdictions afford felony defendants more discovery varies. For example, in the federal system most (though not all) discovery rules apply equally to defendants facing misdemeanor charges as those facing felony charges.[137] Many state jurisdictions, however, create significant disparities in how discovery is handled in felony and misdemeanor cases.

For example, several states that require "open file" discovery do so only in cases involving felony offenses. In Arizona, for instance, only felony defendants are entitled to receive "[a]ll then existing original and supplemental reports prepared by a law enforcement agency in connection with the particular crime with which the defendant is charged"[138] at the outset of the prosecution. Similarly, in North Carolina, a pioneering state for open file discovery, only

135. *See* Schroeder, *supra* note 134, at 511 n.300.

136. *See, e.g.*, 1 LAFAVE ET AL., *supra* note 37, § 1.8(c) ("Pretrial discovery is also likely to be different [for felony and misdemeanor defendants], with such discovery considerably narrower as to the misdemeanor defendant. Similarly, pretrial procedures for developing evidence (e.g., depositions) and for sharpening the issues at trial (e.g., the bill of particulars or pretrial conferences) are likely to be restricted (or simply unavailable) in the process applicable to minor offenses.") (footnote omitted); *id.* § 20.2(c).

137. *See* FED. R. CRIM. P. 16. *But see* FED. R. CRIM. P. 15(c)(3) (making distinctions between felony and misdemeanor offenses for purposes of depositions taken outside the United States).

138. ARIZ. R. CRIM. P. 15.1.

felony defendants are entitled to the wealth of materials made available by such disclosure requirements.[139]

Some jurisdictions that do not require open file discovery also make significant distinctions between felony and misdemeanor offenses. In Georgia, for example, state law provides more expansive discovery regarding statements made by the defendant to members of law enforcement in felony prosecutions than in misdemeanor prosecutions.[140] Moreover, Georgia prosecutors in felony cases must disclose to the defendant more information regarding potential witnesses and witness statements than is required in misdemeanor cases.[141]

Although many jurisdictions create differing discovery obligations for felony and misdemeanor prosecutions, I am not aware of any jurisdiction where the discovery rules are altered based on an offense's potential collateral consequences.

3. Potential Future Costs: Right to a Jury Trial

A final set of procedural guarantees that varies across offense types is a defendant's right to demand a jury trial. According to the Supreme Court, the right to a jury trial provides the defendant "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[142] From the perspective of the prosecutor, however, a jury trial is often unwelcome.

As an initial matter, jury trials take longer to complete than bench trials. Jury trials require additional time for jury selection, jury instructions, and lengthier opening and closing statements. According to one analysis of federal prosecutions, jury trials on average took four times longer to complete than bench trials.[143] As

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139. *See* N.C. GEN. STAT. §§ 15A-901, 15A-903 (1973).

140. *Compare* GA. CODE ANN. § 17-16-4 (1994), *with* GA. CODE ANN. § 17-16-22.

141. *Compare* GA. CODE ANN. § 17-16-8(a), *and* GA. CODE ANN. § 17-16-7, *with* GA. CODE ANN. §§ 17-16-20 to 23. Similarly, only in felony prosecutions must the government disclose before trial any "[s]tatements of coconspirators that are attributable to the defendant and arguably admissible against the defendant at trial." GA. CODE ANN. § 17-16-4(a)(2).

142. Duncan v. Louisiana, 391 U.S. 145, 156 (1968). Blackstone described trial by jury as the "grand bulwark" of English liberties. *See* Jones v. United States, 526 U.S. 227, 246 (1999) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 342-44).

143. *See* Uzi Segal & Alex Stein, *Ambiguity Aversion and the Criminal Process*, 81 NOTRE

one former prosecutor I interviewed pithily put it: "[A] two-hour bench trial becomes a three-day event with a jury."[144]

But the costs associated with the trial itself are only part of the equation. Compared to bench trials, jury trials often require prosecutors to engage in more intensive preparation and frequently entail more pretrial litigation over procedural and evidentiary issues.[145] For these reasons, offenses that result in a jury trial are substantially more costly to prosecute than those that end with a bench trial.[146]

It is no surprise, therefore, that several studies have documented prosecutors' preference for bench trials instead of jury trials. For example, Issa Kohler-Hausmann observed that the "standard practice" for misdemeanor prosecutors in New York City was, on the eve of trial, to reduce any Class A misdemeanor charges (which trigger the right to a jury trial in New York City) to Class B misdemeanor charges (which do not) in order "to ensure a bench trial."[147] Put

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DAME L. REV. 1495, 1499 n.12 (2006).

144. Interview with G, *supra* note 55.

145. *See* Segal & Stein, *supra* note 143, at 1515 (observing that jury trials "involve more ancillary litigation over procedural and evidentiary issues than bench trials"); *see also* Interview with G, *supra* note 55 (explaining that preparation for jury trials is typically more extensive than preparation for bench trials).

146. Of course, it is true that few cases ultimately reach an actual trial—jury or bench. But when prosecutors are making initial charging decisions, they do not always know in advance which cases will be the ones that go to trial and which ones will be resolved before trial. This is particularly true for low-level offenses when the threatened incarceration is rarely exorbitant. Furthermore, defendants facing a severe collateral consequence (such as deportation) may be especially inclined to litigate instead of pleading guilty because they have relatively little to lose. *See* Interview with D, *supra* note 107 (observing that defendants in one large East Coast jurisdiction typically "won't plead" to an offense that renders a noncitizen removable). Thus, prosecutors must charge a case with an eye towards who the ultimate adjudicator will be in the event the case does eventually go to trial. *See id.* (explaining that potential "jury appeal" is a factor prosecutors typically consider when making initial charging decisions, especially if there is reason to believe that the case might ultimately go to trial).

147. Kohler-Hausmann, *supra* note 113, at 659 n.133, 662 n.142; *see also* M. Chris Fabricant, *Rethinking Criminal Defense Clinics in "Zero-Tolerance" Policing Regimes*, 36 N.Y.U. REV. L. & SOC. CHANGE 351, 372 n.106 (2012) (observing the same practice in the context of misdemeanor trespass prosecutions). Class A misdemeanors authorize up to one year imprisonment, whereas Class B misdemeanors authorize up to only three months imprisonment. *See* N.Y. PENAL LAW § 70.15(1)-(2) (McKinney 1965). New York courts have upheld this practice, primarily on the grounds that "[t]he District Attorney has almost unfettered discretion in determining how and when to prosecute, including the right to reduce, add or amend charges." People v. Williams, 465 N.Y.S.2d 648, 655-56 (N.Y. Crim. Ct. 1983); *see also* People v. Urbaez, 886 N.E.2d 142 (N.Y. 2008).

simply, "by withholding the jury trial right governments gain a major strategic advantage, depriving defendants of the option to threaten exercise of the right, with its associated adverse impact on dockets and justice system resources."[148]

Given prosecutors' preference to avoid jury trials—and the threat of jury trials—when feasible, it is important to understand when a defendant has a right to a jury trial. Under the Sixth Amendment, all felony defendants, but only some misdemeanor defendants, have a federal constitutional right to demand a jury trial. A misdemeanor defendant charged only with "petty" offenses has no federal constitutional right to a jury trial.[149] The current lodestar for determining whether an offense is petty is the potential term of imprisonment it authorizes.[150] An offense that threatens more than six months imprisonment is always considered serious and automatically triggers a defendant's right to trial by jury.[151] Conversely, an offense that carries a maximum term of imprisonment of six months or less is presumed to be petty.[152] The presumption is rebutted and the

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Such dedication to avoiding a jury trial whenever possible is by no means limited to New York. *See, e.g.*, Brandon K. Crase, *When Doing Justice Isn't Enough: Reinventing the Guidelines for Prosecutorial Discretion*, 20 GEO. J. LEGAL ETHICS 475, 475-77 (2007) (explaining a practice in the District of Columbia where prosecutors invariably charge "attempted threats rather than threats"—even if the alleged conduct was a completed threat—"because [only] the lesser crime of attempted threats does not provide sufficient time of imprisonment to warrant a jury trial").

148. Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143, 158 (2009).

149. *See, e.g.*, Blanton v. City of N. Las Vegas, 489 U.S. 538, 541 (1989); Baldwin v. New York, 399 U.S. 66, 68 (1970).

150. *See Blanton*, 489 U.S. at 541-42. The Court previously "focused on the nature of the offense and on whether it was triable by a jury at common law." *Id.* at 541 (citing District of Columbia v. Colts, 282 U.S. 63, 73 (1930)); *see* Callan v. Wilson, 127 U.S. 540, 555-57 (1888). *See generally* Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 WIS. L. REV. 133 (tracing the Court's various approaches to the petty offense exception over time). According to the Court, it shifted its attention to an offense's potential term of imprisonment because that is a "more 'objective indication[] of the seriousness with which society regards the offense.'" *Blanton*, 489 U.S. at 541 (quoting Frank v. United States, 395 U.S. 147, 148 (1969)).

151. *Blanton*, 489 U.S. at 542.

152. *See id.* at 543. The Supreme Court has also clarified that the critical inquiry is whether any *single* offense authorizes a term of imprisonment in excess of six months. In *Lewis v. United States*, the Court held that "no jury trial right exists where a defendant is prosecuted for multiple petty offenses," even if "the aggregate prison term authorized for the offenses exceeds six months." 518 U.S. 322, 323 (1996). As a result, a prosecutor that carefully engages in misdemeanor charge stacking, *see infra* note 220 and accompanying text, can avoid

defendant has a right to a jury trial "if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one."[153] Notably, the Supreme Court has thus far limited its "legislative determination" inquiry to the legislature that enacted the offense.[154] This is significant because other sovereigns—such as the federal government—may impose "additional statutory penalties" upon conviction.[155]

Whereas a number of states follow the federal constitutional baseline when determining the scope of a defendant's right to a jury trial, many others exceed the constitutional floor and provide more expansive jury trial rights.[156] For example, several states require a trial by jury for all offenses that authorize any amount of potential imprisonment.[157] And some jurisdictions provide all criminal defendants a right to a jury trial.[158]

As for the relevance of an offense's collateral consequences, the Supreme Court's reference to "additional statutory penalties" in *Blanton v. City of North Las Vegas* appears to suggest that at least some collateral consequences may be pertinent when determining whether a defendant has a federal constitutional right to a jury trial.[159] However, since *Blanton*, several significant collateral consequences have been deemed irrelevant by courts when deciding whether a presumptively petty offense is, in fact, serious for Sixth Amendment purposes. Federal and state courts have repeatedly concluded that a requirement to register as a sex offender is im-

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triggering a defendant's right to a jury trial.

153. *Blanton*, 489 U.S. at 543. In *Blanton*, the Court predicted that it would be the "rare situation where a legislature packs an offense it deems 'serious' with onerous penalties that nonetheless 'do not puncture the 6-month incarceration line.'" *Id.* at 543 (citing Brief for Petitioners at 16); *see also* United States v. Nachtigal, 507 U.S. 1, 5 (1993) (repeating the "rare case" observation made in *Blanton*). Notably, the Court made these predictions when misdemeanor offenses triggered fewer collateral consequences than is the case today.

154. *Blanton*, 489 U.S. at 543-44, 545 n.11.

155. *Id.* at 543; *see supra* note 69.

156. *See* Murphy, *supra* note 150, at 171-73.

157. *See id.* at 171-72.

158. *See id.* at 171.

159. *See Blanton*, 489 U.S. at 543. In *Blanton*, the Court concluded that an automatic ninety-day license suspension imposed for a DUI conviction did not rebut the presumption of pettiness. *See id.* at 543-44.

material to the calculus.[160] This conclusion has primarily rested on the assertion that sex offender registration is not formally a criminal punishment but rather a "remedial, collateral consequence of the conviction."[161] Similarly, state courts have consistently ignored the deportation consequences of a conviction when deciding whether an offense is petty or serious.[162] And state courts have also held that a federal firearm ban—such as the one for persons convicted of a misdemeanor domestic violence offense—is irrelevant because it was Congress that enacted the firearm prohibition, not the applicable state legislature.[163]

In sum, as is the case with grand juries, preliminary hearings, and enhanced discovery obligations, prosecutors can often avoid

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160. *See, e.g.*, Thomas v. United States, 942 A.2d 1180, 1186 (D.C. 2008); People v. Danthuluri, 923 N.Y.S.2d 814 (App. Div. 2011); People v. Wrighton, 918 N.Y.S.2d 274 (App. Div. 2011); People v. Shewbarran, 729 N.Y.S.2d 563 (App. Div. 2001).

161. *Wrighton*, 918 N.Y.S.2d at 725. Some courts have also refused to consider a requirement to register as a sex offender as relevant when determining whether an offense is petty because the jurisdiction imposing that obligation is different from the one prosecuting the offense. *See, e.g.*, Ivy v. United States, No. 5:08-CR-00021-TBR, 2010 WL 1257729 (W.D. Ky. Mar. 26, 2010); Rauch v. United States, No. 1:07-CV-0730 WMW, 2007 WL 2900181 (E.D. Cal. Sept. 28, 2007). Notably, one state supreme court has held as a matter of *state* law that being required to register as a sex offender does transform a presumptively petty offense into a serious one, thereby entitling the defendant to a trial by jury. *See* Fushek v. State, 183 P.3d 536, 543-44 (Ariz. 2008).

162. *See, e.g.*, Amezcua v. Eighth Judicial Dist. Court, 319 P.3d 602, 605 (Nev. 2014) (holding that deportation, which "arise[s] out of federal law," is "not relevant" to the jury trial inquiry because it does "not reflect a determination by the Nevada Legislature that first-offense domestic battery is a serious offense"). Notably, in July 2015, a panel of the D.C. Court of Appeals concluded that, in light of the Supreme Court's decision in *Padilla*, a noncitizen defendant charged with a presumptively petty offense had a constitutional right to a jury trial if a conviction would render the defendant deportable. *See* Bado v. United States, 120 A.3d 50 (D.C. 2015). The D.C. Court of Appeals subsequently vacated that decision after granting the government's petition for rehearing en banc. *See* Bado v. United States, 125 A.3d 1119 (D.C. 2015) (mem.) (per curiam). At the time of publication, the D.C. Court of Appeals had not yet issued its en banc decision.

163. *See Amezcua*, 319 P.3d at 605. Federal courts have generally considered firearm prohibitions, but most have concluded that they are not sufficiently severe to render an offense serious. *See, e.g.*, United States v. Chavez, 204 F.3d 1305, 1314 (11th Cir. 2000) ("We hold that the prohibition of firearm possession by persons convicted of a misdemeanor crime of domestic violence is not so serious as to entitle them to a jury trial for a presumptively petty offense."); United States v. Jardee, No. 4:09-mj-091, 2010 WL 565242 (D.N.D. Feb. 12, 2010); United States v. Combs, No. 8:05CR271, 2005 WL 3262983 (D. Neb. Dec. 1, 2005). *But see* United States v. Smith, 151 F. Supp. 2d 1316, 1318 (N.D. Okla. 2001) (finding that a lifetime ban on firearm possession "is a serious penalty").

triggering a defendant's right to a jury trial by filing a misdemeanor charge instead of a felony one.

C. Increasing (or at Least Not Decreasing) the Likelihood of Conviction

According to many scholars, prosecutors function as conviction maximizers.[164] Regardless of whether prosecutors are in fact maximizing convictions or something else,[165] there is little doubt that concerns about likelihood of conviction are often at the forefront of a prosecutor's mind when deciding what charges to pursue in a given case.[166] In a field where objective metrics for job success are thin, a prosecutor's "conviction rate" is often used as "the principal measure of prosecutorial job performance."[167] Thus, prosecutors concerned with career advancement (or even just career stability) are likely to place a premium on their win-loss statistics.[168] And for offices where the chief prosecutor is elected, "the need to maximize convictions will be an inescapable environmental constraint."[169] As Daniel Richman has explained, "[t]hose elections that are contested are often fought on an incumbent's win-loss record, and an incumbent's concerns in this regard will be felt by his subordinates."[170] For

164. *See* Bowers, *supra* note 18, at 1128. For a small sampling of the many scholars who assert prosecutors are conviction maximizers, see the sources cited in Bibas, *supra* note 116, at 2471-72 nn.20-23 and Bowers, *supra* note 18, at 1128 n.45.

165. *See supra* note 115.

166. *See* Daniel C. Richman, Old Chief v. United States*: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 967 (1997); *see also supra* note 119 (recounting that the prosecutors I interviewed identified strength of the evidence as one of three principal considerations for initial charging decisions).

167. Bowers, *supra* note 87, at 1711; *see id.* at 1710 n.265; *see also* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 106 (1968) ("Conviction statistics seem to most prosecutors a tangible measure of their success."); Bowers, *supra* note 18, at 1149 ("The conviction rate, after all, is the most visible rubric of quality job performance.").

168. *See* Bibas, *supra* note 116, at 2471 (observing that prosecutors "may further their careers by racking up good win-loss records"); Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036, 1045 (1972) ("[C]onvictions are the central performance standard, and departures from the average rate raise questions and create anxieties."). As Stephanos Bibas notes, "[f]avorable win-loss statistics" can also provide many psychic benefits, including "boost[ing] prosecutors' egos, their esteem, [and] their praise by colleagues." Bibas, *supra* note 116, at 2471.

169. Richman, *supra* note 166, at 967.

170. *Id.* This is not to suggest that appointed prosecutors care less about win-loss statistics than their elected peers. But the vast majority of chief prosecutors in the United States

these reasons, prosecutorial office culture is often described as one dominated by the mantra of "nondefeat."[171]

In its purest form, concerns about likelihood of conviction are trained on the strength of the evidence and whether the prosecutor thinks the ultimate adjudicator—a judge or jury—is likely to enter a judgment of conviction.[172] But concerns about likelihood of conviction can also encompass other considerations, such as the likelihood that a particular set of charges will induce a defendant to plead guilty. The strength of the evidence (and how that evidence will be received by the ultimate adjudicator) still plays a leading role in that assessment, but other factors may also be relevant.[173]

In some ways, the strength of the government's case will be minimally affected by whether the case is charged as a felony or a misdemeanor. For example, the existence of incriminating physical evidence, the content and credibility of potential witness testimony, and the persuasiveness of certain defenses (such as an alibi) typically do not turn on the nature of the charge.

To the extent the strength of the government's case varies, however, it does so because of a difference in the elements of the offense the government seeks to prove. In this respect, misdemeanors are almost always easier to prove than felonies. Misdemeanors tend to have fewer elements than their felony counterparts.[174] Felonies also

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are elected, and the prospect of a future election is a variable unique to those offices. *See* Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 734 (1996) (observing that over 95 percent of chief prosecutors at the state and local level are elected); *see also* STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS [BJS], DOJ, NCJ 213799, PROSECUTORS IN STATE COURTS, 2005, at 2 (2006), http://www.bjs.gov/content/pub/pdf/psc05.pdf [https://perma.cc/7H47-4GQF] ("Except for Alaska, Connecticut, the District of Columbia, and New Jersey, all chief prosecutors in 2005 were elected officials.").

171. Bowers, *supra* note 18, at 1128 ("At bottom, prosecutors carry mindsets of 'nondefeat.'"); *see also* Meares, *supra* note 23, at 869 ("[A]n abhorrence of losing ... is central to prosecutorial culture."); Richman, *supra* note 166, at 968. For an old but still oft-cited study detailing this phenomenon, see Jerome H. Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOL. 52, 57 (1967) ("In the county studied, the prosecutor's office cared less about winning than about *not losing*. The norm is so intrinsic to the rationale of the prosecutor's office that one does not often hear it articulated. Nevertheless it is very powerful.").

172. *See supra* note 119.

173. *See generally* Bibas, *supra* note 116.

174. For example, under New York law, a person is guilty of criminal possession of a controlled substance in the seventh degree—a misdemeanor—if he "knowingly and unlawfully possesses a controlled substance." N.Y. PENAL LAW § 220.03 (McKinney 2015). By contrast, in order to prove that a person committed criminal possession of a controlled substance in the

typically have more demanding injury or harm requirements than corresponding misdemeanors.[175]

In addition, felonies sometimes have heightened mens rea requirements in comparison to misdemeanors.[176] Beyond simply being harder to prove, heightened mens rea requirements can unlock additional lines of defense for the defendant, depending on the jurisdiction. For example, in most jurisdictions, a defendant charged with a specific intent crime may claim that he was too intoxicated to form the requisite intent.[177] But that same defendant will likely be prohibited from mounting a voluntary intoxication defense, if charged with an offense requiring only a general intent.[178] Accordingly, if the prosecutor expects that voluntary intoxication may be a credible line of defense, then he would have additional reason to consider charging a lesser offense that requires only a general intent instead of a higher grade offense that requires specific intent.

Another reason why a misdemeanor charge may have a higher likelihood of conviction (or, equally important for present purposes, the perception of a higher likelihood of conviction) in a particular

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fifth degree—a low-grade felony—the government must establish any one of several additional elements, such as "intent to sell" the substance or that he possessed at least a certain amount of the substance. N.Y. PENAL LAW § 220.06 (McKinney 2003) (government must prove one of eight additional elements). For those scoring at home, New York no longer has an offense labeled criminal possession of a controlled substance in the *sixth* degree.

175. For example, under District of Columbia law, a person is guilty of felonious assault—and faces up to three years imprisonment—if he "unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another." D.C. CODE ANN. § 22-404(a)(2) (West 2013). "Significant bodily injury" is defined as "one that requires hospitalization or immediate medical attention." *Id.* Misdemeanor assault, by contrast, has no significant bodily injury requirement. *See id.* § 22-404(a)(1).

176. For example, under New York law, a person is guilty of assault in the third degree—a misdemeanor—if "[w]ith criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument." N.Y. PENAL LAW § 120.00(3) (McKinney 1965). In order to establish that a person is guilty of assault in the second degree—a low-grade felony—the government must instead prove that the defendant committed the assault "[w]ith intent to cause physical injury to another person." N.Y. PENAL LAW § 120.05(2) (McKinney 2014).

177. *See* Montana v. Egelhoff, 518 U.S. 37, 47-48 (1996) (observing that a majority of American jurisdictions permit a voluntary intoxication defense only for specific intent crimes); *see also* State v. Fleck, 810 N.W.2d 303, 307 (Minn. 2012) (explaining that voluntary intoxication defense is permissible for specific intent, but not general intent, crimes).

178. *See Fleck*, 810 N.W.2d at 307. Some states do not allow a voluntary intoxication defense to any offense. *See, e.g.*, Sanchez v. State, 749 N.E.2d 509, 511 (Ind. 2001). But that is the minority position. *See Egelhoff*, 518 U.S. at 48 n.2.

case relates to differences between a bench trial and a jury trial.[179] Generally speaking, a defendant is more likely to be convicted after a bench trial than a jury trial.[180] Of course, there are exceptions to this observation, depending both on the jurisdiction and the offense charged. But the best studies to date have concluded that judges are more likely to convict than juries.[181] Perhaps relatedly, judicial officers in most jurisdictions are subject to some form of election.[182] Judges forced to navigate the perilous waters of electoral politics may be more inclined to convict than a jury of the defendant's peers, none of whom face a future election challenge.[183]

In some jurisdictions, including several that encompass the country's largest urban populations, juries have a well-earned reputation for being particularly hostile to certain criminal prosecutions. For example, the so-called "Bronx jury" became famous (or infamous) after juries in the Bronx consistently returned acquittals at a rate far above the national average.[184] The Bronx is far from alone on that score, and there is evidence of significantly higher acquittal rates in the District of Columbia, Baltimore, Detroit, and Los

179. As noted earlier, some misdemeanor defendants lack the right to demand a jury trial. See *supra* Part II.B.3.

180. *See infra* note 187.

181. *See* Adam M. Gershowitz, *12 Unnecessary Men: The Case for Eliminating Jury Trials in Drunk Driving Cases*, 2011 U. ILL. L. REV. 961, 971-76 (summarizing the "considerable empirical and qualitative evidence that judges are more willing to convict than juries"). *But see* Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 WASH. U. L.Q. 151 (2005) (exploring potential reasons why, since the late 1980s, acquittal rates for *federal* judges outpace the acquittal rates for *federal* juries).

182. *See* Lynn Adelman & Jon Deitrich, *Why Habeas Review of State Court Convictions Is More Important than Ever*, 24 FED. SENT'G REP. 292, 292 (2012) ("Thirty-nine states permit voters to elect or retain judges."). In fact, "eighty-seven percent of all state judges stand for some form of election." *Id.* at n.5 (citing Roy A. Schotland, Comment, 61 LAW & CONTEMP. PROBS. 149, 154 (1998)).

183. *See id.* at 292-94 (discussing various examples in which judicial campaigns focused on an incumbent's record in criminal cases); *see also* Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 201 (1996) ("Crime in general has become more of a high profile issue in political discourse, and no politician wants to be classified as 'soft on crime.' Elected judges are no exception.") (footnote omitted). *See generally* Joanna Cohn Weiss, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U. L. REV. 1101 (2006).

184. *See* Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 899-900 (1999).

Angeles—just to name a few.[185] This phenomenon has been explained as the inevitable byproduct of drawing a jury pool from "communities that harbor such profound and problematic systemic distrust" of law enforcement.[186] Regardless of the reason, prosecutors in such jurisdictions are likely to believe that avoiding the prospect of a jury trial will significantly increase the odds of conviction.[187]

Even when the defendant has a right to a jury trial, the nature of that right often varies depending on whether he has been charged with a felony or a misdemeanor. Although nearly every state has twelve jurors sit on a felony case,[188] many states have fewer jurors serve on misdemeanor cases.[189] For example, in Texas only six jurors sit on a "trial involving a misdemeanor offense."[190] And some states permit even fewer than six jurors in petty offense cases (where the federal constitutional requirement of a six-juror minimum does not apply).[191] Smaller juries tend to favor the

185. *See id.* at 900 n.114. Prosecutors may also sometimes believe that jurors have skewed expectations about the level of evidence necessary to satisfy the beyond a reasonable doubt standard. Much has been made of the so-called *CSI* effect on juries. *See generally* Tom R. Tyler, *Viewing* CSI *and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050 (2006). Although there is no evidence confirming that the *CSI* effect is an actual phenomenon, it remains a widely-shared perception among many government officials.

186. Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85, 110 n.119 (2007).

187. *See* Interview with D, *supra* note 107 (acknowledging that, in a jurisdiction where the jury pool is understood to be generally distrustful of law enforcement, cases perceived to "not play well before a jury" were more likely to be charged as a misdemeanor in order to have a bench trial, even if that meant "the charging decision does not always line up with the brutality of the crime"). *But see* Telephone Interview with Individual B, Former Prosecutor (June 3, 2015) (stating that juries in a rural East Coast community "were very conservative" and thus "the jury pool was never a concern").

188. *See* 6 LAFAVE ET AL., *supra* note 37, § 22.1(d) ("Only six states authorize juries of less than 12 in felony cases.").

189. *See id.* at 19 n.79.

190. TEX. CODE CRIM. PROC. ANN. art. 33.01(b) (West 2004).

191. *See, e.g.*, UTAH CODE ANN. § 78B-1-104(d) (West 2008) (four jurors sit on petty misdemeanor cases). If a defendant enjoys a federal constitutional right to a jury trial, the jury must include at least six persons. *See* Ballew v. Georgia, 435 U.S. 223, 245 (1978) (declaring a five-person jury unconstitutional in a nonpetty offense case).

prosecution,[192] making this yet another reason a prosecutor may prefer charging a misdemeanor instead of a felony.

Finally, regardless of whether the ultimate adjudicator is a judge or a jury, a "rich body of empirical and experimental studies indicates ... that fact finders adjust the burden of proof in accordance with the size of the applicable sanction."[193] Specifically, studies show that "judges and jurors often elevate the probative threshold for conviction as the severity of the punishment increases."[194] Because felonies carry more punishment than misdemeanors, these studies suggest that the fact finder will be less likely to convict—even if marginally—for the felony than for the misdemeanor.[195]

When it comes to the likelihood of inducing a guilty plea, the relative strength of a prosecutor's case will have a significant effect on the negotiations. Thus, for all the reasons just discussed, a prosecutor's case will often appear stronger when viewed through the lens of a misdemeanor.

But there are other relevant considerations, and those additional factors present more of a mixed bag. For example, the threat of increased incarceration associated with a felony charge may give additional leverage to the prosecutor seeking to induce a guilty plea. However, the actual difference in expected prison time can often be relatively small, thereby minimizing the effectiveness of that threat.[196]

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192. *See* Brown v. Louisiana, 447 U.S. 323, 332 (1980) ("[S]tatistical and empirical data established that because of a concomitant decrease in the number of hung juries, a reduction in the size of the jury panel in criminal cases unfairly disadvantages one side—the defense."); *see also id.* at 332 n.10 (identifying three reasons why smaller juries tend to favor the prosecution).

193. Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 MICH. L. REV. 597, 598 (2012); *see id.* at 601-07 (surveying studies).

194. *Id.* at 598; *see also* Richman, *supra* note 166, at 972 n.115 (listing studies conducted on this subject).

195. *See* Cade, *supra* note 73, at 1795 ("Studies have suggested that adjudicators convict on less evidence where defendants are charged with minor offenses or face less severe criminal sanctions."). Even though a jury is typically not aware of the specific penalties at stake, it will likely have a sense of the relative severity of an offense based on its name alone. For example, many offenses indicate whether they are a felony or a misdemeanor. And some, such as aggravated assault versus simple assault, can clue-in an otherwise unfamiliar jury.

196. *See infra* Part II.D. Vertical overcharging is most potent when the potential "trial penalty"—the difference between a post-trial sentence and guilty plea sentence—is especially severe. For many low-grade felonies, however, the potential trial penalty will not be exorbitant, since the maximum term of incarceration is typically only a few years.

In addition, a defendant facing a felony charge can threaten to impose more procedural and administrative demands on the prosecutor than he could if he were charged with only a misdemeanor.[197] As Josh Bowers has correctly recognized, the defense team typically enjoys one significant "advantage over the prosecutor: the defendant has a 'call' on the prosecutor's time."[198] Felony defendants can almost always "call" more of a prosecutor's time than can misdemeanor defendants—meaning the threat to do so is more powerful when coming from a felony defendant.[199] And defendants facing one of the severe collateral consequences highlighted here, such as deportation or sex offender registration, may be especially inclined to fight the charges to the bitter end—and therefore be perceived at the time of charging as someone more likely to actually call the prosecutor's time.[200]

Potential differences in counsel may also play a role. A felony defendant is likely to have better and more experienced counsel, plus an attorney with superior resources and opportunities to investigate, file motions, and actually bargain with the prosecutor.[201] By contrast, misdemeanor defendants are often lucky to get their lawyer's individual attention for more than a few minutes. And those lawyers are usually so overburdened that independent investigation and case analysis are often the exception rather than the rule.[202]

In the end, whether a felony or misdemeanor charge is more likely to induce a plea will probably vary from case to case. But more often than not, the government's case is likely to be viewed as stronger—in terms of likelihood of conviction at trial—if charged as

197. *See supra* Part II.B.

198. Bowers, *supra* note 18, at 1151.

199. As Bowers points out, "[t]he best defense tool in the face of an atypically high price then—or even just a price that the defendant does not particularly like—is to create the perception that the defendant is willing to engage her own process costs." *Id.* at 1152. Because felony cases have more process costs, felony defendants generally have more procedural chips with which to bargain. *See id.*

200. *See* Interview with A, *supra* note 107 (observing that it was, on average, more difficult to secure a plea agreement when the defendant would be facing deportation or sex offender registration); Interview with D, *supra* note 107; Interview with G, *supra* note 55; *see also* Eagly, *supra* note 79, at 1195-96 & nn.315-16 (reporting that noncitizen defendants in Harris County, Texas charged with deportable offenses appear to be "disproportionately inclined to take their cases to trial").

201. *See infra* notes 237, 247 and accompanying text.

202. *See infra* notes 239-43 and accompanying text.

a misdemeanor rather than a felony. That fact alone means prosecutors will not reflexively choose the felony charge, assuming the misdemeanor offense also provides an adequate penalty (including the pertinent collateral consequence) upon conviction.

D. The (Minimal) Penalty Sacrifice

The primary concession prosecutors make when filing a misdemeanor instead of a felony is foregoing the additional penalties offered by the felony offense—in particular the possibility of increased incarceration. Before examining the degree to which expected prison time differs between low-grade felonies and misdemeanors—and therefore how much prison time prosecutors are actually surrendering when choosing the misdemeanor offense—it is important to appreciate how prosecutors typically approach the issue of potential penalties.

Prosecutors generally have a preferred penalty for each case. I do not mean to suggest that prosecutors formally assign each case such a value. But prosecutors routinely, even if only implicitly, have a rough idea of what a case is "worth"—or, perhaps more precisely, what a defendant "deserves"—in terms of appropriate penalties.[203]

Critically, a prosecutor's preferred penalty is seldom the most severe one she can possibly seek under the law. Put another way, prosecutors "rarely operate as sentence maximizers."[204] In the words of William Stuntz, "however prosecutors define their preferred sentence, there is no good reason to assume that their preference is always for the harshest sentence they can possibly get."[205] This is because, as Stuntz colorfully put it, "[p]rosecutors are not like civil plaintiffs: they are not paid by the conviction, with bonuses for each additional month the defendant spends in prison."[206] "Once the defendant's sentence has reached the level the prosecutor prefers,"

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203. *See* Bowers, *supra* note 18, at 1146-47; Stuntz, *supra* note 88, at 2564.

204. Bowers, *supra* note 18, at 1128; *see also* Bibas, *supra* note 116, at 2471-75. To the extent prosecutors ever act as sentence maximizers, it is only for those offenses at the top of the severity ladder. *See* Bowers, *supra* note 18, at 1153 ("In serious cases, prosecutors drive harder bargains and aim for sentence maximization to a greater degree."). But those especially severe cases fall outside the scope of this Article.

205. Stuntz, *supra* note 88, at 2554.

206. *Id.*

Stuntz observed, "adding more time offers no benefit to the prosecutor."[207]

Perhaps the best evidence that prosecutors typically have preferred penalties that are not the most severe available under the law is a series of studies that examined how prosecutors exercise their charging discretion when navigating mandatory minimum sentences or "three-strike" repeat offender laws.[208] In one such study, David Bjerk demonstrated that after the imposition of a "three-strike" repeat offender law, "prosecutors [became] almost twice as likely to prosecute three-strikes arrestees for lesser misdemeanor crimes not covered by the laws."[209] Bjerk also concluded that "such behavior [was] the result of prosecutors using their discretion to partially circumvent three-strikes laws owing to [the prosecutors'] own constraints and preferences, not simply in response to changes in behavior by other actors within the judicial system."[210] In other words, prosecutors altered their charging behavior in order to achieve a preferred penalty based on their own belief about what each defendant deserved.

One further point bears mentioning. Recall that for low-level offenses, prosecutors will often view the imposition of certain collateral consequences—for example, sex offender registration, firearm prohibitions, or deportation—to be as important, if not more important, than any term of incarceration.[211] For that reason, there are likely many cases in which a prosecutor is relatively indifferent to the amount of prison time imposed on a defendant, so long as a particular collateral consequence is imposed. For example, when a prosecutor confronts a low-grade sex offense, the most important penalty is likely to be sex offender registration, not the prospect of a few additional months in prison.[212]

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207. *Id.*

208. *See* Michael Tonry, *Sentencing in America, 1975-2025*, *in* CRIME AND JUSTICE IN AMERICA, 1975-2025, at 141, 166 (Michael Tonry ed., 2013) (summarizing "six major studies").

209. David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & ECON. 591, 593 (2005).

210. *Id.*

211. *See supra* note 4 and accompanying text.

212. *See, e.g.*, Interview with E, *supra* note 119 (explaining that sex offender registration was usually treated as nonnegotiable in sex offense prosecutions and recounting cases in which she agreed to reduced terms of incarceration in exchange for a guilty plea that included sex offender registration); Interview with I, *supra* note 113 (stating that sex offender registra-

This also means that an inability to impose a particular collateral consequence for a misdemeanor conviction might effectively take that charging option off the table. But when the same collateral consequence is available for a misdemeanor conviction as for a felony conviction, that particular disincentive to pursuing a misdemeanor has been removed.

If the collateral consequence at issue can be imposed for both a misdemeanor and a felony conviction, the main penalty difference between the two is the length of incarceration. But whereas the maximum *potential* prison terms authorized by each type of offense may be years apart, the *actual* amount of incarceration imposed on a defendant for conduct that could feasibly be charged as a misdemeanor or low-grade felony will often differ much less.

First, a significant number of felony convictions result in little or no actual jail time.[213] In 2006 (the most recent year reported by the Bureau of Justice Statistics), 31 percent of *all* state criminal defendants convicted of a felony were sentenced to no term of imprisonment, and another 28 percent were sentenced only to a local jail (which is typically reserved for defendants incarcerated for less than one year).[214] The average prison sentence in state courts that year for *all* felony defendants was about three years.[215] The average prison sentence for defendants convicted of only low-grade felonies was likely much less.[216]

Second, even if a defendant convicted of a felony was sentenced to incarceration for more than one year, it is not necessarily the case that the defendant would actually serve that full amount of time before being released. Defendants may obtain good time credits while in prison, which can reduce the total period of incarceration in some jurisdictions by at least one-third.[217]

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tion "was the most important goal in sex offense cases" and that it was "very rare to give [that penalty] up" in exchange for a guilty plea, but that she was generally "willing to give up jail time and length of probation").

213. *See* Bowers, *supra* note 18, at 1145 n.139; Chin, *supra* note 4, at 153.

214. SEAN ROSENMERKEL ET AL., BJS, DOJ, NCJ 226846, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 2 (rev. ed. 2010), http://www.bjs.gov/content/pub/pdf/fssc06st.pdf [https://perma.cc/JR6Y-H2VS].

215. *Id.*

216. *See id.*

217. *See, e.g.*, Bowers, *supra* note 18, at 1145 ("[U]nder New York law, defendants serve only two-thirds of their sentenced jail time, calculated from the moment of arrest." (citing N.Y.

Third, some studies have indicated that courts with limited or specialized jurisdiction—including many misdemeanor courts and domestic violence courts—may sentence a borderline felony/misdemeanor case more harshly than would a general felony court that routinely adjudicates more serious offenses.[218] According to scholars, the differing responses stem from the courts' differing baselines, as the borderline offense may appear relatively serious to a court whose typical case is a petty offense, but that same conduct might appear relatively mild to a court immersed in higher gravity cases.[219]

Finally, if prosecutors are keen on seeking more than one year of imprisonment, they need not always file a felony charge to achieve that goal. Instead, prosecutors can bring multiple misdemeanor charges—a practice sometimes called "stacking"—and request that the prison sentences for each convicted offense be served consecutively.[220] If successful, the ultimate prison sentence could be well in excess of one year. And, critically, the practice of stacking misdemeanors does not trigger the bundle of procedural guarantees typically afforded defendants charged with a felony.

In sum, although a low-grade felony prosecution could potentially lead to a longer term of incarceration than a misdemeanor prosecution, the difference in *actual* incarceration may often be relatively small—one that is more likely to be measured in months rather than years.

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PENAL LAW § 70.30(3) (McKinney 1998))).

218. *See* Adi Leibovitch, Relative Judgments 29-31 (unpublished manuscript), http://www.law.uchicago.edu/files/files/leibovitch_relative_judgments.pdf [https://perma.cc/HS5D-VSBA].

219. *See id.* at 30 ("[W]hen recidivist domestic violence offenders in Chicago were charged with felonies (at the Criminal Court) instead of misdemeanors [(at the Domestic Violence Division)], the felony charges received lower sentences than those that would have been ordered for equivalent misdemeanors by the Domestic Violence Division.").

220. The ultimate effectiveness of such stacking will depend on whether the trial court orders that the sentences for multiple convictions run consecutively or concurrently. Most states "entrust to judges' unfettered discretion the decision whether sentences for discrete offenses shall be served consecutively or concurrently." Oregon v. Ice, 555 U.S. 160, 163-64 (2009).

The upshot of all this is that although prosecutors do forego additional penalties by pursuing a misdemeanor case, that sacrifice may not be as significant as it first appears. As a result, prosecutors often have strong incentives to relinquish the possibility of additional incarceration in exchange for the efficiency and likelihood of conviction gains that typically accompany misdemeanor prosecutions. And if a prosecutor cares primarily about the imposition of the collateral consequence in a given case, the calculation is straightforward. Indeed, there is no real tradeoff at all.[221]

III. STRATEGIC UNDERCHARGING'S RIPPLE EFFECTS

At first glance, the choice to file a misdemeanor instead of a felony may appear to be relatively insignificant. In a world of guilty pleas, one might ask, what difference does it really make? But misdemeanor prosecutions and felony prosecutions differ in critical ways, including ways that can affect a case's ultimate disposition.[222] As already detailed, misdemeanor defendants are typically afforded fewer procedural protections than felony defendants. The following Part examines some of the other ripple effects caused by a prosecutor's decision to engage in strategic undercharging.[223]

A. Misdemeanor Courts

In most states, misdemeanors are adjudicated in different trial courts than felonies.[224] While felony dockets have no shortage of

221. Consider the following experience of a domestic violence prosecutor in a large, Midwestern jurisdiction. According to this prosecutor, many domestic violence defendants in his jurisdiction, especially first-time offenders, are unlikely to receive any term of incarceration upon conviction, even when convicted of a felony. At the same time, his office (like many others) prioritizes the imposition of firearm prohibitions in domestic violence cases. Because the defendant's expected prison "exposure" is often the same for a felony as a misdemeanor, the prosecutor acknowledged that he sometimes files a misdemeanor charge because the "defendant will get probation regardless," "you still get the gun out of the house," and the "process is much quicker." Interview with K, *supra* note 97.

222. *See generally* Natapoff, *supra* note 13.

223. The effects highlighted in this Part primarily relate to state, not federal, prosecutions. State prosecutions account for about 98 percent of all criminal prosecutions in the United States. *See* 1 LAFAVE ET AL., *supra* note 37, § 1.2(e).

224. *See* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (2009), https://www.nacdl.

cases, misdemeanor courts are typically bursting at the seams. According to one recent study, state trial courts of limited jurisdiction (those primarily responsible for misdemeanor cases) handled more than three times as many cases as state trial courts of general jurisdiction (those primarily responsible for felony cases).[225] The docket disparity is even greater when one focuses on criminal cases.[226] In Washington, for example, state trial courts of limited jurisdiction processed nearly 300,000 criminal cases in 2010, whereas state trial courts of general jurisdiction processed about 38,500 criminal cases.[227] Other states experience similar disparities.[228]

In 1972, the Supreme Court cautioned that "the volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result."[229] A fixation on clearing dockets is likely even more pronounced today, because the number of misdemeanors is now double what it was in 1972.[230]

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org/reports/misdemeanor/ [https://perma.cc/G2HJ-HQ9S]; *see also* Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOC. 351, 359 n.8 (2013).

225. *See* R. LAFOUNTAIN ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 3 (2012), http://www.courtstatistics.org/~/media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx [https://perma.cc/7KEW-FLUR].

226. *See id.*

227. *Id.* at 21. Because courts of limited jurisdiction also process preliminary felony matters, some felony cases are "counted twice"—once in the court of limited jurisdiction for the preliminary matter and again in the court of general jurisdiction for subsequent proceedings. *See id.* at 19.

228. *See id.* at 21 (courts of limited jurisdiction in Michigan processed 867,100 criminal cases and courts of general jurisdiction processed 63,224 criminal cases).

229. Argersinger v. Hamlin, 407 U.S. 25, 34 (1972) ("An inevitable consequence of [such] volume ... is the almost total preoccupation in such a court with the movement of cases." (quoting PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 128 (1967))).

230. In *Argersinger*, the Court estimated that between four and five million cases involved misdemeanors. 407 U.S. at 34 n.4. Today, the best estimates place that number northward of ten million. *See* Natapoff, *supra* note 13, at 1320-21. Much (though not all) of the increase is likely attributable to widespread adoption of a policing strategy called "order maintenance" policing or the "broken windows" theory. *See* Kohler-Hausmann, *supra* note 113, at 632-33, 639.

For a small but representative sampling of the extensive literature on order maintenance policing and the broken windows theory, see WILLIAM BRATTON & PETER KNOBLER, TURNAROUND: HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC 152 (1998); BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 1-4 (2001); Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York*

Given the pressures to process cases rapidly,[231] misdemeanor judges must limit the amount of time they spend on any particular matter.[232] This means they have less time for holding in-person hearings and instead decide more issues on the papers alone. This also means they have less time for engaging defendants in searching plea colloquies, which are supposed to be the final backstop for ensuring that there is a factual basis for the plea and a knowing and voluntary waiver of various constitutional rights.[233]

Misdemeanor courts, moreover, usually operate with their own pool of judges. As Eve Brensike Primus has detailed, "[s]tate misdemeanor judges often have smaller salaries and occupy positions of less prestige than their felony counterparts. As a result, more qualified applicants are naturally attracted to the felony courts."[234] Further, "[i]n a number of states, such as Arizona, Missouri, New York, and Pennsylvania, some of the judges in these [misdemeanor] courts are not lawyers."[235] Perhaps unsurprisingly, the average difference between misdemeanor judges and felony judges—"both in terms of the judges' knowledge of the law and their receptivity to legal arguments"—has been described by some as "astounding."[236]

City and a Five-City Social Experiment, 73 U. CHI. L. REV. 271 (2006); George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/ [https://perma.cc/8K37-EMHR] (introducing the broken windows theory).

231. Among other things, docket clearance rate is a common component of judicial performance evaluations. For example, the National Center for State Courts has developed ten criteria to measure court performance, and three of those criteria rate a judge's ability to effectively manage her docket. *See* NAT'L CTR. FOR STATE COURTS, TRIAL COURT PERFORMANCE MEASURES (2005), http://www.courtools.org/Trial-Court-Performance-Measures.aspx [https://perma.cc/PXQ6-9ZG3].

232. *See generally* Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043 (2013).

233. *See id.* at 1071-72. As Natapoff notes, some courts have even taken to doing pleas en masse. *See id.* at 1072-73 (detailing practice in one Arizona court where judges routinely presided over fifty-to-seventy defendants pleading guilty at once).

234. Eve Brensike Primus, *Our Broken Misdemeanor Justice System: Its Problems and Some Potential Solutions*, 75 S. CAL. L. REV. POSTSCRIPT 80, 81 (2013).

235. *See* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 224, at 11.

236. Primus, *supra* note 234, at 81. Moreover, because "felony convictions get appealed at much higher rates than do misdemeanor convictions ... misdemeanor judges are relatively insulated from higher court feedback and do not learn of their mistakes in the same way that felony trial court judges do." *Id.*

B. Misdemeanor Defense Counsel

Another key consequence of strategic undercharging relates to the defense counsel that misdemeanor defendants receive. Misdemeanor defense attorneys are typically less experienced than felony defense attorneys.[237] Among other things, this means they have had comparatively less time to establish credibility with local prosecutors—a trait that is often critical to counsel's ability to plea bargain effectively.[238]

In addition, defense attorneys handling misdemeanors typically carry greater caseloads than their felony colleagues.[239] The most widely recognized caseload guidelines provide that defense attorneys should not exceed four hundred misdemeanor cases annually.[240] Many defense attorneys, however, go far past that recommended limit.[241] One recent study found that public defenders in Chicago, Atlanta, and Miami average more than two thousand misdemeanor cases per year.[242] That same study reported similar excesses in a variety of other jurisdictions.[243]

The defense attorneys managing these caseloads are usually public defenders compensated by a fixed salary or court-appointed

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237. Cade, *supra* note 73, at 1787 ("[M]isdemeanor defenders typically have little experience.").

238. *See* Bibas, *supra* note 116, at 2534. Depending on the greenness of the attorney, it may also mean that counsel is not yet aware of the various collateral consequences that may attach upon conviction. For now at least, the Supreme Court has limited the Sixth Amendment right that it recognized in *Padilla*—"that counsel must inform her client whether his plea carries a risk of deportation"—to the penalty of deportation. Padilla v. Kentucky, 559 U.S. 356, 374 (2010). Accordingly, defense counsel's failure to advise her client of other potential collateral consequences of conviction is not a ground for a later ineffective assistance claim.

239. *See* Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 470-71 (2007); Roberts, *supra* note 44, at 294. Of course, stifling defense caseloads are not unique to misdemeanor attorneys. *See* Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 812 (2004); Roberts, *Ignorance*, *supra* note 26, at 146-47 (describing "crushing caseload conditions" facing defense attorneys). That said, "individuals facing misdemeanor charges are more likely to suffer the consequences of the workload strain." Roberts, *supra* note 44, at 294.

240. *See* Hashimoto, *supra* note 239, at 487 n.122, 504 n.180; Roberts, *supra* note 44, at 295.

241. *See, e.g.*, Natapoff, *supra* note 13, at 1342-43; NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 224, at 21.

242. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 224, at 21.

243. *See id.* at 20-22.

attorneys operating under strictly-limited fee caps.[244] For the latter, the fees are typically capped at a fraction of the funding allotted for felony cases.[245] In Illinois, for example, payment to court-appointed counsel "may not exceed $500 for a defendant charged with a misdemeanor," yet payment "may not exceed ... $5,000 for a defendant charged with a felony."[246] The combination of a demanding caseload with either a fixed salary or depressed fee caps can have deleterious effects on an attorney's ability and incentive to perform the costly work of investigating potential defenses, filing motions, negotiating with the prosecutor, or personally meeting with the defendant to discuss any number of pertinent issues (including potential consequences of conviction).[247]

This is particularly significant given that misdemeanor attorneys typically receive much less "free" (or low-cost) discovery than their felony counterparts.[248] As a result, misdemeanor defense counsel must rely even more on the fruits of their own investigation in order to assess the strength of the government's case. But, for the reasons noted,[249] misdemeanor defense attorneys will often be the ones least able to perform that critical task.

Some misdemeanor defendants lack access to counsel altogether.[250] An indigent defendant charged with a misdemeanor has a constitutional right to government-provided counsel only if he is

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244. Most misdemeanor defendants are indigent. *See* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1034 (2006) ("Poor people account for more than 80% of individuals prosecuted.").

245. Roberts, *supra* note 44, at 326-27, 327 n.214. Court-appointed attorneys are typically paid on a per case basis. Cade, *supra* note 73, at 1788.

246. *See* 725 ILL. COMP. STAT. 5/113-3.1(b) (1994). Curiously, the same statute provides that court-appointed counsel may receive up to "$2,500 for a defendant who is appealing a conviction of any class offense." *Id.* In other words, counsel is entitled to five times as much funding for appealing a misdemeanor conviction as he is for trying to avoid that conviction in the first place.

247. *See* Roberts, *supra* note 44, at 317-18 ("Misdemeanor attorneys across the country handle caseloads that make almost any investigation difficult."); Bibas, *supra* note 116, at 2479-80.

248. *See supra* notes 137-41 and accompanying text.

249. *See supra* notes 237-47 and accompanying text.

250. There also is "compelling evidence that indigent defendants, petty offenders in particular, often do not get counsel even when they are legally entitled to it." Natapoff, *supra* note 13, at 1340-43 (collecting and summarizing various studies showing lack of access to counsel for indigent petty offenders).

actually "sentenced to a term of imprisonment."[251] Nearly half of the states have exceeded that federal floor and provide counsel to an indigent defendant if he is charged with a misdemeanor that merely authorizes incarceration.[252] But a significant number of states still limit the right to counsel for at least some misdemeanor offenses to those instances in which imprisonment is actually imposed.[253] As with other constitutional safeguards, an offense's potential collateral consequences are generally considered irrelevant when determining whether the defendant has a right to counsel.[254]

C. Misdemeanor Prosecutors

Strategic undercharging can also affect which line prosecutor is responsible for handling the case.[255] This choice is important because misdemeanor prosecutors can differ in meaningful ways from felony prosecutors. Misdemeanor prosecutors are frequently the most junior and least experienced attorneys in the office.[256] Given their lack of seniority, misdemeanor prosecutors often need supervisory approval for any number of case-altering decisions.[257]

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251. Scott v. Illinois, 440 U.S. 367, 374 (1979). In *Alabama v. Shelton*, 535 U.S. 654, 662 (2002), the Supreme Court clarified that a suspended prison sentence also may not be imposed on a misdemeanor defendant unless he was represented by counsel. An indigent defendant charged with a felony, however, has an absolute right to government-provided counsel. *See* Gideon v. Wainwright, 372 U.S. 335 (1963). This is true regardless of whether any prison time is actually imposed on the defendant. *See* Nichols v. United States, 511 U.S. 738, 743 n.9 (1994).

252. *See* 3 LAFAVE ET AL., *supra* note 37, § 11.2(a).

253. *See id.* at 619 n.30; *see also Shelton*, 535 U.S. at 669 n.8.

254. As a matter of federal constitutional law, courts have uniformly concluded that an offense's potential collateral consequences have no bearing on whether an indigent defendant is entitled to counsel. *See* Clapman, *supra* note 26, at 603. As a matter of state law, a handful of jurisdictions have indicated that an offense's collateral consequences may be relevant to defining the scope of the right. *See* 3 LAFAVE ET AL., *supra* note 37, § 11.2(a), at 620 n.34. But those jurisdictions are few in number and, generally speaking, appear to consider an offense's collateral consequences as merely one factor among many when deciding whether the right to state-provided counsel applies in a given case.

255. This is particularly true in large prosecutor's offices that have dedicated misdemeanor units. *See supra* notes 95-98 and accompanying text.

256. *See* Lee, *supra* note 73, at 596.

257. Bowers, *supra* note 18, at 1128 ("[L]ine prosecutors often must obtain supervisory approval before dismissing cases."); Cade, *supra* note 73, at 1783 ("New prosecutors, cutting their teeth on misdemeanor cases, may need permission from supervisors to deviate significantly from the original charge.").

Unsurprisingly, junior prosecutors tend to be the "most deferential to supervisory authority and are therefore least likely to buck [office] policy."[258] As a result, misdemeanor prosecutors may be less likely to second-guess the initial charging decisions that were made by more senior prosecutors in the office.[259]

Misdemeanor prosecutors also tend to carry caseloads that far outpace their felony colleagues.[260] For example, one leading study reports that misdemeanor prosecutors in many of the country's most populous districts are responsible for hundreds of cases at any given time.[261] For example, "[i]n Tarrant County, Texas, home of Fort Worth, ... misdemeanor prosecutors juggle between 1200 and 1500 matters apiece."[262]

Given such caseloads, a prosecutor's capacity to scrutinize the merits of a particular case will typically be quite limited. As one prosecutor I interviewed put it: "The amount of attention you can give to a misdemeanor is a fraction of the attention you can give a felony. There is rarely an opportunity to reevaluate the case after the initial charging decision and determine whether different charges are more appropriate."[263] This reality is particularly significant since cases charged as misdemeanors are not subjected to an independent, initial screening mechanism, such as a grand jury or a preliminary hearing.[264]

Finally, new prosecutors tend to be "systematically harsher" than their more senior colleagues.[265] Among other things, this means they

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258. Bowers, *supra* note 87, at 1704.

259. *See supra* notes 95-98 and accompanying text.

260. *See* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 268-70 tbl.1 (2011).

261. *See id.* (giving examples from most of the country's largest cities, including Los Angeles, Chicago, Manhattan, Brooklyn, Miami, Philadelphia, and Dallas); *see also* Kohler-Hausmann, *supra* note 113, at 664 n.150 (observing that, in New York City, Assistant District Attorneys often carry upwards of two hundred open misdemeanor cases at any given time).

262. Gershowitz & Killinger, *supra* note 260, at 272. For a synopsis of potential harms caused by excessive prosecutorial caseloads generally, see *id.* at 279-96.

263. Interview with K, *supra* note 97.

264. *See supra* Part II.B.1; *see also* Interview with K, *supra* note 97 ("[M]isdemeanors are unloved from the beginning.").

265. Bibas, *supra* note 116, at 2475; *see also* Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 190 (2007) (quoting one former prosecutor: "As a baby DA, I thought all criminals needed to be punished to the fullest extent of the law.").

are less likely to bargain away potential penalties on equitable grounds alone.[266] "[I]nexperienced prosecutors" are also more likely to "press for overly broad categories in their sentencing recommendations, when more individualized judgments could produce more proportional and economical sentencing."[267]

IV. TAKING SERIOUS MISDEMEANORS SERIOUSLY

In many respects, misdemeanors and felonies are processed in two different worlds: different judges, different attorneys, different docket pressures, and different procedures. This Part focuses on that last difference—the procedural disparity between misdemeanors and felonies.[268] For reasons explained earlier, that disparity is an integral component of strategic undercharging.

The procedural gap between misdemeanors and felonies has long rested on two grounds: (1) heightened procedures are warranted only for offenses of a sufficient severity,[269] and (2) the sole metric for determining an offense's relative severity is the potential term of imprisonment it authorizes.[270] This Part challenges the continued wisdom of the second ground and claims that collateral consequences should also be considered when determining an offense's relative severity. Under that approach, misdemeanor offenses carrying certain collateral consequences would trigger the same bundle

266. As Ronald Wright and Kay Levine document in their recent study about the effect that experience has on prosecutors over time, "[e]ntry-level and junior prosecutors were more likely than their experienced colleagues to say that it is important to stick with the most serious charges during plea negotiations." Wright & Levine, *supra* note 20, at 1087-88.

267. *Id.* at 1069.

268. Even when the procedural safeguards afforded to misdemeanor defendants are similar to those provided felony defendants, the misdemeanor version usually comes in a watered-down form. For example, while most misdemeanor defendants have a right to government-provided counsel, the amount of funding provided to that counsel will pale in comparison to what an attorney would receive if the case were a felony. *See supra* notes 244-46. Similarly, a misdemeanor defendant afforded the right to demand a jury trial will typically be entitled only to a jury of a smaller size than a felony defendant (for example, six jurors instead of twelve). *See supra* notes 188-91 and accompanying text.

269. As Alexandra Natapoff summarized this state of affairs, "[i]f the United States Supreme Court can be said to have a misdemeanor theory, it is that lesser punishments should trigger reduced procedural entitlements." Natapoff, *supra* note 13, at 1350.

270. *See supra* notes 150-52 and accompanying text. The lone exception is the constitutional right to counsel, which uses both a potential imprisonment and actual imprisonment metric for purposes of determining relative severity. *See supra* notes 251-53.

of entitlements typically afforded felony defendants. This would better honor an important principle underlying the criminal justice system: serious sanctions require serious procedures.

A. Reconsidering Relative Severity

Although potential imprisonment remains a useful proxy for offense severity, the misdemeanor-felony line should no longer serve as the sole litmus test.[271] Instead, an offense's potential collateral consequences should also be factored into the calculus.

The current prison-centric benchmarks for determining relative severity were designed at a time when the overwhelming majority of collateral consequences—and especially those generally considered most severe—were limited to felony convictions.[272] As explained earlier, that is no longer the case.[273] Now that many important collateral consequences are triggered by misdemeanors, defining severity solely in terms of potential prison time fails to capture the full picture of an offense's potential sanctions and therefore fails to capture the full picture of an offense's relative severity.[274]

This is true regardless of whether one views severity from the perspective of the legislature that enacted the offense or the defendant charged with the offense. Consider the following (and fairly common) example. A jurisdiction creates an offense for misdemeanor sexual abuse and caps potential imprisonment at twelve months or less. In addition, the legislature requires a lengthy period of sex offender registration upon conviction.[275] It would be mistaken to conclude that the legislature did not view misdemeanor sexual

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271. For a thoughtful and thought-provoking take on the difficulties of drawing lines when it comes to the issue of relative crime severity, see generally Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957 (2004).

272. *See supra* notes 40-42 and accompanying text.

273. *See supra* notes 43-44 and accompanying text.

274. When collateral consequences were effectively limited to felony offenses, little was lost when severity was understood exclusively as a function of potential prison time. This is because a conclusion about an offense's severity would have been the same regardless of whether collateral consequences were considered (since those consequences were confined to offenses already considered serious).

275. *See supra* notes 60-64 and accompanying text. In some jurisdictions, like New York, a defendant convicted of certain misdemeanor sex offenses faces a maximum of only three months in jail but will be required to register as a sex offender for a minimum of fifteen years. *See supra* note 64.

abuse as a serious offense simply because it declined to authorize a higher potential term of imprisonment.[276] Rather, the legislature employed an alternative and additional penalty in the form of sex offender registration.[277]

The same can be said when viewing matters from the perspective of the defendant. It is far from clear, for example, whether a typical defendant would consider a modest amount of additional prison time to be a more or a less severe penalty than being required to register as a sex offender for over a decade. Indeed, there is evidence that at least some defendants are willing to risk additional time in prison in the hopes of avoiding a severe collateral consequence that a misdemeanor conviction now triggers.[278]

Accounting for an offense's potential collateral consequences would reflect the increasingly central role such consequences currently play in our criminal justice system. The collateral consequences imposed on a defendant are often the most significant penalties that result from a criminal conviction.[279] The procedures aimed at ensuring accurate and fair criminal adjudications should, simply put, reflect this new norm.

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276. *See* Welsh v. Wisconsin, 466 U.S. 740, 762-63 (1984) (White, J., dissenting) ("Although the seriousness of the prescribed [penal] sanctions is a valuable objective indication of the general normative judgment of the seriousness of the offense, other evidence"—such as an offense's collateral consequences—"is available and should not be ignored") (citation omitted); Schroeder, *supra* note 134, at 516 ("[A]ny collateral consequence to an offender that might result from a conviction for a particular offense is arguably relevant in assessing the seriousness of the offense.").

277. At first blush, a legislature's decision to simultaneously impose a lengthy period of sex offender registration for a conviction and yet cap potential imprisonment at twelve, six, or even three months might make little sense. If the offense warrants a lengthy period of sex offender registration, why would it not also warrant at least the possibility of substantial jail time? The most likely answer is that legislatures wanted to expand a prosecutor's menu of charging options, thereby making it easier for prosecutors to successfully impose sex offender registration requirements on more offenders. The menu analogy is, of course, from Professor Stuntz. *See* Stuntz, *supra* note 88, at 2549.

278. *See, e.g.*, Kaiser v. State, 641 N.W.2d 900, 901-02 (Minn. 2002) (ruling on a defendant seeking to withdraw guilty plea to misdemeanor sex offense on the grounds that counsel failed to inform him of sex offender registration requirement); *see also, e.g.*, Sames v. State, 805 N.W.2d 565, 566 (Minn. Ct. App. 2011) (describing a defendant seeking to withdraw guilty plea to misdemeanor domestic assault on the grounds that counsel failed to inform him of firearm prohibition); State v. Ortiz, 44 A.3d 425, 426-27 (N.H. 2012) (defendant seeking to withdraw guilty plea to misdemeanor shoplifting on the grounds that court failed to inform her of deportation consequences).

279. *See supra* notes 4-10 and accompanying text.

One potential objection to considering collateral consequences when determining relative severity is that it would create difficult line-drawing problems about which consequences should be taken into account and which ones should qualify as sufficiently severe. If nothing else, the misdemeanor-felony line provides a clear point of demarcation. Injecting collateral consequences into the mix would—even if only temporarily—muddy that clean dividing line.[280] Among other things, courts and legislatures tasked with determining relative severity would have to resolve at least three questions when setting the parameters for the universe of relevant collateral consequences.[281]

The first is whether to consider collateral consequences beyond those imposed by the prosecuting jurisdiction. If a conviction in state court also would trigger federal collateral consequences, should those federal consequences be factored in the severity analysis? The answer to this question likely depends on how one resolves a more fundamental issue about relative offense severity: should relative severity be viewed from the perspective of the defendant or from the perspective of the prosecuting jurisdiction (that is, its legislature)? If the former, then collateral consequences imposed by other sovereigns should be relevant to the severity analysis. If the latter, then the possibility of another jurisdiction's collateral consequences being imposed on the defendant is largely irrelevant, as it fails to reflect the views of the prosecuting jurisdiction.[282]

The second question is whether to consider collateral consequences that are not uniformly applied across all defendants. Some collateral consequences, including firearm prohibitions and sex offender registration, apply to all defendants convicted of a trigger-

280. This concern echoes one aspect of the familiar debate involving rules versus standards. *See generally* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

281. I assume for present purposes that courts and legislatures would consider only those consequences imposed by law—that is, those consequences that arise by some form of state action, not private conduct. *See supra* note 27 (discussing the distinction between consequences imposed by law and those by private action).

282. This has been the approach adopted by the Supreme Court in the context of a constitutional right to a jury trial: only those "additional statutory penalties" adopted by the legislature that enacted the offense are relevant. *See* Blanton v. City of N. Las Vegas, 489 U.S. 538, 543-44, 545 n.11 (1989).

ing offense, but some other consequences do not. Consider a federal misdemeanor drug offense where a conviction would render a noncitizen deportable. The sanction of deportation applies only to noncitizen defendants. Should the possibility of deportation be considered relevant for purposes of relative offense severity, even though that consequence would threaten only some defendants charged with the pertinent offense? As with the previous question, the answer likely depends on whether relative severity should be viewed from the perspective of the defendant or that of the prosecuting jurisdiction.

The third question is whether to consider collateral consequences that afford the pertinent decision maker some degree of discretion about imposing them or to limit consideration to those consequences imposed automatically upon conviction.[283] Under the current approach, relative severity is determined by looking at potential imprisonment and not the actual amount of incarceration imposed. Courts and legislatures would therefore need to decide whether discretionary consequences are similar to potential incarceration such that they merit consideration—even though the penalty may not ultimately materialize.

The existence of such open questions should not obscure the fact that a number of important collateral consequences would be relevant even under the most restrictive approach: consequences that are automatically imposed by the prosecuting jurisdiction on all defendants convicted of the pertinent offense. That standard alone would encompass, among other things, sex offender registration and many firearm prohibitions.

After determining the universe of relevant collateral consequences, courts and legislatures would also need to decide what consequences qualify as sufficiently severe to trigger the relevant felony procedure. This could be done either by identifying the specific consequences that merit heightened procedures, or on a

283. *See supra* note 33 (discussing distinction between collateral sanctions and discretionary disqualifications). For an interesting discussion about the American Law Institute's recent proposal to "fully integrate" collateral consequences into a trial court's sentencing process, including by permitting trial judges to "grant relief from specific mandatory collateral consequences at and after sentencing," see Margaret Colgate Love, *Managing Collateral Consequences in the Sentencing Process: The Revised Sentencing Articles of the Model Penal Code*, 2015 WIS. L. REV. 247, 263-73.

case-by-case basis using a standard akin to the one employed by the Supreme Court in the jury trial context—that is, whether the additional "penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe" to warrant classifying the offense as a "'serious' one."[284]

It is important to emphasize here that some procedural safeguards are required by the Constitution and others are governed exclusively by statute or court rule. How and where to draw the line may vary depending on the right at issue, including whether the inquiry is geared toward establishing a constitutional floor or instead about achieving optimal criminal justice policy.

I will not attempt here to catalogue which collateral consequences should trigger which procedural entitlements. For now, my sole aim is to establish that relative severity—and, by extension, the procedural protections afforded a criminal defendant—should no longer turn exclusively on the maximum term of incarceration authorized by the pertinent offense. The next Section explains why there is potentially much to be gained by including collateral consequences in the relative severity calculus.

B. Implications

Applying felony-level procedures to misdemeanors carrying severe collateral consequences could have several salutary effects on the administration of low-level offenses.[285] To begin, bolstering available procedural protections would likely increase the intensity of initial case screening by prosecutors, and in particular, encourage

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284. *Blanton*, 489 U.S. at 543; *see also* N.J. STAT. ANN. § 2B:24-1 (West 1998) (New Jersey statute authorizing counsel for indigent defendants "subjected to a conviction entailing imprisonment in fact *or other consequence of magnitude*" (quoting Rodriguez v. Rosenblatt, 58 N.J. 281, 295 (1971)) (emphasis added)).

285. Because my focus here is on the relationship between the current regime of collateral consequences and adjudicatory procedures, I do not discuss other potential reforms that also merit serious consideration. For example, I am putting to the side arguments that legislatures should cease attaching significant collateral consequences to misdemeanors or should at least make them comparatively less severe (for example, creating a rule that misdemeanants are ineligible to possess a firearm for five or ten years rather than for life). Similarly, reforms to the method of assignment for misdemeanor cases triggering severe collateral consequences in prosecutors' offices or to defense attorneys also deserve more attention than I can give them here.

additional consideration about whether to charge an offense that carries a severe collateral consequence, to pursue a different charge that does not, or even to refuse filing charges at all.[286] Extra attention given at the screening stage would be a most welcome development in the low-level offense arena, which is more often known for its quick and deferential-to-arrest screening decisions.[287]

The implementation of felony-level procedures would also lead to improved scrutiny and testing of the government's case after charges have been initiated. For example, cases would be subject to review by a grand jury or a judge at a preliminary hearing. This review could at least weed out some of the weakest evidentiary cases, in part by discouraging prosecutors from pursuing such cases in the first place. Furthermore, imposing heightened discovery obligations on the government—in addition to the "free" discovery provided by preliminary hearings—would give the defense team a far better picture of the prosecutor's case than it typically receives in the normal misdemeanor setting. Among other things, this could help defense counsel learn where the government's pressure points are—or grease the wheels for a guilty plea upon better appreciating the strength of the government's case. Either way, having more information available, and available earlier, would strengthen the ability of the defense team to subject a case to meaningful adversarial testing.

The adoption of felony-level procedures for serious misdemeanors would also increase the degree to which prosecutorial charging decisions account for the views of the local community. "[T]he idea that prosecutors should be broadly responsive to the concerns of their community" is one that "runs deep" in American criminal law.[288] Indeed, this commitment to community oversight is reflected by the fact that 95 percent of all chief prosecutors in the United States are elected.[289] But "direct elections are not likely to prove an effective means of giving prosecutors guidance as to a community's enforcement priorities or of holding them accountable for the dis-

286. For a persuasive discussion of the benefits of increased screening at the outset of cases, see generally Wright & Miller, *supra* note 95.

287. *See* Bowers, *supra* note 87, at 1709; Natapoff, *supra* note 13, at 1328.

288. Richman, *supra* note 166, at 960.

289. *See supra* note 170.

cretionary decisions that they have already made."[290] To the extent that prosecutorial elections are contested—which itself is infrequent[291]—they are typically focused on a few high-profile issues, and not the "low-visibility enforcement decisions" of the sort at issue here.[292]

More effective entry points for community influence on prosecutorial charging decisions are instead the petit jury and, where available, the grand jury. As Daniel Richman explains, a prosecutor concerned about conviction rates "must make all her decisions in the shadow of projected jury responses"—that is, at least, when the defendant has a right to demand a jury trial.[293] In such circumstances, even "the mere possibility of a jury trial can bring an often overlooked degree of accountability into our system of essentially administrative justice."[294] While this dynamic is "not necessarily the strongest of voices," the potential reaction of a group of laypersons drawn from the community surely "has a far greater say in how prosecutors deploy their resources than ... any more direct mechanism of political accountability."[295]

The adoption of felony-level procedures for serious misdemeanors could have a related beneficial impact—even if a relatively small one—regarding the community's perception of the criminal justice

290. Richman, *supra* note 166, at 963.

291. *See id.*

292. *Id.* at 963-65 ("Perhaps electoral or appointive politics will ensure that the community's preferences will at least be considered on some broad issues of the guns vs. butter variety.... But the bulk of the discretionary decisions that prosecutors make turn not on such broad matters of policy but on the individual circumstances of putative defendants, alleged victims, and other such case-specific factors.") (citation omitted). Richman echoes the observations made by earlier scholars. *See generally* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 3 (1969) (seeking "to minimize injustice from exercise of discretionary power"); ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 38 (1930) (suggesting that "[a] balance between rules of law and magisterial discretion ... is perhaps the most difficult problem of the science of law"); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 41 (proposing "a model for regulating the exercise of prosecutorial discretion in plea bargaining").

293. Richman, *supra* note 166, at 973. Recall that a key motivation for charging a borderline case as a misdemeanor is to avoid the possibility of a jury altogether. This is especially likely in jurisdictions where prosecutors perceive the potential jury pool to be comparatively hostile to the contemplated prosecution. *See supra* notes 184-87 and accompanying text.

294. Richman, *supra* note 166, at 975.

295. *Id.* at 973-74.

system. "Community participation in the administration of the criminal law," the Supreme Court has observed, "is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system."[296] While felony defendants receive a jurisdiction's highest forms of due process, misdemeanants typically receive something that could be charitably called due process "light."[297] Treating misdemeanor cases that carry grave penalties more like felonies and less like traffic infractions could make the process seem more legitimate and fair, thereby having positive effects on public confidence in the criminal justice system.

Finally, applying felony procedures to serious misdemeanors may result in some prosecutors' and public defenders' offices routing those cases to more senior attorneys. Since these serious misdemeanors would be treated as felonies from a procedural perspective, prosecutors' and defenders' offices could respond by shifting responsibility for such cases to the attorneys that typically handle felony cases. This, in turn, could have several benefits. As noted, felony attorneys typically handle lighter caseloads, and therefore can devote more attention to each individual case. In addition, those attorneys tend to be more experienced. The combination of smaller caseloads and more senior attorneys would increase the odds of achieving individualized and proportionate penalties in a particular case.

I do not mean to suggest that the extension of felony procedures to misdemeanors triggering severe collateral consequences would be all roses. Because the efficiency gains associated with charging a misdemeanor would largely be eliminated, more borderline cases would likely be charged as felonies in my proposed world. Defendants would thus be exposed to further and harsher penalties,

296. Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

297. To be sure, providing a defendant with a jurisdiction's highest forms of due process is not a failsafe against nonmeritorious prosecutions or erroneous convictions. *See generally* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011). The point is simply that whatever one thinks of the process afforded felony defendants, misdemeanor defendants typically receive something much less. *See* Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1093 (2013) ("[T]here is little reason to have confidence in the outcome of convictions secured in our lower criminal courts.").

including the threat of increased incarceration and a slate of collateral consequences that may not have been associated with the misdemeanor offense (such as disenfranchisement). The imposition of such additional penalties could have negative effects on the defendant, his family, and society at large.

Relatedly, because increased procedures mean increased costs, prosecutors might decide to forego some cases altogether. It is unlikely that prosecutors could transfer wholesale all cases that previously would have been charged as misdemeanors to the felony side of the ledger. Indeed, one of the main reasons prosecutors engage in strategic undercharging is because they are stretched too thin as it is.

Perhaps prosecutors would seek to mitigate the increased costs by lowering plea prices, in the hopes of inducing earlier and less costly guilty pleas. For example, prosecutors might view the misdemeanor-felony line as more permeable than they currently appear to do and offer misdemeanor pleas for cases initially charged as felonies. However, such an offer might be of limited effect if the collateral consequence is so severe that reduced prison exposure is of secondary importance to the defendant (such as a defendant facing deportation or a lengthy period of sex offender registration). In short, application of felony procedures to serious misdemeanors might result in prosecutors declining otherwise meritorious cases in light of the increased costs they would be forced to bear.

CONCLUSION

This Article explored the impact that collateral consequences have on prosecutors and, in particular, their initial charging decisions. It explained why the attachment of severe collateral consequences to misdemeanor offenses is likely to have a gravitational pull on prosecutors, incentivizing them to charge more borderline cases as misdemeanors rather than as felonies. This is because a misdemeanor triggering a severe collateral consequence offers prosecutors the ability to impose significant penalties at a fraction of the cost. Examining the effect collateral consequences have on prosecutorial decision making also revealed an important and previously overlooked charging tactic: strategic undercharging. Finally,

this Article explained why courts and legislatures should look beyond potential imprisonment when assessing relative offense severity and therefore determining the procedures afforded criminal defendants.