

# Misdemeanor Declination: A Theory of Internal Separation of Powers

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*Millions of times every year, American prosecutors make the all-important decision whether to decline or file formal criminal charges after police have made an arrest. This declination decision determines whether an arrest will become a full-fledged criminal case and thus whether an individual arrestee will become a defendant. It establishes the classic dividing line between investigation and adjudication, triggering numerous constitutional consequences. Through declination, prosecutors also check and regulate police decision-making within the executive branch. In an era of racialized mass incarceration, prosecutorial declination can function as a mode of equitable gatekeeping, regulating the impact of sloppy or biased policing practices on communities, courts, and the rest of the criminal pipeline. It is therefore a unique structural moment of institutional and constitutional significance.*

*Declination is especially influential because police and prosecutors are the two main decision-makers within the carceral executive branch. This Article conceptualizes the relationship between them as an overlooked example of internal separation of powers, with the declination decision as its most impactful regulatory moment. Administrative law teaches that intrabranched checks are vital, especially when interbranch separation of powers has proven ineffective as it famously has with respect to the penal executive. The prosecutorial declination decision, in turn, is an especially promising intrabranched checking tool. It offers decisional friction, oversight, and accountability within the executive at precisely the moment when good law enforcement decision-making makes a big difference for millions of people.*

*In our massive misdemeanor system, this regulatory promise usually fails. Misdemeanor prosecutors routinely rubber-stamp police arrest decisions and convert arrests automatically into formal charges: namely, they abdicate their screening and checking functions by deferring to police. Misdemeanor declination rates are typically very low—often less than five percent—which means that police effectively get to decide not only who will be arrested but who will be formally charged with a crime. This is not how the criminal system is supposed to work. In administrative law terms, such prosecutorial abdication is a violation of basic branch design and a worrisome species of intrabranched*

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*collusion. It is, however, neither universal nor foreordained. Around the country, many newly elected prosecutors have embraced strong misdemeanor declination policies, not only as a way of checking police but increasing equity, efficiency, and accountability. Such policies exemplify how misdemeanor declination is an underappreciated opportunity to regulate the penal executive from within and to mitigate the excesses and injustices of the low-level carceral state.*

INTRODUCTION .....	939
I. INTERNAL SEPARATION OF POWERS .....	947
A. Executive Anxieties.....	947
B. The Police–Prosecutor Intrabranh Relationship .....	951
C. Reframing the Problem of Police–Prosecutor Consensus .....	955
D. Limits to the Analogy.....	960
II. DECLINATION AND THE ANTI-RUBBER STAMP PRINCIPLE .....	962
A. Prosecutorial Declination .....	962
B. The Anti-Rubber Stamp Principle.....	966
C. Warrants and the Interbranch Anti-Rubber Stamp Principle .....	968
D. Implied Doctrinal Checking Requirements.....	969
E. The Structural Significance of Declination Rates .....	973
III. A CASE STUDY IN INTRABRANCH DYSFUNCTION: DECLINATION IN THE MISDEMEANOR SYSTEM .....	976
A. The Power of Misdemeanor Declination .....	976
B. Misdemeanor Declination Rates .....	980
C. What Do Low Declination Rates Mean?.....	983
D. Systemic Implications .....	988
IV. DECLINATION REFORM: STRENGTHENING INTERNAL SEPARATION OF POWERS .....	992
A. Strengthen Declination Policies .....	993
B. A Heightened Standard for Filing Formal Charges .....	997
C. Withhold Absolute Immunity for Malicious Prosecution .....	1000
D. Eliminate Police–Prosecutors.....	1004
CONCLUSION.....	1008

## Introduction

It is commonly said that the state holds a monopoly on criminal punishment.<sup>1</sup> In operation, however, that monopoly power is wielded almost entirely by the executive while the legislative and judicial branches rarely intervene. Legislative enactments provide nearly unlimited grounds for arrest and prosecution and thus confer enormous authority on law enforcement while exerting little constraint.<sup>2</sup> Courts in turn have mostly refused to interfere with statutory overcriminalization, even as plea bargaining has deprived the judiciary of much of its supervisory power over police and prosecutors.<sup>3</sup> As a result, the executive Leviathan exercises highly discretionary, largely unreviewed power over nearly all aspects of the criminal system.

Put differently, conventional separation of powers lacks traction in the criminal sphere.<sup>4</sup> Insofar as interbranch checks are a classic response to concentrated governmental power,<sup>5</sup> they fail here. The state's penal

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1. McDonald v. City of Chicago, 561 U.S. 742, 892 (2010) (Stevens, J., dissenting) (“[I]t is a foundational premise of modern government that the State holds a monopoly on legitimate violence.”); Bernal v. Fainter, 467 U.S. 216, 225 (1984) (noting that “[i]n contrast to state troopers, notaries do not routinely exercise the State’s monopoly of legitimate coercive force” (citation omitted)) (citing Foley v. Connelie, 435 U.S. 291, 293 (1978)). *But see* Malcolm M. Feeley, *The Unconvincing Case Against Private Prisons*, 89 IND. L.J. 1401, 1402, 1404–05 (2014) (criticizing the “state monopoly theory of punishment”).

2. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 599 (2001) (“[C]hecks and balances are an illusion.”).

3. On legislative and judicial impotence, see Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 789, 792 (2012), which notes that failure to address overcriminalization is “due in large part to the dysfunctional political process that expands but never contracts the criminal justice system,” and that “the third branch has done virtually nothing to curb the [overcriminalization] phenomenon.” On judicial impotence, see also Stuntz, *supra* note 2, at 599, which asserts that “[c]ourts are no check, because they can do nothing that legislatures and prosecutors cannot together undo.” *But see* Rehaif v. United States, 139 S. Ct. 2191, 2196, 2200 (2019) (interpreting statute to preserve a strong mens rea standard for 18 U.S.C. § 922(g) status offenses).

4. See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009) [hereinafter Barkow, *Institutional Design*] (arguing that the solution to prosecutorial overreach cannot be found through traditional interbranch separation of powers); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 992 (2006) [hereinafter Barkow, *Separation of Powers*] (“What has been completely overlooked in both the scholarly literature and the Supreme Court’s decisions is what the separation of powers requires when the government proceeds in a criminal action.”); cf. Daniel Epps, *Checks and Balances in the Criminal Law*, 74 VAND. L. REV. 1, 5 (2021) (arguing that “the central organizing idea for the structure of the criminal justice system should be ‘checks and balances’ instead of the ‘separation of powers’”).

5. J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 66–67 (1991) (“Traditionally, the separation of powers doctrine has been regarded as an anti-monopoly principle . . . a kind of Sherman Act for government . . . .”); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 270 (1982) (“[T]he provisions of the Constitution that establish the separation of powers and freedom of political speech . . . thereby protect society against a particularly costly form of monopoly—a monopoly of political power.”).

monopoly functionally resides in a single branch with few operative checks or balances between branches. At the risk of stating the obvious, unchecked carceral power poses big problems for democratic accountability and authority. Eighty-one years ago, Justice Felix Frankfurter worried that “[t]he awful instruments of the criminal law cannot be entrusted to a single functionary,”<sup>6</sup> and the concentrated power of the carceral executive has only ballooned since then.

For decades, this executive Leviathan has appeared uniformly committed to mass incarceration and tough-on-crime policies. High arrest rates were followed by high prosecution rates, which triggered harsh punishments.<sup>7</sup> This apparent unanimity has made the branch look and feel monolithic. As a result, many scholars—myself included—often refer to police and prosecutors collectively as “law enforcement” or “the government” as if those two internal branch actors were one and the same.<sup>8</sup> The elision is defensible and often accurate. It reflects the on-the-ground reality that police and prosecutors are almost always on the same side of the adversarial criminal process. They have many shared goals and interests, and they routinely collaborate—or even collude—to justify and support arrest, prosecution, and conviction. Indeed, as cohabitants of the executive branch, it is often their job to do so.

But this conceptual lumping misses a large and underexplored piece of the institutional puzzle: the intrabranch check. The executive penal monopoly is not internally monolithic. Rather, it is divided up and regulated through the prosecutorial checking and supervision of police, a species of what administrative law calls the internal separation of powers.<sup>9</sup> Prosecutors check and regulate police every day through dozens of routine decisions about whether to file charges after an arrest, to seek bail, to disclose or use evidence, to call a witness, or to reward an informant. As a substantive matter, prosecutors will often agree with police, and such checks do not necessarily generate conflict. As a matter of institutional design, however,

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6. *McNabb v. United States*, 318 U.S. 332, 343 (1943).

7. Support for mass incarceration and tough-on-crime politics appears to be waning. *See, e.g.*, BRENNAN CTR. FOR JUST., *ENDING MASS INCARCERATION: IDEAS FROM TODAY’S LEADERS* (Inimai Chettiar & Priya Raghavan eds., 2019), <https://www.brennancenter.org/media/163/download> [<https://perma.cc/J3VS-7KG6>] (containing reform proposals from a broad political spectrum); *see also infra* note 52 (documenting recent reductions in national arrest, conviction, and incarceration rates).

8. *E.g.*, William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 *STAN. L. REV.* 553, 560 (1992) (conflating police and prosecutorial function); *see also* *Rothgery v. Gillespie County*, 554 U.S. 191, 207 (2008) (holding that the right to counsel attaches when a defendant is “faced with the prosecutorial forces of organized society” regardless of whether police or prosecutors happen to initiate the process (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion))).

9. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 *YALE L.J.* 2314, 2318–19 (2006).

these checks separate the two classes of executive actor, shaping and defining the different jobs that police and prosecutors perform. And those jobs are very different indeed. Police investigate, produce evidence, make arrests, and use force. Prosecutors do none of those things. Rather, they check those police investigations and uses of force; they make judgments about the legal significance of that evidence; and they decide what to do with that evidence, most importantly, whether it should lead to formal criminal charges. In response to these role-based differences, criminal procedure doctrine routinely subjects police and prosecutors to substantially different regulations and constraints.<sup>10</sup>

This Article conceptualizes the relationship between police and prosecutors as an internal separation of powers phenomenon and an underappreciated opportunity to respond to some key problems of the executive penal monopoly. Administrative law has long recognized the importance of intrabranched checking, especially when interbranch checking is unavailable or ineffectual. These insights have powerful implications for criminal law. In effect, criminal law has its own version of an internal separation of powers arrangement in which intrabranched checking, competition, and operational friction between police and prosecutors generate review, offer accountability, and create the potential for penal restraint.

This design feature has been obscured, and thus largely ignored, due to the practical fact that police and prosecutors appear to collude more often than they compete. But as both administrative and criminal law makes clear, such intrabranched coziness is not inevitable.<sup>11</sup> Indeed, the past few years of criminal systemic upheaval have put the police–prosecutor relationship under substantial pressure. As the Police Executive Research Foundation recently acknowledged: “It is an uncomfortable truth that the criminal justice reform movement, in many cases, has disrupted long-standing relationships between police and prosecutors.”<sup>12</sup> In effect, new challenges to the ethos of mass incarceration have revealed structural fissures within the penal executive that have been submerged for decades.

Of all the mechanisms for internal separation of powers within the penal executive, the most significant is the prosecutorial decision whether to decline a case immediately after police have made an arrest. The declination decision is simultaneously routine and seminal. Because American police make approximately ten million arrests every year, prosecutors must also

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10. See *infra* subpart II(D).

11. See *infra* subpart I(B) (describing extensive differences and tensions between police and prosecutors).

12. POLICE EXEC. RSCH. F., POLICE CHIEFS AND PROSECUTORS WORK THROUGH CHALLENGES TO FIND COMMON GROUND 7 (2020), <https://www.policeforum.org/assets/PoliceProsecutors.pdf> [<https://perma.cc/U7YF-72J5>].

make the declination decision millions of times.<sup>13</sup> Declination is often treated as a subspecies of dismissal but in fact it is *sui generis*. A dismissal can occur at any stage in a criminal case, but declination (sometimes called “rejection” or “no papering” or “nolle prosequi” depending on the jurisdiction) occurs by definition right after arrest and therefore prevents a formal criminal case from coming into being at all.<sup>14</sup> It is the moment in which prosecutors make the all-important decision whether an arrestee should become a full-fledged defendant.<sup>15</sup> It is a moment that distinguishes policing from prosecution, investigation from adjudication, and in its most profound form, the police state from rule of law.<sup>16</sup> The declination decision is, in effect, the mother of all internal checks, the loudest way that prosecutors say “no” to the police decision to investigate and arrest a person for potential criminal activity. It is also an obligation that the Supreme Court, the American Bar Association, the National District Attorneys Association, and many other authorities have long recognized as core to the prosecutorial job.<sup>17</sup> The prosecutorial declination decision is thus a unique structural moment of constitutional significance, essential to the legitimacy of executive law enforcement and to the architecture of the criminal system itself.

The declination decision impacts every player in the criminal drama. The prompt decision to decline charges means that an arrestee, their family, and their community do not bear the costs and stigma of formal criminal justice involvement. At the same time, the criminal system itself is spared the

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13. 2019 *Crime in the United States: Persons Arrested*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/persons-arrested> [<https://perma.cc/6YS3-MY74>] (documenting 10,085,207 arrests in 2019).

14. Although in practice there can be substantial delays of weeks or even months. See Pamela R. Metzger & Janet C. Hoefel, *Charging Time*, 108 IOWA L. REV. 1723, 1728, 1754–56 (2023) [hereinafter Metzger & Hoefel, *Charging Time*] (describing long and costly delays in the prosecutorial charging decision); Pamela R. Metzger & Janet C. Hoefel, *Criminal (Dis)Appearance*, 88 GEO. WASH. L. REV. 392, 402 (2020) [hereinafter Metzger & Hoefel, *Criminal (Dis)Appearance*] (describing long delays between arrest and initial court appearances).

15. The legal line between suspect and defendant is concededly not a bright one. For example, the Court sometimes deems people to be “defendants” before a prosecutor is formally involved in the case. *Rothgery v. Gillespie County*, 554 U.S. 191, 208 (2008).

16. *Cf. Johnson v. United States*, 333 U.S. 10, 17 (1948) (holding that warrant requirement preserves “one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law”).

17. *Kirby v. Illinois*, 406 U.S. 682, 689–90 (1972) (plurality opinion); CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION, 3-1.2(b) (AM. BAR ASS’N, 4th ed. 2017) [hereinafter ABA PROSECUTION STANDARDS], [https://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/) [<https://perma.cc/HCC9-TWMX>]; NAT’L PROSECUTION STANDARDS, 1-1.1 to 1-1.2 (NAT’L DIST. ATT’YS ASS’N, 3d ed. 2009), <https://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Ed.-w-Revised-Commentary.pdf> [<https://perma.cc/9JJT-FF9S>]; see also Lauren M. Ouziel, *Prosecution in Public, Prosecution in Private*, 97 NOTRE DAME L. REV. 1071, 1099 (2022) (noting that as a historical matter “the potential for [private] abuse of the declination power was among the reasons for the shift to public prosecution”).

expense of processing the case.<sup>18</sup> This opportunity for equitable efficiency, however, is routinely missed. Prosecutors often put off the substantive decision about whether to dismiss a case, reflexively charging arrests upfront and then deciding later to dismiss them.<sup>19</sup> This gap—between the initial failure to decide and the ultimate decision to dismiss—is wildly expensive. It means that defendants whose cases are ultimately dismissed can languish in jails for weeks; incur financial burdens and criminal records; lose their jobs; and undergo the prolonged trauma of being marked and treated as criminals. It is also costly for the criminal system, forcing courts, jails, and public defenders to expend resources on cases that will eventually be dismissed. Put differently, the prosecutorial decision to skimp on declination imposes enormous externalities throughout the criminal process.<sup>20</sup>

Nowhere has this vital declination function failed more spectacularly than in the misdemeanor system. Average state felony declination rates hover around 25%; by contrast, misdemeanor declination rates are usually low—often less than 5%.<sup>21</sup> In Mecklenburg, North Carolina, in 2009, prosecutors declined fewer than 5% of all drug cases; for Black women arrestees the declination rate was zero.<sup>22</sup> In Alaska, the 2015 misdemeanor declination rate was 3.7%.<sup>23</sup> In Iowa, the 2008 declination rate for simple misdemeanors was less than 0.5%.<sup>24</sup> In each of these jurisdictions, moreover, large percentages of cases were subsequently dismissed, meaning that prosecutors routinely reversed their initial decisions. In such jurisdictions, low declination rates

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18. See *infra* subparts III(A)–(B) (documenting impact on defendants and the criminal process).

19. Or simply delaying the initial decision entirely. See Metzger & Hoeffel, *Charging Time*, *supra* note 14, at 1741, 1749.

20. Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 189 (2017) (pointing out that police and prosecutors impose a wide array of negative externalities on the rest of the criminal system for which they do not pay and thus overuse their criminalization authority in inefficient and destructive ways).

21. See *infra* notes 173–74; see also *infra* subpart III(B) (describing data).

22. *Racial Disparities in the Criminal Justice System: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 37 (2009) [hereinafter *McKenzie Testimony*] (statement of Wayne S. McKenzie, Director, Prosecution & Racial Justice Program, Vera Institute of Justice); WAYNE MCKENZIE, DON STEMEN, DEREK COURSEN & ELIZABETH FARID, PROSECUTION AND RACIAL JUSTICE: USING DATA TO ADVANCE FAIRNESS IN CRIMINAL PROSECUTION 7 (2009), <https://www.vera.org/downloads/publications/Using-data-to-advance-fairness-in-criminal-prosecution.pdf> [<https://perma.cc/HC7M-MFA9>] (reporting that ultimate dismissal rates in Mecklenburg were high).

23. ALASKA CT. SYS., ALASKA COURT SYSTEM ANNUAL REPORT FY 2015, at 135 tbl.5.12 (2016), <https://courts.alaska.gov/admin/docs/fy15.pdf> [<https://perma.cc/2GUV-ZHVB>] (showing 3.7% of misdemeanors dismissed at or before arraignment but 30.6% of misdemeanor cases ultimately dismissed).

24. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1717 tbl.3 (2010). Bowers does not report the ultimate 2008 dismissal rate for simple misdemeanors, but it is highly likely to be much higher than one half of one percent.

reveal that prosecutors frequently defer, at least initially, to police decision-making instead of checking it and thereby mechanically convert thousands of arrestees into criminal defendants at great cost to them and to the criminal system.

The decision whether to decline a misdemeanor is also, comparatively speaking, made on the fly. One study revealed that the felony declination decision often takes weeks. Prosecutors in another study spent an average of forty hours before deciding to decline murder charges.<sup>25</sup> By contrast, misdemeanor prosecutors often make declination decisions in minutes, or even seconds. Sometimes they don't make the decision at all. In some jurisdictions, police are permitted to file charges and initiate cases directly.<sup>26</sup> In others, prosecutor offices automatically charge all police misdemeanor arrests and wait until later to figure out how they actually want to handle the case, which much of the time ends up being by dismissal.<sup>27</sup>

Such lax misdemeanor declination practices reflect the failure of intrabranched checking and a widespread abdication of the prosecutorial screening function. When prosecutors rubber-stamp arrests into formal charges without considering the evidence and the equities, they are functionally deferring to police on that crucial initial charging question. This abdication—demonstrably worse for misdemeanors than for felonies<sup>28</sup>—has numerous sources. Like their public defender counterparts, many prosecutors' offices struggle with large misdemeanor caseloads.<sup>29</sup> The resultant time crunch and resource constraints create incentives to defer

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25. AM. PROSECUTORS RSCH. INST., HOW MANY CASES SHOULD A PROSECUTOR HANDLE? 21–22 (2002), [https://biblioteca.cejamicas.org/bitstream/handle/2015/2111/How\\_Many\\_Cases.pdf?sequence=1&isAllowed=y](https://biblioteca.cejamicas.org/bitstream/handle/2015/2111/How_Many_Cases.pdf?sequence=1&isAllowed=y) [<https://perma.cc/V45E-VUR8>]; see also Metzger & Hoeffel, *Charging Time*, *supra* note 14, at 1743 (noting felony charging delays of weeks or months in forthcoming version of Deason Study); DEASON CTR., SMU DEDMAN SCH. OF L., SCREENING AND CHARGING CASES IN THREE MID-SIZED JURISDICTIONS 2, <https://www.smu.edu/-/media/Site/Law/Deason-Center/Publications/Prosecution/Prosecution-Charging-Practices-Project/Series-Preview---Screening-and-Charging-Practices-of-Three-Mid-Sized-Jurisdictions.pdf?la=en> [<https://perma.cc/VJW7-VABU>] (previewing study); cf. Aya Elamroussi, *The Officers Accused in Elijah McClain's Death Didn't Face Charges for 2 Years. Here's a Timeline of How the Case Made It to Trial*, CNN (Sept. 23, 2023, 4:12 AM), <https://www.cnn.com/2023/09/23/us/elijah-mcclain-police-death-trial-timeline/index.html> [<https://perma.cc/4DH5-MVR5>] (noting that it took more than two years for charges to be filed against police officers who killed Elijah McClain).

26. See *infra* subpart IV(D).

27. See *infra* subpart III(B) (data describing ultimate misdemeanor dismissal rates across jurisdictions as ranging from 30–60%).

28. Prosecutorial deference to police is not limited to misdemeanors. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2124 (1998) (“Most commonly, in all likelihood, the prosecutor simply accepts the results of the police investigation.”); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y.U. L. REV. 669, 687 (noting that “the initial charging decision will frequently be made in a matter of minutes” and “the screening process does not produce a considered and informed charging decision”).

29. 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 (2011).



decisions rather than devoting the time to make them properly up front. Misdemeanor culture tends to be sloppy: it often tolerates delay and error while devaluing the liberty and dignitary interests of defendants. As a result, baseless or inappropriate misdemeanor arrests are routinely charged as a matter of convenience and leverage with the tacit understanding that they will later be dismissed, diverted, or resolved by a sentence of time served. Misdemeanor charging decisions, moreover, are typically delegated to the least experienced junior prosecutors in the office, ensuring that police expertise will have disproportionate influence over prosecutorial decision-making. All of these routine institutional dynamics conspire to devalue the declination decision and depress declination rates.

When prosecutors fail to screen and instead rubber stamp arrests into formal charges, they permit policing values and priorities to pass unchecked into the adjudicative legal system. This creates both intra- and interbranch design problems of some magnitude. Police are not authorized to decide who should be formally charged with a triable offense; that is the prosecutor's job.<sup>30</sup> Prosecutorial deference to police also permits problematic or even illegal policing choices—including the tendency to over-police the poor and people of color—to overdetermine the composition of the entire criminal pipeline and to establish which populations will be hauled into court as criminals.

The downstream consequences of rubber stamping extend even further into the misdemeanor system. Police are definitely not authorized to decide who gets *convicted*—that is supposed to be the ultimate decisional product of the entire adversarial system. In practice, however, weak misdemeanor declination covertly shifts conviction authority to police. In a world of 5% declination rates, getting arrested means getting charged. Because the low-level criminal system exerts such strong pressures on defendants to plead guilty, for many defendants simply getting charged will mean accepting conviction. In these ways, weak prosecutorial declination means that the police decision to arrest becomes the central determinant of conviction.<sup>31</sup> It is thus a key mechanism through which sloppy or biased policing decisions

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30. See, e.g., N.Y. CRIM. PROC. LAW § 1.20(6)–(7) (McKinney 2023) (distinguishing “prosecutor’s information” which can “serve[] as basis for prosecution” from a police “misdemeanor complaint” which “may not, except upon the defendant’s consent, serve as a basis for prosecution of the offenses charged therein”); *Manuel v. City of Joliet*, 137 S. Ct. 911, 925 (2017) (Alito, J., dissenting) (“[L]aw enforcement officers . . . lack the authority to initiate or dismiss a prosecution. That authority lies in the hands of prosecutors.” (citation omitted)). *But see infra* subpart IV(D) for exceptions to this general rule.

31. Alexandra Natapoff, *A Stop Is Just a Stop: Terry’s Formalism*, 15 OHIO STATE J. CRIM. L. 113, 125–26, 128 (2017) (describing this dynamic in detail); see also Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 815 (2015) (discussing the use of arrest information by administrative actors outside of the criminal justice system); Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 989 (2019) (“[A]rrests appear to be fused with guilt.”).

get thoughtlessly translated into formal convictions and punishment. Specifically, it permits racialized policing practices to formally criminalize thousands of Black men for low-level offenses such as trespassing, loitering, disorderly conduct, jaywalking, and traffic violations.<sup>32</sup>

Declination failure in the misdemeanor system is thus not merely a source of error, although it produces many unjustified outcomes. It alters the very reasons why people are charged with crimes. It elevates police authority over the legal and equitable judgments of prosecutors. It exacerbates the informal criminalization and punitive treatment associated with arrest. And it has been an underappreciated contributor to mass incarceration, the criminalization of the poor, and the racial disproportion of the entire penal apparatus.<sup>33</sup>

Conversely, the declination function offers powerful opportunities for better systemic regulation of the low-level carceral state. It is an internal separation of powers mechanism with the potential to restrain excessive policing and overcriminalization, while injecting stronger values of lawfulness and equity into the front end of the penal process. It spares individuals from the crushing burdens of formal criminalization while conserving systemic resources. It is also increasingly realistic. Jurisdictions from Texas to South Carolina are developing new screening infrastructure.<sup>34</sup> Many recently elected prosecutors are instituting stronger misdemeanor declination policies as part of broader reform efforts.<sup>35</sup> Prosecutors from Boston to Los Angeles have created official presumptions against filing formal charges based on arrests for loitering, disorderly conduct, marijuana possession, and a host of other low-level offenses.<sup>36</sup> Through these policies, thousands of people have already avoided incarceration, conviction, and the crushing fines and fees that typically accompany misdemeanor offenses.

This Article concludes with various proposals to strengthen misdemeanor declination as a way of regulating and disrupting the executive penal monopoly and mitigating the racialized mass incarceration that rubber-stamping produces. Strong declination policies should be defended and

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32. See *infra* notes 334–36 and accompanying text.

33. ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME 149–70 (2018) (describing pervasive racial skew of the misdemeanor system).

34. DOTTIE CARMICHAEL, MELISSA GIBSON & MICHAEL VOLOUDAKIS, EVALUATING THE IMPACT OF DIRECT ELECTRONIC FILING IN CRIMINAL CASES 1 (2006), [https://www.supremecourt.gov/opinions/URLs\\_Cited/OT2007/07-440/07-440.pdf](https://www.supremecourt.gov/opinions/URLs_Cited/OT2007/07-440/07-440.pdf) [<https://perma.cc/JJ7C-PWK8>] (Texas); Jess Sorensen, Kevin Himberger, JJ Nadeo, Rory Pulvino & Jared Fishman, *The Case for Screening*, JUST. INNOVATION LAB (Feb. 24, 2023), <https://why-screen-charleston-sc.justiceinnovationlab.org/> [<https://perma.cc/9UDW-WSBX>] (South Carolina).

35. See *infra* Part IV; John Pfaff, Spreadsheet: ReformProsecutorRaces, <https://t.co/WBwW63j7dQ> [<https://perma.cc/6KKM-UEQC?type=image>] (documenting over seventy reform-minded prosecutors elected in the last decade).

36. See *infra* notes 280–95 and accompanying text.

expanded. Prosecutorial deference to police arrest decisions should be discouraged both legally and professionally. Legislatures should formally raise the evidentiary charging standards for low-level crimes from probable cause to a preponderance of the evidence or higher to ensure that the prosecutorial decision to transform an arrestee into a defendant cannot be based solely on the police decision to arrest. Prosecutors who fail to screen and who passively rubber stamp police decisions should lose their absolute immunity from suit for malicious prosecution. Finally, police should not be permitted to direct file or prosecute their own misdemeanor cases, as they are still currently authorized to do in approximately a dozen states.

This is a crucial moment for criminal law to reevaluate old assumptions about the penal executive. The past ten years have given us new data about the misdemeanor system, new insights into the relationship between police and prosecutors, and perhaps most profoundly, new momentum for change. The time is ripe to take advantage of the design insights offered by administrative law. That scholarship has developed analytic tools to go after intrabranched collusion and the monopolistic abuse of branch power, precisely the sorts of problems that plague the criminal apparatus. We should borrow and adapt those tools to the special challenges of mass incarceration and the dysfunctions of the low-level carceral process. With a wave of newly elected prosecutors experimenting with executive discretion in creative ways, now is a perfect time.

## I. Internal Separation of Powers

### A. *Executive Anxieties*

Scholars of administrative law and of the Presidential Executive share some basic anxieties with criminal law scholars. The administrative state has become a Leviathan “wielding executive powers of frightening scope and power.”<sup>37</sup> “[T]he greatest threat of aggrandized power today lies in the broad delegations of power to the Executive Branch.”<sup>38</sup> “[L]egislative abdication is the reigning *modus operandi*,”<sup>39</sup> and there is “nearly unfettered [executive] discretion.”<sup>40</sup> Scholars fear “efforts to cut legal corners or implement hyperpartisan policies.”<sup>41</sup> The horizon is haunted by “the specter of abuse

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37. CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW & LEVIATHAN 1* (2020) (describing criticism of the administrative state).

38. Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 428–29 (2009).

39. Katyal, *supra* note 9, at 2316.

40. Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 229–30 (2006).

41. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 522 (2015).

and corruption<sup>42</sup> and, at the end of the day, a profound lack of democratic accountability.<sup>43</sup> While each of these formulations comes from administrative or national security law scholarship, they could easily have been lifted from criminal scholarship's critique of the carceral state.<sup>44</sup>

In response to these anxieties, executive branch scholars—unlike criminal law scholars—have developed robust theories of internal checks and balances as a complement to traditional tripartite separation of powers. Separation, fragmentation, and competition within and among agencies advance the “tradition of employing rivalrous institutional counterweights to limit State power and to promote good governance, pluralism, political accountability, and the rule of law.”<sup>45</sup> Scholars have identified an array of specific institutional designs within the executive that can improve decision-making and accountability even in the absence of strong external checks by the legislature and the judiciary.<sup>46</sup> Splitting up functions within a bureaucracy, for example, creates discussion, competition, and opportunities for review.<sup>47</sup> Insulating various agency actors from political pressure (or, conversely, exposing them to it) can create greater accountability within the agency.<sup>48</sup> Overlapping authority between different agencies can expand

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42. *Id.*

43. See Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419, 426 (2015) (arguing that the functional goals of constitutional structure are “to diffuse political power and ensure ambition counters ambition, in order to promote liberty, governmental efficacy, and democratic accountability”).

44. See Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 84 (2019) (criticizing lack of constitutional restraint over police); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1830 (2015) (describing American policing as “a failure of democratic processes and accountability”); Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1433 (2012) (describing intersectionality theories regarding race, gender, and mass incarceration as “practices and discourses designed to resist the Leviathan”); Stuntz, *supra* note 2, at 599 (“[C]hecks and balances are an illusion.”).

45. Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 262 (2016).

46. Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 115 (2018) (describing the array of subconstitutional actors who generate internal checks and balances).

47. See, e.g., Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1077–78 (2011) (“The ongoing contest over the roles of expertise, legalism, and politics in administrative law can . . . be viewed in sociological terms as a contest among different types of professionals, with different types of training and priorities.”); Metzger, *supra* note 38, at 429 (explaining that there is a “due process element [to] the division of functions within agencies and the separation of adjudication from legislative, investigatory, and enforcement activities”).

48. Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 55, 94 (2008) (arguing that the value of bureaucratic insulation will vary with its politics; “the greater the bureaucracy’s expected policy bias, the lower the optimal level of bureaucratic insulation”).

viewpoints and expertise while making capture more difficult.<sup>49</sup> The shared spirit of these interventions is both pro-discourse and anti-monopolistic: the former advances the latter. By creating internal branch friction and disrupting the unchecked march toward executive consensus, so the argument goes, internal checks can improve the decisional process and promote accountability.<sup>50</sup>

These design insights are rarely leveraged within criminal law, but their utility is obvious. The penal Leviathan is the paradigmatic conglomeration of executive power, and traditional external checks and balances have been ineffectual in constraining it. This makes internal checks and friction especially important. Like its civil administrative counterpart, the penal apparatus tends to get ideologically one-sided. It faces interest-group pressure from the crime control constituency, a kind of carceral capture by tough-on-crime politics.<sup>51</sup> It also exhibits the classic bureaucratic tendency to self-aggrandize and grow. Indeed, we are currently grappling with the legacy of over three decades of mass incarceration during which the U.S. penal bureaucracy expanded to become the largest carceral system on the planet.<sup>52</sup>

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49. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1136, 1142 (2012) (describing benefits that accrue from the “shared regulatory space” created by overlapping agency authority); cf. Daniel A. Farber & Anne Joseph O’Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375, 1384 (2017) (arguing that “[c]onflict among and within agencies can provide substantial political, social welfare, and legitimacy benefits”).

50. See Katyal, *supra* note 9, at 2324 (arguing that overlapping agency jurisdiction creates friction and a richer policy dialogue to counter the risk that “the President could easily surround himself with people of a similar worldview who lack expertise”).

51. Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 718 (2005) (explaining pervasive political pressures to criminalize and noting that “the desire to insulate sentencing decisions from raw politics prompted Congress to use an ‘independent agency’ model in establishing the U.S. Sentencing Commission”); Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 744 (2017) (describing the impact of police unions on various criminal justice policies); Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 74 (2016) (describing political clout of public correctional officers’ organizations and their opposition to decarceral policies and practices).

52. Although more recently it has been shrinking. Campbell Robertson, *Crime Is Down, Yet U.S. Incarceration Rates Are Still Among the Highest in the World*, N.Y. TIMES (Apr. 25, 2019), <https://www.nytimes.com/2019/04/25/us/us-mass-incarceration-rate.html> [<https://perma.cc/RFJ7-GK22>]; *The Footprint: Tracking the Size of America’s Criminal Justice System*, COUNCIL ON CRIM. JUST. (Sept. 2023), <https://counciloncj.foleon.com/the-footprint-trends-in-crime-arrests-and-the-total-correctional-population> [<https://perma.cc/6JDG-TYCM>]; ASHLEY NELLIS, SENT’G PROJECT, MASS INCARCERATION TRENDS 2 (2023), <https://www.sentencingproject.org/app/uploads/2023/01/Mass-Incarceration-Trends.pdf> [<https://perma.cc/YC7Y-5HQU>]; WILLIAM J. SABOL & THADDEUS L. JOHNSON, JUSTICE SYSTEM DISPARITIES: BLACK-WHITE NATIONAL IMPRISONMENT TRENDS, 2000 TO 2020, at 6–7 (2022), <https://secure.counciloncj.org/np/viewDocument?orgId=counciloncj&id=2c918083835fc0e8018361f02fe6001a> [<https://perma.cc/646W-3FD3>] (documenting reduced racial disparities over the past twenty years); cf. *Drug Arrests Stayed High Even as Imprisonment Fell from 2009 to 2019*, PEW (Feb. 15, 2022), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/02/drug-arrests-stayed-high-even-as-imprisonment-fell-from-2009-to-2019> [<https://perma.cc/S77P-5DRA>].

More philosophically, the administrative state and the penal apparatus both rely heavily on well-reasoned, rule-based decision-making for their basic legitimacy. It matters a lot how agencies make decisions. As the Supreme Court has written, in order to receive deference an agency must supply “reasoned analysis” and “must cogently explain why it has exercised its discretion in a given manner.”<sup>53</sup> It likewise matters a lot whether criminal convictions and punishment are based on the right kinds of reasons. Rule of law and the legality principle *nulla poena sine lege* are central to the normative authority of criminal law and the convictions that it imposes.<sup>54</sup> Reasoned decision-making is especially vital in light of the extensive discretion accorded to both civil agencies and criminal law enforcement. In both spheres, therefore, intrabranched checks that improve reasoned, accountable decision-making nurture the integrity of the entire endeavor.

The general salience of internal separation of powers has been suggested, although never fully explored, by some criminal legal scholarship. Most prominently, Rachel Barkow has argued for an administrative conceptualization of the penal state that would, among other things, militate for greater separation of functions between prosecutors within prosecutorial offices.<sup>55</sup> Daniel Epps has argued that “the central organizing idea for the structure of the criminal justice system should be ‘checks and balances’ instead of the ‘separation of powers.’”<sup>56</sup> Russell Gold has argued that prosecutors have a specific obligation to enforce the Fourth Amendment and a “duty to serve as a constitutional check on police to protect constituents’ rights” thereby fulfilling “their intended role as an intra-executive-branch check.”<sup>57</sup> Others suggest that prosecutorial control over plea bargaining

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53. *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43, 48 (1983); cf. Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1356 (2016) (arguing for a thinner approach to rationality review that accommodates the reality that “rational agencies may have good reason to decide in a manner that is inaccurate, nonrational, or arbitrary” (emphasis omitted)).

54. See *Rogers v. Tennessee*, 532 U.S. 451, 467–68 (2001) (Scalia, J., dissenting) (“[T]he maxim *nulla poena sine lege* . . . has been described as one of the most ‘widely held value-judgment[s] in the entire history of human thought.’” (second alteration in original) (quoting JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 59 (2d ed. 1960))); Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW. & SOC. INQUIRY 387, 390 (2008) (arguing that the “decision *not* to prosecute, in a case where there is probable cause to believe that a crime has been committed” exemplifies “the logic of sovereignty and its complex relationship to legality”).

55. Barkow, *Institutional Design*, *supra* note 4, at 898.

56. Epps, *supra* note 4, at 5, 61, 66–67 (identifying voters and juries as key mechanisms for checking the criminal process).

57. Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor’s Role*, 47 U.C. DAVIS L. REV. 1591, 1596, 1623, 1641 (2014); see also Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1920–21 (2014) (observing that modern police are “overseen not by an occupying army or a foreign empire, but by local prosecutors steeped in legal training and attentive to judicial interpretations of constitutional rights”).

might work as a kind of check on police overreach.<sup>58</sup> Most of these scholars do not call this internal separation of powers, but they easily could. Indeed, a few scholars have wondered out loud why criminal legal theory does not take advantage of insights from internal separation of powers.<sup>59</sup> It is past time to do so.

### B. *The Police–Prosecutor Intrabran­ch Relationship*

The police–prosecutor relationship raises precisely the kinds of governance problems addressed by internal separation of powers theories. Traditional interbranch separation has been a generally ineffective check on the carceral state. At the same time, the two main executive decision-makers—police and prosecutors<sup>60</sup>—are separate branch actors with distinct normative and policy obligations that make them obvious candidates to engage in intrabran­ch checking and balancing. As a literal matter, they constitute different agencies within the executive and thus implicate the kinds of concerns triggered by overlapping or competing agency authority that administrative law engages.<sup>61</sup> More conceptually, police and prosecutors coinhabit the broader law-enforcement endeavor and thus resemble officials

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58. Jonathan Abel, *Cops and Pleas: Police Officers' Influence on Plea Bargaining*, 126 YALE L.J. 1730, 1732, 1741–43 (2017) (quoting a district attorney who called it “an important bulwark against overreaching by police that there has to be a vetting [of] the investigations by an individual from a separate agency that’s not within the chain of command of the police department” (alteration in original)); see also Adam M. Gershowitz, *Prosecutorial Dismissals as Teachable Moments (and Databases) for the Police*, 86 GEO. WASH. L. REV. 1525, 1528 (2018) (arguing that prosecutors should use dismissals as an opportunity to educate police).

59. Brian Richardson, *The Imperial Prosecutor?*, 59 AM. CRIM. L. REV. 39, 91 (2022) (calling it “curious” that internal “[b]ran­ch-wide checks and balances are not part of the account of the legitimacy of criminal law enforcement”); Epps, *supra* note 4, at 74 (briefly noting that internal separation of powers might create “interesting possibilities” as applied to criminal law); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 752, 810 (2003) (mourning that “the positive contributions that an administrative law perspective offers to understanding the [criminal] enforcement bureaucracy have been left largely unexplored” and noting “the doctrinal oddity of thinking in separation of powers terms within the executive branch” in connection with criminal law enforcement).

60. Prison officials are a third class of executive penal decisionmaker; they have their own special brands of discretion and judicial deference. Sharon Dolovich, Response, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 302, 303 (2022) (describing “deferential posture with which federal courts tend to approach [prison officials’] assertions in individual cases”).

61. Compare Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 95 (2016) (pointing out that “police departments are agencies”), and Barkow, *Separation of Powers*, *supra* note 4, at 997 (pointing out that prosecutor offices are agencies), with Freeman & Rossi, *supra* note 49, at 1136 (describing “shared regulatory space” created by overlapping agency authority), and Farber & O’Connell, *supra* note 49, at 1384 (arguing that “[c]onflict among and within agencies can provide substantial political, social welfare, and legitimacy benefits”). See also Jason Marisam, *Interagency Administration*, 45 ARIZ. ST. L.J. 183, 185–86 (2013) (offering a theory of interagency relationships through which agencies contribute to, influence, and pressure each other in ways that accrue power to themselves).

separated by function within a single agency or agencies that share a common mission.<sup>62</sup>

Police and prosecutors also have highly distinct educational, sociological, and institutional identities which make them very different kinds of decisionmakers. Prosecutors are professionally socialized in law schools and courtrooms; police are professionally socialized in training academies and on the beat.<sup>63</sup> The average rank-and-file U.S. police officer has a high school diploma and might earn \$67,600 a year, although in many jurisdictions average salaries are closer to \$40,000 a year.<sup>64</sup> The law school graduates who become prosecutors start out earning around \$68,000 with an average salary of \$91,474.<sup>65</sup> On the job, policing and prosecution are distinctive kinds of work. Police, for example, carry guns and use physical force; prosecutors do not.<sup>66</sup> Police actively confront people in their cars, houses, and on the street; prosecutors might never interact with a defendant outside of a legal office or courtroom.

The distinct nature of these jobs and identities can generate conflicting role moralities and even professional distrust.<sup>67</sup> For example, police in Chicago and New York used to maintain “double file” systems in which police created two sets of investigative reports: a full internal version and a partial, sanitized version which they gave to prosecutors.<sup>68</sup> Similarly, some

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62. Cf. Magill & Vermeule, *supra* note 47, at 1036, 1061, 1072, 1077–78 (describing how authority within an agency can be allocated both horizontally among co-equal professions and vertically among superiors and subordinates and that these design choices can be used to calibrate agency decision-making).

63. Compare Shaun Ossei-Owusu, *The New Penal Bureaucrats*, 170 U. PA. L. REV. 1389, 1409–10 (2022) (describing typical law-school socialization of prosecutors), with PETER MOSKOS, COP IN THE HOOD: MY YEAR POLICING BALTIMORE’S EASTERN DISTRICT 6, 22, 24 (2008) (describing police socialization in both the academy and on the street).

64. CHRISTIE GARDINER, POLICING AROUND THE NATION 16, 31 (2017), [https://www.policinginstitute.org/wp-content/uploads/2017/10/PF-Report-Policing-Around-the-Nation\\_10-2017\\_Final.pdf](https://www.policinginstitute.org/wp-content/uploads/2017/10/PF-Report-Policing-Around-the-Nation_10-2017_Final.pdf) [<https://perma.cc/XD7U-JQJY>] (reporting that more than 80% of police departments require only a high school diploma, approximately half of sworn officers have at least a two-year degree, and about 30% have at least a four-year degree); Andrew DePietro, *Here’s How Much Money Police Officers Earn in Every State*, FORBES (Apr. 23, 2020, 2:02 PM), <https://www.forbes.com/sites/andrewdepietro/2020/04/23/police-officer-salary-state/?sh=6a88e8522010> [<https://perma.cc/KRA9-Z8DV>]; see also Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2132–33 (2017) (observing that low police wages contribute to legal estrangement between police and community).

65. Debra Cassens Weiss, *Prosecutor Pay Isn’t Keeping Up with Inflation, Even as Some Case Backlogs Grow, Study Author Says*, ABA J. (Nov. 24, 2021, 9:24 AM), <https://www.abajournal.com/news/article/study-finds-average-pay-is-68k-for-new-prosecutors-while-case-backlogs-jump-62-in-some-offices> [<https://perma.cc/FL8K-DA4B>].

66. See Rachel Harmon, *Reconsidering Criminal Procedure: Teaching the Law of the Police*, 60 ST. LOUIS U. L.J. 391, 398–99 (2016) (“[T]here is an inexorable link between police and violence, even if officers rarely use force.”).

67. My thanks to Aziz Huq for pressing this point.

68. See Stanley Z. Fisher, *“Just the Facts, Ma’am”*: Lying and the Omission of Exculpatory Evidence in Police Reports, 28 NEW ENG. L. REV. 1, 36–37, 36 n.179 (1993).



FBI agents express reluctance to share information with federal prosecutors based on the fear that prosecutors “have far less ‘on the line’” and will misuse the information when they enter private practice.<sup>69</sup> Federal prosecutors, in turn, often “see their job as reining in ‘cowboy’ line agents who pay little heed to the niceties of due process.”<sup>70</sup> Other seasoned prosecutors describe “coming to the profession ‘very naive,’ as far as their ideas about the credibility of law enforcement witnesses” and ultimately develop a “healthy skepticism” about police factual accounts and the propriety of their conduct.<sup>71</sup> In all these ways, police and prosecutors can be substantially at odds even as they work together to make the government’s case.

Legally speaking, both police and prosecutors are empowered to “enforce” the criminal law, but they do so in very different ways and with different legal institutional identities. Prosecutors are attorneys making quasi-judicial decisions, officers of the court with constitutional responsibilities to the judiciary and charged with “doing justice.”<sup>72</sup> They receive enormous legal deference, enjoying a “presumption of regularity” which means that “in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties.”<sup>73</sup>

As part of their legal role, prosecutors formally check police in myriad ways. For example, prosecutors have a due process obligation under *Brady v. Maryland*<sup>74</sup> to disclose to the defense all exculpatory material in the government’s possession, including information held by police.<sup>75</sup> As the Court has put it, “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”<sup>76</sup> To hold otherwise would be “to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government’s obligation to ensure fair trials.”<sup>77</sup> Only

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69. Richman, *supra* note 59, at 789.

70. *Id.* at 789–90.

71. Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors’ Syndrome*, 56 ARIZ. L. REV. 1065, 1103–04 (2014).

72. See *Imbler v. Pachtman*, 424 U.S. 409, 422–23 (1976) (“The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges . . . .”); *Berger v. United States*, 295 U.S. 78, 88 (1935) (“[The prosecutor’s] interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law . . . .”).

73. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926)); see also *Town of Newton v. Rumery*, 480 U.S. 386, 397 (1987) (“[T]radition and experience justify our belief that the great majority of prosecutors will be faithful to their duty.”).

74. 373 U.S. 83 (1963).

75. *Id.* at 87.

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

77. *Id.* at 438 (1995); see also *United States v. Agurs*, 427 U.S. 97, 103 (1976) (acknowledging established prosecutorial obligation not to permit perjured police testimony).

prosecutors can offer a binding plea deal, or immunity to a cooperating suspect working with police, even when police disagree with the decision.<sup>78</sup> Prosecutors must decide whether to call police as witnesses and may prevent unreliable police from testifying.<sup>79</sup> Once prosecutors decide to file formal charges, police are precluded from engaging in certain forms of investigation.<sup>80</sup> In these ways, the criminal process is riddled with formal prosecutorial checks over police.

To be sure, prosecutorial checks do not eliminate the vast, on-the-ground influence exerted by police over the entire criminal process, especially in the misdemeanor system.<sup>81</sup> Police have extensive power over evidence gathering and arrests which in turn gives them many informal ways of checking and constraining prosecutors, shaping the legal process and determining its outcomes.<sup>82</sup> This operational reality sits in some tension with the formal story of legally superior prosecutorial authority.<sup>83</sup>

Such tensions notwithstanding, police lack formal authority to check prosecutorial decisions. Police cannot forbid prosecutors from filing charges, using witnesses, or disclosing evidence, although they can impede or sabotage those processes. More fundamentally, it is not the police's job to ensure fair trials, and the system treats them accordingly.<sup>84</sup> Police need only have minimal legal training, and they typically appear before courts not as legal advocates but as witnesses and providers of evidence. They “regularly testify in criminal cases [where] their credibility may be relentlessly attacked by defense counsel. They also may have to testify in pretrial proceedings . . .

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78. See Laurent Sacharoff, *Miranda's Hidden Right*, 63 ALA. L. REV. 535, 556–57, 557 n.119 (2012) (noting that “police lack authorization to make binding plea deals” and citing cases); cf. *United States v. Abcasis*, 45 F.3d 39, 43 (2d Cir. 1995) (describing defense of “entrapment by estoppel” where police lead defendants to believe that they are acting with government authorization).

79. Andrew Guthrie Ferguson, *Big Data Prosecution and Brady*, 67 UCLA L. REV. 180, 231 (2020) (“Many prosecution offices maintain a ‘do not call’ list of police officers whose testimony cannot be trusted under oath . . .”).

80. *Massiah v. United States*, 377 U.S. 201, 205–06 (1964) (filing of formal charges precluded police from “deliberately elicit[ing]” defendant’s confession by using an informant).

81. I have made this point in previous work. E.g., Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. & SOC. SCI. 255, 262 (2015) (“In the felony world it is often said that the most powerful decision maker is the prosecutor. In the misdemeanor world, it is the police.” (citation omitted)); see also Abel, *supra* note 58, at 1754, 1759 (describing informal police influence over prosecutorial plea decisions).

82. See *infra* subpart I(C) (describing police influence); Richman, *supra* note 59, at 767–69, 777 (describing workgroup dynamics between federal prosecutors and their agents).

83. Prosecutor offices self-report a range of both collaborative and combative relationships with police. See DEASON CTR., *supra* note 25, at 4 (describing prosecutorial attitudes towards police ranging from “colleag[ial]” to “fraught”).

84. *Schneckloth v. Bustamonte*, 412 U.S. 218, 232, 241 (1973) (police investigations “are a far cry from the structured atmosphere of a trial” and thus subject to lesser constitutional regulation).

and again their honesty is open to challenge.”<sup>85</sup> As a result, they are unprotected by sweeping presumptions of legality and regularity. Police are not “servants of the law” like prosecutors are: the police work of investigation, arrest, and sometimes violence is devoted to “the often competitive enterprise of ferreting out crime.”<sup>86</sup> For such reasons, police and prosecutors are governed by different constitutional, professional, and ethical rules which reflect these core distinctions and embody the expectation that prosecutors will impose legal constraints on policing.<sup>87</sup>

C. *Reframing the Problem of Police–Prosecutor Consensus*

Taken together, all these intrabranched differences make police and prosecutors distinctive, separate institutional actors who should be expected to disagree and even to clash. All too often, however, they do neither. A key feature of the American penal state is the highly interdependent police–prosecutor relationship, which is to say the lack of disagreement and friction within the penal executive.

The problem is an old and large one: criminal law scholars have long decried the codependence and coziness between police and prosecutors. Perhaps the best-known example lies in the prosecutorial toleration and protection of police misconduct. Kate Levine writes that “there is something structurally problematic about the role of a local prosecutor in police–defendant cases” when prosecutors must decide whether to “bring charges and lead cases against their closest professional allies.”<sup>88</sup> Others note that “prosecutors have . . . duties to discover and disclose misconduct of police officers—a duty they cannot be expected to pursue given the conflict of interest in prosecutors investigating the misconduct of the officers they rely

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85. *United States v. Davis*, 793 F.3d 712, 720 (7th Cir. 2015) (en banc) (refusing to protect police from discovery because “[a]gents of the ATF and FBI are not protected by a powerful privilege or covered by a presumption of constitutional behavior”).

86. *Berger v. United States*, 295 U.S. 78, 88 (1935) (“[The prosecutor’s] interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law.”); *Johnson v. United States*, 333 U.S. 10, 14 (1948).

87. *Montejo v. Louisiana*, 556 U.S. 778, 790 (2009) (noting that the ABA’s ethical rules regarding prosecutors do not apply to police because “the Constitution does not codify the ABA’s Model Rules, and does not make investigating police officers lawyers”). Compare *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (establishing presumption of legality and constitutionality for prosecutorial decisions), with *United States v. Washington*, 869 F.3d 193, 219 (3d Cir. 2017) (refusing to extend *Armstrong* to police because “[p]rosecutors are ordinarily shielded by absolute immunity for their prosecutorial acts, but police officers and federal agents enjoy no such categorical protection” (footnote omitted)).

88. Kate Levine, *Who Shouldn’t Prosecute the Police*, 101 IOWA L. REV. 1447, 1450–51 (2016) (arguing that conflict-of-interest law should govern the police–prosecutor relationship); see also I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1590 (2020) (“[P]rosecutors, who have a symbiotic relationship with the police, are loath to bring charges against officers.”).

on.”<sup>89</sup> Indeed, the repeated and predictable failure of prosecutors to hold police responsible for the unjustified killings of unarmed Black people has long been understood as a form of ethical and institutional abdication.<sup>90</sup>

Prosecutors also routinely fail to check police in less dramatic ways. It is vanishingly rare for prosecutors to charge police officers with perjury even when they know police have lied.<sup>91</sup> Some prosecutors sanitize or conceal illegal police informant use: prosecutors often dismiss cases or offer favorable deals to ensure that police informant misuse does not come to light.<sup>92</sup> Some prosecutor offices intentionally fail to monitor police evidentiary practices in order to avoid triggering Brady disclosure obligations.<sup>93</sup> And as the innocence movement has revealed time and time again, prosecutorial resistance to acknowledging and revisiting wrongful convictions often flows from a desire to cloak shoddy police work.<sup>94</sup> More broadly, American prosecutors have worked hand-in-hand with police for

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89. Cynthia H. Conti-Cook, *Defending the Public: Police Accountability in the Courtroom*, 46 SETON HALL L. REV. 1063, 1077 (2016); Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 MINN. L. REV. 843, 856 (2018) (noting that “partiality is inevitable” when “officials from one law enforcement agency [are called on] to assess the evidence against officials from another”).

90. See Mitch Smith & Julie Bosman, *Jason Van Dyke Sentenced to Nearly 7 Years for Murdering Laquan McDonald*, N.Y. TIMES (Jan. 18, 2019), <https://www.nytimes.com/2019/01/18/us/jason-van-dyke-sentencing.html> [<https://perma.cc/LA8X-92KT>] (noting that Van Dyke was “the city’s first patrolman in almost 50 years to be convicted of murder”); Melanie D. Wilson, *The Common Prosecutor*, 53 LOY. U. CHI. L.J. 325, 362 (2022) (noting that “anecdotal evidence is building that all prosecutors are beginning to take police brutality more seriously”).

91. Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1045, 1047 (1996); see also I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 870 (2008) (“[Police] lies are so pervasive that even former prosecutors have described them as ‘commonplace’ and ‘prevalent.’ Surveyed prosecutors, defense attorneys, and judges believed perjury was present in approximately twenty percent of all cases.” (footnotes omitted)).

92. See, e.g., U.S. DEP’T OF JUST., INVESTIGATION OF THE ORANGE COUNTY DISTRICT ATTORNEY’S OFFICE AND THE ORANGE COUNTY SHERIFF’S DEPARTMENT 20, 24, 38–39 (2022), <https://www.justice.gov/opa/press-release/file/1542116/download> [<https://perma.cc/J7CR-642X>] (finding that prosecutors cut deals and dropped cases to protect informants and the sheriff’s department); ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 90–94 (2d ed. 2022) (describing codependence between prosecutors, police, and informants).

93. See REPORT OF THE 1989–90 LOS ANGELES COUNTY GRAND JURY: INVESTIGATION OF THE INVOLVEMENT OF JAIL HOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY 113, 115, <http://grandjury.co.la.ca.us/pdf/Jailhouse%20Informant.pdf> [<https://perma.cc/WFR3-GH9G>] (finding that the LA District Attorney’s office intentionally avoided creating a jailhouse informant database so as to shield the Los Angeles Sheriff’s Department from liability).

94. Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 136–37 (2004); see also Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2204 (2010) (describing how prosecutorial reliance on police may cause prosecutors “to put on intellectual blinders to the possibility of other outcomes”).

decades to generate current levels of overcriminalization and mass incarceration.<sup>95</sup> Because so much of prosecutorial culture magnifies rather than checks the tough-on-crime culture, it makes prosecutors look like poor candidates for ensuring intrabranched restraint even where it might be their legal job to do so.

Put differently, many of the criticisms of police–prosecutor interdependence are implicitly complaints about a lack of internal checks within the executive. Although their functions are technically separate and they inhabit very different professional offices and roles, police and prosecutors share too many interests and are too codependent to function as true competitors. They have powerful incentives to walk in lockstep towards conviction and overcriminalization, a bureaucratic one-way ratchet even where those outcomes are legally unsupported or undermine public safety. Or as Daniel Richman once warned, “one ought not underestimate the unifying influence [on police and prosecutors] of a shared commitment to ‘getting the bad guys.’”<sup>96</sup> This lack of internal friction contributes to poor prosecutorial decision-making, police misconduct, and wrongful conviction. Although prosecutors are held out as legal and institutional checks on police, all too often they do not function robustly in this role.<sup>97</sup>

Administrative law scholarship has devoted sustained attention to precisely these kinds of intrabranched challenges. Internal separation of powers is deeply concerned about the degradation of decision-making that goes with unchecked internal agency consensus. The problem of colluding agencies within the executive or colluding actors within a particular agency is one of the central anxieties plaguing the administrative state. That literature invites us to reframe the problem of police–prosecutor consensus as a lack of intrabranched friction, which in turn suggests the importance of strengthening existing checks and balances between the two actors.

For example, administrative law often treats interagency conflict and rivalry as a potential democratic good. Jon Michaels argues that “administrative rivalry” can strengthen agency accountability and legitimacy because agencies that are “unitary,” “monolithic,” and “have a singular identity” can lose credibility: “such agencies will generally be perceived as too political, too insulated, or too captured—and thus insufficiently responsive to the fuller range of democratic, technocratic, and rule-of-law values we expect to inform State power.”<sup>98</sup> Daniel Farber and Anne

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95. JOHN F. PFAFF, *LOCKED IN* 72 (2017) (describing how prosecutors drove up filing rates from 1994–2008 despite falling arrest and crime rates). *See generally* EMILY BAZELON, *CHARGED* (2019) (describing how unchecked prosecutorial power has led to more incarceration).

96. Richman, *supra* note 59, at 792.

97. *See* Michaels, *supra* note 45, at 241 (“There is no guarantee that [agency] rivals will . . . act sufficiently rivalrous.”).

98. *Id.* at 229–30, 260, 272 (describing various dysfunctions of unitary agencies).

O’Connell agree with Michaels that “[c]onflict among and within agencies can provide substantial political, social welfare, and legitimacy benefits.”<sup>99</sup>

Police and prosecutors are good candidates for rivalrous and conflicted decision-making. While they are codependent in many ways and share many values, they are far from monolithic; executive law enforcement does not have a singular identity, policing norms often conflict with prosecutorial ones, and those norms are not static.<sup>100</sup> Accordingly, split functions, competition, and institutional fragmentation within the carceral executive should be identified, appreciated, and encouraged.

Such internal checks and divisions can take many forms. As Gillian Metzger describes it, “the structural mechanism of simply dividing staff with similar responsibilities into separate agencies can serve a checking function, as their separate administrative homes may foster different perspectives and lead to different sources of information.”<sup>101</sup> Farber and O’Connell offer a complex taxonomy of intrabranched power relationships—hierarchical, advisory, monitoring—that can generate different sorts of conflicts.<sup>102</sup> Each of these descriptions maps relatively neatly into the law enforcement space. Police and prosecutors already interact across their separate administrative homes with very different perspectives, enmeshed in various hierarchical, advisory, and monitoring relations, all the while subject to differing rules and cultures. In other words, they are subject to precisely the kinds of internal checks and divisions identified by administrative law literature which could be subsidized and strengthened.

What might greater functional splits and deeper rivalries look like in the penal executive? This Article identifies prosecutorial declination as the most influential intrabranched checking mechanism and the one that most deserves to be strengthened. But there are many more possibilities. Some prosecutorial offices, for example, have warrant officers who check police warrant applications; they could be affirmatively rewarded for screening rigor on the theory that they create an important intrabranched restraint.<sup>103</sup> Conviction integrity units in prosecutor offices already go back and check old police decisions; they could be appreciated not only as pro-innocence reforms but as intra-executive accountability mechanisms.<sup>104</sup> Rachel Barkow has argued for splitting functions within prosecutor offices between investigative and adjudicative functions; this might also promote friction and rivalry between

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99. Farber & O’Connell, *supra* note 49, at 1384.

100. POLICE EXEC. RSCH. F., *supra* note 12, at 7, 20.

101. Metzger, *supra* note 38, at 430.

102. Farber & O’Connell, *supra* note 49, at 1407.

103. Gold, *supra* note 57, 1596, 1642 (arguing for this model).

104. Irene Oritseweyinmi Joe, *Learning from Mistakes*, 80 WASH. & LEE L. REV. 297, 299–300 (2023) (describing wrongful convictions as oft-missed opportunities for police and prosecutors to learn from their mistakes).

trial lawyers and the police who supply them with weak or constitutionally suspect evidence.<sup>105</sup> Some scholars have argued that law enforcement should be held accountable for the costly externalities caused by profligate arrest and prosecution practices.<sup>106</sup> On that theory, prosecutor offices might be held financially accountable, or subject to fee-shifting provisions, for policing excesses which they could have curbed through their supervisory powers. In a more political vein, elected prosecutors might be barred or deterred from accepting political contributions from police unions.<sup>107</sup> In other words, we could evaluate criminal reforms and restructuring not only on the basis of conventional criminal justice values but also as ways of promoting healthy intrabranched separation and friction.

At the same time, administrative law warns that intrabranched divisions don't always work. As Jacob Gersen and Adrian Vermeule point out, “[s]plitting powers or functions across different subdivisions of a larger organizational unit does not guarantee constraint so long as the subdivisions can talk, cooperate, or even informally contract. Government overreach is often accomplished by agreement and collusion between putative rivals.”<sup>108</sup> This is just the kind of overreach through collusion that often infects the police–prosecutor relationship even though they are technically separate agencies and actors. Structural friction designs, in other words, will not always overcome the intrinsic ties that bind police and prosecutors.

Finally, administrative law helpfully doubles down on the special role of lawyers whose job it is to inject legality into agency decision-making. As Dawn Johnsen has pointed out in the national security context, executive branch lawyers are a form of internal check: “legal advice from within the executive branch [is] an essential component of efforts to safeguard civil liberties, the constitutional allocation of governmental authority, and the rule of law.”<sup>109</sup> The same is true for the everyday workings of the executive penal state once it decides to charge someone with a crime. Prosecutors are responsible for checking the legality and constitutionality of penal executive decisions, from warrants to witnesses to disclosures. Criminal procedure largely conceptualizes this lawyerly role as a constraint on state action

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105. Barkow, *Institutional Design*, *supra* note 4, at 895–97.

106. Bierschbach & Bibas, *supra* note 20, at 225–26.

107. Kirstin Jensvold-Rumage & Bridget Fogarty Gramme, *State Bar of California*, CAL. REG. L. REP., Spring 2021, at 124, 130 (documenting such a proposal).

108. Jacob E. Gersen & Adrian Vermeule, *Delegating to Enemies*, 112 COLUM. L. REV. 2193, 2233 (2012).

109. Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1564 (2007); *see also* Magill & Vermeule, *supra* note 47, at 1079 (“The more robust the power of courts to override agency choices on legal grounds, the larger the role within agencies of lawyers . . .”).

designed to protect individual liberty. Administrative law shows that it is also a vital intrabranched check.

*D. Limits to the Analogy*

In all these ways, internal separation of powers scholarship can help us better articulate the pitfalls and promises of the police–prosecutor relationship. Admittedly, the comparison between the federal executive and the penal apparatus remains a rough one. It requires a broad and loose conception of the “Executive Branch” to include highly dissimilar functions ranging from local traffic enforcement to environmental impact statements. Moreover, the Presidency and its administrative apparatus exercise many powers and make all kinds of decisions that distinguish them from traditional criminal law enforcement.<sup>110</sup> The decision to regulate can look very different from the decision to prosecute.<sup>111</sup> Prosecutor offices, in turn, can do things that civil agencies cannot. Criminal law enforcement is often accorded special treatment and tweaked rules regarding transparency, discretion, and democratic accountability. This exceptional treatment rests on the foundational notion that criminal punishment is a uniquely intrusive and violent state function that is to be distinguished from conventional agency action. Put differently, the criminal system is indeed a bureaucracy but an unusual one from the perspective of administrative law.<sup>112</sup>

Assuming we embrace the civil–criminal analogy with its rough edges, internal separation of powers is no panacea even in the civil administrative space. It is a response to, not a cure for, the inability of external separation of powers to robustly check the executive. It is not the only possible response, and it isn’t always enough on its own.<sup>113</sup> Elizabeth Magill has argued that

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110. Barkow, *Separation of Powers*, *supra* note 4, at 1011–31 (explaining differences); *see also* Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 1020–21 (2021) (noting that city courts are not agencies and that agencies cannot lock people up).

111. Although there is quite a bit of overlap. *See* Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1316 (2001) (describing the socially contingent choice to regulate white collar wrongdoing primarily through civil mechanisms while prosecuting street crime through conventional criminal punishment); Jennifer M. Chacón, *Commentary, Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1831 (2007) (describing “blurred boundaries between immigration control, crime control and national security”).

112. *See, e.g.*, Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2060 (2016) (pointing out both the promise and limitations of an administrative approach to the criminal system and warning against the “risk of going too far” in the administrative turn); Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 6 (2019) (arguing for greater attention to police agency design while positing that traditional agency rulemaking is not a viable strategy for regulating police).

113. Metzger, *supra* note 38, at 425 (“Internal checks can be, and often are, reinforced by a variety of external forces—including not just Congress and the courts, but also state and foreign



intrabran­ch dis­course and con­flict will often be in­ suf­fi­cient to check agency ac­tion driven by dom­i­nant politics: the prob­lem of politics is sub­stantive, not pro­cedural, and dis­sen­ters some­times just lose.<sup>114</sup> Metzger likewise ac­knowledges the con­cern that intrabran­ch checks “in the end, [might be] little more than ‘parchment barriers’ that are largely in­ef­fective and, worse, may ob­scure the extent of ac­cu­mu­lated [executive] power.”<sup>115</sup>

By the same token, pro­secu­to­rial check­ing of police is not a silver bullet: it cannot guar­an­tee law en­force­ment re­straint or fair out­comes. Pro­secu­to­rs and police have strong in­trinsic in­centives and op­por­tu­nities to co­op­er­ate and col­lude. In­deed, pro­secu­to­rial cul­ture has its own bi­ases and pathologies that can re­in­force or even worsen police de­cision­-making. Police, more­over, do not like to be checked, and they are pow­er­ful political ad­ver­sar­ies in their own right.<sup>116</sup> Dis­sen­ters some­times just lose: re­form­-minded pro­secu­to­rs have faced sus­pen­sion, re­call, and hostile legis­la­tion.<sup>117</sup> To put it somewhat skepti­cally, one might fairly argue that the U.S. penal executive en­gaged in thirty years of mass in­car­ceration not be­cause it lacked in­ter­nal check­ing me­chanisms, but not­with­stand­ing them.<sup>118</sup>

A healthy skepti­cism, how­ever, is not fatalism. In­tra­bran­ch check­ing theory it­self was born as a re­ponse to the in­sti­tu­tional and political he­gemony of the na­tional security ap­paratus: a truly for­midable Leviathan that has re­peatedly shown it­self prone to over­reach and re­sis­tant to ex­ter­nal

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governments, international bodies, the media, and civil society organizations.”); *see also* Seifter, *supra* note 46, at 115 (“[M]eaningful checks can come from a combination of subconstitutional actors . . . .”); Michaels, *supra* note 41, at 533–34 (on civil society checks).

114. M. Elizabeth Magill, Response, *Can Process Cure Substance? A Response to Neal Katyal’s “Internal Separation of Powers,”* YALE L.J.F. (Nov. 3, 2006), <https://www.yalelawjournal.org/forum/can-process-cure-substance-a-response-to-neal-katyal>8217s-a8220internal-separation-of-powersa8221 [https://perma.cc/F8BJ-T8KS].

115. Metzger, *supra* note 38, at 437 (footnote omitted) (quoting THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961)).

116. *E.g.*, Benjamin Sachs, *Police Unions: It’s Time to Change the Law and End the Abuse*, ONLABOR (June 4, 2020), <https://onlabor.org/police-unions-its-time-to-change-the-law/> [https://perma.cc/LNN9-LNR7]; *see also* Carly Margolis, *Targeting Police Unions, Rethinking Reform*, 46 N.Y.U. REV. L. & SOC. CHANGE 224, 227, 239 (2022) (describing how the Movement for Black Lives targeted the police union in Washington D.C. as a site for reform).

117. *E.g.*, Thomas Fuller, *Voters in San Francisco Topple the City’s Progressive District Attorney, Chesa Boudin*, N.Y. TIMES (June 8, 2022), <https://www.nytimes.com/2022/06/07/us/politics/chesa-boudin-recall-san-francisco.html> [https://perma.cc/2E79-JZDF]; Warren v. DeSantis, No. 22cv302-RH-MAF, 2023 WL 345802, at \*1 (N.D. Fla. Jan. 20, 2023) (holding that although Governor Ron DeSantis unconstitutionally suspended reformist State Attorney Andrew Warren over his declination policies, the federal court could not provide relief); Akela Lacy, *17 States Have Now Tried to Pass Bills that Strip Powers from Reform-Minded Prosecutors*, INTERCEPT (Mar. 3, 2023, 1:27 PM), <https://theintercept.com/2023/03/03/reform-prosecutors-state-legislatures/> [https://perma.cc/USH9-HB74].

118. *Cf.* Magill, *supra* note 114 (stating that opponents of the post–September 11 legal regime “did in fact express their disagreement . . . . They just lost.”).

checks.<sup>119</sup> If intrabranch checking can be a meaningful response to the political and democratic dangers of the executive war on terror, then it has promise for the excesses of the domestic criminal Leviathan.

## II. Declination and the Anti-Rubber Stamp Principle

### A. *Prosecutorial Declination*

Once we take seriously the importance of internal checks and balances within the carceral executive, the prosecutorial declination decision stands out for its unique power.<sup>120</sup> The dominant intrabranch relationship of the penal bureaucracy is the one between prosecutors and police; its central formal checking mechanism is the declination decision through which prosecutors check police arrest decisions on the order of ten million times every year.<sup>121</sup> In administrative law terms, the decision represents a foundational separation of functions: the investigative police function is to collect probable cause to arrest, while the adjudicative prosecutorial function is to evaluate whether that probable cause supports the initiation of a formal criminal case.<sup>122</sup> The declination decision creates natural intrabranch friction between police and prosecutors because prosecutors must reevaluate police investigations and will sometimes conclude that suspects should not or cannot be charged. Declination can thus be understood as a kind of salutary “second opinion,” in which prosecutors are required to rethink and recalculate criminalization decisions made by police.<sup>123</sup> Apparently police

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119. Katyal, *supra* note 9, at 2319–22 (discussing the dangers of the national security apparatus and its war on terror).

120. Jenny Roberts, *Prosecuting Misdemeanors*, in *THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION* 513, 524 (Ronald F. Wright, Kay L. Levine & Russell M. Gold eds., 2021) (“The exercise of prosecutorial discretion to decline or file charges is the most important decision-making point in a misdemeanor case.”); *see also* Sarat & Clarke, *supra* note 54, at 390 (arguing that the prosecutorial “decision *not* to prosecute, in a case where there is probable cause to believe that a crime has been committed” exemplifies “the logic of sovereignty and its complex relationship to legality”).

121. *2019 Crime in the United States: Persons Arrested*, *supra* note 13 (10,085,207 arrests in 2019); NATAPOFF, *supra* note 33, at 41 (over thirteen million misdemeanor cases filed in 2015).

122. In a handful of jurisdictions, prosecutors may technically be classified as part of the judiciary, not the executive branch, but their checking obligations vis-à-vis police remain functionally the same. *See, e.g.*, IND. CONST. art. VII (Judicial), § 16 (requiring the election of prosecuting attorneys); TEX. CONST. art. V (Judicial Department), § 21 (providing for the election of county and district attorneys). Arguably prosecutorial checking obligations would be even stronger under this interbranch separation of power arrangement.

123. Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435, 1435 (2011) (“[M]any institutional structures, rules, and practices have been justified as mechanisms for requiring or permitting decision makers to obtain second opinions; examples include judicial review of statutes or of agency action, bicameralism, the separation of powers, and the law of legislative procedure.”); *see also* Epps, *supra* note 4, at 70 (arguing that “it might be better to encourage decisionmakers to perform the *same* functions . . . in order to increase the chance that more interests can have a role in any particular decision”).

themselves experience declination as a significant check since police are well-known for getting angry at prosecutors who decline their arrests.<sup>124</sup>

A narrow class of especially strong declination policies creates friction not only between prosecutors and police, but between prosecutorial and legislative authority. After the Supreme Court eliminated the constitutional right to abortion in June 2022, for example, numerous prosecutors promised not to enforce anti-abortion laws at all.<sup>125</sup> Other prosecutors have refused to seek the death penalty.<sup>126</sup> Some categorically refuse to enforce certain gun laws or provide protection to same-sex couples.<sup>127</sup> Many argue that prosecutors lack discretion to nullify legislative enactments through categorical declination policies like these, and scholars have examined these conflicts in the context of conventional interbranch separation of powers theories.<sup>128</sup> But most declination policies are not blanket refusals to enforce legislation and do not nullify legislative pronouncements. Rather, standard declination policies are more flexible: they preserve individual line prosecutors' ultimate discretion to charge while establishing presumptions and default policies regarding the allocation of prosecutorial and court resources.<sup>129</sup> These routine forms of declination sit well within the

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124. Bowers, *supra* note 24, at 1700; Wright & Levine, *supra* note 71, at 1104; Richman, *supra* note 59, at 763–65 (exploring various law enforcement agency reactions to prosecutorial declination decisions).

125. J. David Goodman & Jack Healy, *In States Banning Abortion, a Growing Rift Over Enforcement*, N.Y. TIMES (June 29, 2022), <https://www.nytimes.com/2022/06/29/us/abortion-enforcement-prosecutors.html> [<https://perma.cc/4GW9-X6W6>].

126. See Jessica Pishko, *Prosecutors Are Banding Together to Prevent Criminal-Justice Reform*, THE NATION (Oct. 18, 2017), <https://www.thenation.com/article/archive/prosecutors-are-banding-together-to-prevent-criminal-justice-reform/> [<https://perma.cc/5B5J-BNUX>] (noting argument in prosecutorial brief asserting that Florida state attorney Aramis Ayala violated separation-of-powers by refusing to enforce the death penalty).

127. Christopher Wills, *Prosecutor Hopes to Stir Debate on Illinois Gun Laws*, JOURNALSTAR (Aug. 22, 2012, 9:23 PM), <https://www.pjstar.com/story/news/2012/08/22/prosecutor-hopes-to-stir-debate/42519830007/> [<https://perma.cc/B4JB-4MQM>]; Ronald F. Wright, *Prosecutors and Their State and Local Politics*, 110 J. CRIM. L. & CRIMINOLOGY 823, 832 (2020) (describing Tennessee prosecutor's decision not to enforce domestic violence laws in cases involving same-sex couples).

128. Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1244 (2011) (asking “when, if ever, is the exercise of prosecutorial discretion better characterized as ‘prosecutorial nullification?’”); W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 176–77 (2021) (theorizing “programmatically prosecutorial nullification”); see also Zachary S. Price, *Faithful Execution in the Fifty States*, 57 GA. L. REV. 651, 657 (2023) (describing “a spectrum [of] relative hostility to categorical nonenforcement” among the fifty states).

129. See *infra* text accompanying notes 292–97 (describing Gascón misdemeanor directive guiding and preserving prosecutorial discretion to charge or decline); see also Bowers, *supra* note 24, at 1683–84 (arguing that the equitable decision to decline to charge is not nullification but rather the exercise of the prosecutorial “duty to engage in a contextualized ‘exercise of judgment’” (quoting *Pugach v. Klein*, 193 F. Supp. 630, 634 (S.D.N.Y. 1961))).

parameters of traditional prosecutorial discretion and the established, quasi-judicial prosecutorial role.<sup>130</sup>

The mechanics of the standard declination decision are deceptively familiar. After police make an arrest, prosecutors check, screen, and mediate that police decision by deciding whether to decline the case or, alternatively, to convert the arrest into a formal criminal charge and thereby transform the arrestee into a full-fledged criminal defendant. Prosecutors do not need an arrest to proceed against a defendant—they can file an information or obtain an indictment in the absence of arrest—but as a practical matter most charging decisions follow a custodial arrest.<sup>131</sup> Accordingly, most criminal cases require prosecutors to make a judgment about the original police arrest decision. Although the declination decision often occurs within hours or days of arrest, formal timing requirements are a matter of state law, not constitutional requirements. In practice, defendants in some jurisdictions can languish for weeks in jail before any prosecutorial charging decision is made.<sup>132</sup>

Both arrests and formal charges require the same minimum amount of evidence—probable cause—but charging is more complicated. The decision to charge requires prosecutors to evaluate not only the evidence but the equities, whether the case could be proven at trial, whether filing a charge is a good use of state resources, and whether it is in the interests of justice.<sup>133</sup> The decision also has immediate constitutional implications: it triggers the onset of the adversarial process, the attachment of the defendant's right to counsel, and a variety of other consequences.<sup>134</sup> The police decision to arrest

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130. See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (upholding prosecutorial decision to recharge defendant with a more serious offense in order to induce a plea).

131. Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 335 (2016) (“[A]rrests remain the default mechanism for starting the criminal process.”); 4 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 13.1(a) (4th ed. 2022) (“The overwhelming majority of cases that reach the prosecutor are brought to his attention by police after they have made an arrest . . . .”); see *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (“[A] judicial hearing is not prerequisite to prosecution by information.”).

132. See, e.g., LA. CODE CRIM. PROC. ANN. art. 701(B)(1)(a) (2022) (requiring the filing of a misdemeanor information within thirty days of arrest if the defendant is in custody); Metzger & Hoeffel, *Charging Time*, *supra* note 14, at 1728, 1754–56 (“Until a prosecutor decides to accept or decline charges, the defendants are in a procedural abyss.”); Metzger & Hoeffel, *Criminal (Dis)appearance*, *supra* note 14, at 401 (“An uncharged defendant can spend weeks—or even months—in jail without ever seeing a judge or learning about his rights.”).

133. ABA PROSECUTION STANDARDS, *supra* note 17, at 3-4.3; Lissa Griffin & Ellen Yaroshfsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 320, 323 (2017); see also *Gerstein*, 420 U.S. at 119–20 (“The standard of proof required of the prosecution is usually referred to as ‘probable cause,’ but in some jurisdictions it may approach a prima facie case of guilt.” (citing MODEL CODE OF PRE-ARRAIGNMENT PROC. Art. 330, cmt. at 90–91 (AM. L. INST., Tentative Draft No. 5, 1972))).

134. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion) (“[I]nitiating of adversary judicial criminal proceedings [may occur] by way of formal charge, preliminary hearing, indictment, information, or arraignment.”); *Massiah v. United States*, 377 U.S. 201, 204 (1964).

or file a complaint, by contrast, is merely “investigative” and does not initiate the adversarial process.<sup>135</sup> Police detention alone does not trigger the right to counsel unless and until the defendant appears before a judge and “has restrictions imposed on his liberty in aid of the prosecution.”<sup>136</sup>

If the original arrest decision is declined, the suspect will be released, and it is the legal end of the matter. If the prosecutor decides to proceed, however, the arrest converts into a formal judicial case bearing the prosecutorial imprimatur with its heightened constitutional and legal significance. In these various ways, the prosecutorial decision functions as a review and recalculation of the arrest decision. In some sense, this observation is merely definitional. As ABA Prosecution Standard 3-4.2 states, “[w]hile the decision to arrest is often the responsibility of law enforcement personnel, the decision to institute formal criminal proceedings is the responsibility of the prosecutor.”<sup>137</sup> Prosecutors cannot directly collect evidence of guilt themselves and therefore are nearly always in the posture of reviewing police investigative results and decisions.<sup>138</sup> Because the decision to charge and thus initiate the adversarial process is a weightier legal decision than the decision to arrest, it requires not only evidentiary review but independent, equitable decision-making. Declination is the procedural vehicle through which prosecutors perform this function.

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135. See, e.g., N.Y. CRIM. PROC. LAW § 1.20(6)–(7) (McKinney 2023) (distinguishing “prosecutor’s information” which can “serve[] as a basis for prosecution” from a police “misdemeanor complaint” which “may not, except upon the defendant’s consent, serve as a basis for prosecution of the offenses charged therein”); see also *Kirby*, 406 U.S. at 690 (distinguishing “routine police investigation” from “formal prosecutorial proceedings” initiated by a criminal charge); *Rothgery v. Gillespie County*, 554 U.S. 191, 198 (2008) (recognizing that formal charges represent “the point at which ‘the government has committed itself to prosecute,’ ‘the adverse positions of government and defendant have solidified,’ and the accused ‘finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law’” (quoting *Kirby*, 406 U.S. at 689)).

136. *Rothgery*, 554 U.S. at 202 (holding that when a “defendant is brought before a judicial officer, is informed of a formally lodged accusation, and has restrictions imposed on his liberty in aid of the prosecution, the State’s relationship with the defendant has become solidly adversarial” even though no prosecutor was involved); *Gerstein*, 420 U.S. at 120 (denying the right to counsel at probable cause hearing because “[t]he sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. . . . The standard is the same as that for arrest.”). See generally Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333 (2011) (arguing that the adversarial process actually begins, and that therefore the right to counsel should attach, at bail hearings); Charlie Gerstein, Note, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513 (2013) (same).

137. ABA PROSECUTION STANDARDS, *supra* note 17, at 3-4.2(a).

138. Prosecutors can investigate indirectly through their control of grand jury investigations, although even these require police to serve subpoenas and execute search warrants. Ellen S. Podgor, *White Collar Shortcuts*, 2018 U. ILL. L. REV. 925, 942–45 (describing the grand jury investigative process). If prosecutors act directly as investigators, they relinquish their absolute immunity. See *infra* text accompanying notes 162–69 (regarding loss of absolute immunity).

The routine declination decision thus turns out to be seminal as a matter of substantive criminal law and procedure as well as institutional integrity. It is a bright procedural dividing line between policing and prosecution, a gatekeeping mechanism standing between police and the judiciary itself. Or as the Court has put it:

The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the “criminal prosecutions” . . . .<sup>139</sup>

For the millions of people swept into the criminal system, declination is a life-altering decision. It is the legal moment that determines whether their interaction with the criminal system will remain one of investigatory policing or balloon into one of adversarial adjudication. It is precisely the moment when good decision-making within the executive can make a very big difference.

#### B. *The Anti-Rubber Stamp Principle*

Internal separation of powers gives us a rich way to conceptualize declination, namely, as a kind of divided government accountability mechanism, an opportunity for substantive checking, and a core feature of good decision-making and intrabranched health. It also teaches, conversely, that inappropriate deference, shirking, or collusion at such moments undermine branch integrity. If it is a branch actor’s job to check other branch actors and make independent decisions, it is important that they actually check and decide.

These lessons from administrative law translate into what I will call the “anti-rubber stamp principle” of criminal declination. Not only *can* prosecutors check police arrest decisions, they are *supposed* to. They are supposed to not only in order to protect individual liberty (a classic criminal law concern) but also in pursuit of executive institutional integrity (a classic administrative law concern). The intrabranched check also advances the values of traditional interbranch separation of powers.<sup>140</sup> Charging decisions are

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139. *Kirby*, 406 U.S. at 689–90.

140. Borrowing here from Metzger’s argument that traditional separation of powers can be deployed to reinforce intrabranched checking mechanisms. Metzger, *supra* note 38, at 451; *see also*

major interbranch events in which investigative police actions become adjudicative matters, engaging and burdening the judiciary. Such decisions require gatekeeping and evaluation: they should not be permitted to pass undigested out of the police station into the adversarial courtroom.<sup>141</sup> That gatekeeping is the heart of the prosecutor's job, which means they need to actually do it. Put differently, declination is an essential part of what it means to be a prosecutor and not merely an adjunct to the police.

Administrative law also highlights the importance of the timing of seminal decisions like declination. Rubber stamping is a form of deferral: prosecutors who uncritically charge all police arrests are postponing the substantive merits decision of whether charges should be filed at all. Indeed, the decision to charge is often reversed later on: in some jurisdictions, as many as fifty percent of cases are ultimately dismissed.<sup>142</sup> Cass Sunstein and Adrian Vermeule have analyzed the similar question of when an agency is permitted to defer a decision. Like prosecutors, agencies have broad discretion over timing, resource allocation, and policy priorities, which can legitimately inform their decision to postpone a policy choice. But this discretion is subject to the basic contours of the agency's mandate. Sunstein and Vermeule argue that timing discretion is cabined by whether "the underlying statute expressly states, or else presupposes by necessary implication, that the agency may not defer decisions or must decide one way or another. If so, agencies may not defer decision or refuse to decide."<sup>143</sup> In their view, "agencies are subject to a general *anti-circumvention principle*: when deciding whether to decide, agencies may not circumvent express or implied congressional instructions by deferring action."<sup>144</sup> Moreover, "agencies may not invoke their ability to allocate limited resources in such a way as to abdicate their statutory responsibilities."<sup>145</sup>

The anti-circumvention principle is the conceptual cousin of the anti-rubber stamp principle. Like agencies with statutory mandates, prosecutors must make the initial charging decision one way or another. As in comedy, timing is everything. The initiation of a criminal case is a unique legal

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Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1845 (2015) (arguing that Article II and the Take Care Clause give rise to a constitutional duty to supervise within the Executive Branch requiring "systems and structures of internal supervision adequate to preserve the overall hierarchical control and accountability of governmental power").

141. See David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 477, 503–04 (2016) (arguing that "the key to understanding prosecutors [is that] above all else, they are mediating figures, bridging organizational and theoretical divides in criminal justice" and describing prosecutors as gatekeepers "between the courtroom and the squad room").

142. See *infra* subpart III(B) (on misdemeanor filing rates).

143. Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 GEO. L.J. 157, 161–62, 176 (2014).

144. *Id.* at 162.

145. *Id.* at 162, 176, 186.

moment of constitutional and structural significance that has been delegated to prosecutorial, not police discretion. Prosecutors thus cannot defer or postpone it by rubber stamping the initial arrest decision, even if they eventually change their minds, take it back, and dismiss the case later on. The damage of deferral has already been done.

In sum, the anti-rubber stamp principle instantiates values of intrabranch friction, discussion, and accountability by requiring prosecutors to rethink police arrest decisions and not simply to defer to them. It reflects the existing structure of executive penal decision-making and the conventional understanding of the prosecutorial role vis-à-vis police. It is even good for the courts.

The anti-rubber stamp principle finds logical support not only from administrative law but in standard features of criminal procedure, including warrant procedure, judicial review, and prosecutorial absolute immunity. They are discussed briefly below.

### C. *Warrants and the Interbranch Anti-Rubber Stamp Principle*

The anti-rubber stamp principle is a familiar idea from criminal procedure. In the warrant context, a valid warrant is the product of executive decision-making checked by the judiciary—a classic separation-of-powers validation. Warrant procedure “insure[s] that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police.”<sup>146</sup> Or as Justice Robert Jackson famously wrote in 1948:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.<sup>147</sup>

Accordingly, the Court has held that magistrates who “rubber stamp” warrants without meaningful scrutiny have abdicated their judicial role, thus invalidating the resulting warrant.<sup>148</sup> The lack of an impartial check is fatal,

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146. *Wong Sun v. United States*, 371 U.S. 471, 481–82 (1963).

147. *Johnson v. United States*, 333 U.S. 10, 13–14 (1948).

148. *United States v. Leon*, 468 U.S. 897, 914 (1984) (stating that in order for a warrant to be found valid, “courts must . . . insist that the magistrate purport to ‘perform his “neutral and detached” function and not serve merely as a rubber stamp for the police’” (quoting *Aguilar v. Texas*, 378 U.S. 108, 111 (1964))); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 327 (1979) (invalidating warrant where town justice “[left the] determination of what was ‘similar’ to the officer’s discretion” and “yielded to the State Police even the completion of the general provision of the warrant”).



even if it turns out in retrospect that the police did indeed have probable cause.

Prosecutors play a similar checking role—albeit intrabranched rather than interbranch—when they make declination and charging decisions.<sup>149</sup> With a few notable exceptions discussed below, only a prosecutor can file formal charges. Prosecutors are “interposed” between the police, the citizen, and the court system, ensuring that the decision to decline or charge a crime is not made by police who are immersed in the “competitive enterprise” of crime fighting and therefore “may lack sufficient objectivity.”<sup>150</sup> Rather, the decision is to be made according to law, by a separate actor who is an officer of the court, charged not only with producing convictions but with doing justice. Like judicial checking in the warrant context, prosecutorial checking injects a level of legality, formality, and oversight necessary to the integrity of the ultimate decision. Conversely, prosecutors who rubber-stamp have let the system down.<sup>151</sup>

#### D. *Implied Doctrinal Checking Requirements*

The anti-rubber stamp principle is also implicitly suggested by doctrines that elevate the legal status of prosecutorial declination and charging decisions over arrest decisions made by police. The most obvious elevations are the lack of judicial review and the protections of absolute immunity.

As is well known, prosecutors have plenary discretion over the charging decision. With very narrow exceptions, the decision is judicially unreviewable. As the Court has explained, “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or

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149. See Sklansky, *supra* note 141, at 498 (noting that prosecutors are mediating figures who exercise “‘both executive and judicial power,’ playing ‘a quasi-magisterial role, somewhere between police officer and judge’” (footnote omitted) (first quoting Barkow, *Separation of Powers*, *supra* note 4, at 1048; and then quoting JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL* 193 (Christine Cardone ed., 3d ed. 1994)); cf. Aziz Z. Huq, *How the Fourth Amendment and the Separation of Powers Rise (and Fall) Together*, 83 U. CHI. L. REV. 139, 152 (2016) (arguing that the warrant requirement intrinsically “repudiates what administrative law scholars call ‘internal separation of powers’ solutions for checking and diffusing government power”).

150. *Steagald v. United States*, 451 U.S. 204, 212 (1981) (describing the judicial warrant process as a “checkpoint between the Government and the citizen [that] implicitly acknowledges that an ‘officer engaged in the often competitive enterprise of ferreting out crime,’ may lack sufficient objectivity to weigh correctly the strength of the evidence” (citation omitted) (quoting *Johnson*, 333 U.S. at 14)).

151. Magistrates have long been accused of letting the system down in precisely this way by rubber-stamping warrant applications. See Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1639 (2012) (describing and to some extent questioning “pervasive concern in the literature and in court decisions with the ‘rubber stamp’ magistrate”).

bring before a grand jury, generally rests entirely in his discretion.”<sup>152</sup> That charging decision, in turn, is the paradigmatic subject of and inspiration for prosecutorial absolute immunity. The Supreme Court has repeatedly stated that the rationale for absolute immunity flows from the traditional common law grant of immunity regarding the prosecutorial decision whether or not to bring formal charges against a defendant.<sup>153</sup>

Absolute immunity is an enormous accommodation: it means that a malicious prosecutor who knowingly initiates a prosecution without probable cause, based on a witness they know to be lying, and does so with intentional racial bias, cannot be sued.<sup>154</sup> This heightened protection reflects the Court’s deference to and care for the all-important prosecutorial decision to charge.<sup>155</sup> It is also a kind of interbranch protection for the judiciary because the prosecutor plays a quasi-judicial role when she decides to decline a case or file a criminal charge; the Court has reasoned that “any lesser degree of immunity could impair the judicial process itself.”<sup>156</sup>

By contrast, police have lesser legal autonomy and fewer protections. Like prosecutors with respect to charging, police have enormous discretion over whether to arrest in the first place. They get stronger legal protections when they decide not to: victims generally cannot compel an arrest or sue police for failing to make an arrest.<sup>157</sup> Unlike prosecutors, however, police

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152. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *cf.* *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (noting that “a prosecutor’s discretion is ‘subject to constitutional constraints’” such as the bar on intentional race discrimination (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979))).

153. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (absolute immunity for “initiating a prosecution”); *Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 274 n.5 (1993) (absolute immunity in connection with “advocate’s preparation for the initiation of a prosecution” and for “acts [that] include the professional evaluation of the evidence assembled by the police” even in cases of malicious prosecution because “we have found a common-law tradition of immunity for a prosecutor’s decision to bring an indictment, whether he has probable cause or not”); *Van de Kamp v. Goldstein*, 555 U.S. 335, 341 (2009) (absolute immunity for the “decision to initiate a prosecution” (quoting *Imbler*, 424 U.S. at 421)); *see also* *Burns v. Reed*, 500 U.S. 478, 490–91 (1991) (absolute immunity for appearing at a probable cause hearing and “presenting evidence in support of a motion for a search warrant”); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. REV. 53, 96–103 (discussing lower court confusion over the probable cause prerequisite to absolute immunity).

154. *See Imbler*, 424 U.S. at 427 (acknowledging that “immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty”).

155. *Id.* at 421, 424 (“The function of a prosecutor that most often invites a common-law tort action is his decision to initiate a prosecution, as this may lead to a suit for malicious prosecution if the State’s case misfires.”).

156. *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997) (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)).

157. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005) (holding that domestic violence victim lacked a constitutionally protected interest in police enforcement of restraining

have only qualified immunity for their individual decision to arrest; they can be sued if the decision is unreasonable under clearly established law.<sup>158</sup> Moreover, while courts do not check prosecutors' charging decisions—"the accused is not 'entitled to judicial oversight or review of the decision to prosecute'"<sup>159</sup>—the arrest decision is a judicially reviewable deprivation of liberty. Indeed, arrestees have the affirmative right to judicial review within forty-eight hours of arrest.<sup>160</sup>

Giving prosecutors these sorts of greater legal authority and protection is consistent with the anti-rubber stamp principle. Prosecutors check police and thus stand in a superior decisional position. The Court has basically acknowledged this decisional hierarchy with an apology to police: "We intend no disrespect to the officer applying for a warrant by observing that his action, while a vital part of the administration of criminal justice, is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment."<sup>161</sup> It is because prosecutors exercise independent decisional judgment in such close connection with the adversarial process that they get extra legal protection.

Conversely, the doctrine holds that when prosecutors behave like police, they lose their immunity status. Absolute immunity is downgraded to qualified immunity when prosecutors perform investigative tasks or otherwise act like police officers. As the Court put it in *Buckley v. Fitzsimmons*,<sup>162</sup> "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'" <sup>163</sup> In *Buckley*, prosecutors who fabricated forensic evidence in

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order); *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989) (finding no substantive due process right to police protection). *But see* Valeriya Safronova & Rebecca Halleck, *These Rape Victims Had to Sue to Get the Police to Investigate*, N.Y. TIMES (May 23, 2019), <https://www.nytimes.com/2019/05/23/us/rape-victims-kits-police-departments.html> [<https://perma.cc/FYB5-9JCD>] (describing cases where women sued on equal protection grounds for failure to investigate rape).

158. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 25 (2017).

159. *Albright v. Oliver*, 510 U.S. 266, 274 (1994) (plurality opinion) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 118–19 (1975)); *see also Gerstein*, 420 U.S. at 119 ("[A] judicial hearing is not prerequisite to prosecution by information.").

160. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

161. *Malley*, 475 U.S. at 342–43 (withholding absolute immunity from police).

162. 509 U.S. 259 (1993).

163. *Id.* at 273 (quoting *Hampton v. City of Chicago*, 484 F.2d 602, 608 (7th Cir. 1973)). The Court further stated:

There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. . . . Thus, if a prosecutor plans and executes a raid on a suspected

order to generate probable cause were entitled only to investigative qualified immunity, as if they were merely police.<sup>164</sup> In *Kalina v. Fletcher*,<sup>165</sup> the prosecutor received absolute immunity for her advocacy decision to file an information, but only qualified immunity for her decision to submit sworn inaccurate testimony establishing probable cause.<sup>166</sup> This was because that latter conduct placed her in the same functional role as a police officer or complaining witness.<sup>167</sup> Similarly in *Burns v. Reed*,<sup>168</sup> the Court accorded prosecutors absolute immunity when conducting a probable cause hearing in their role as advocate seeking a warrant, but only qualified immunity for giving legal advice to police about whether there was probable cause to arrest in the first place. “Indeed,” reasoned the Court, “it [would be] incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice.”<sup>169</sup> In other words, when prosecutors are not checking police but cooperating with them on their investigative turf, looking for probable cause to arrest or for a warrant, prosecutors lose the special protections of absolute immunity.

In these various ways, immunity doctrine implicitly reflects a decisional hierarchy of prosecutors over police when they make charging decisions. The prosecutorial evaluation of whether to charge an offense requires more and different inputs than the initial police evaluation of probable cause to arrest. Or as one senior prosecutor bluntly put it, “an effective prosecutor is not ‘married to cops,’ but rather does his own math.”<sup>170</sup> When prosecutors make declination and charging decisions, they are engaged in a more fulsome equitable decision about the strength of the evidence, the normative guilt of the defendant, and the resources required to prosecute and adjudicate the case.<sup>171</sup> Conversely, when they aren’t checking, when they are investigating or colluding with police to produce probable cause, they lose their special prosecutorial status because they are not actually performing the prosecutorial function.

The anti-rubber stamp principle embodies this doctrinal logic. If the bare fact of probable cause were enough to justify both the arrest and

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weapons cache, he “has no greater claim to complete immunity than activities of police officers allegedly acting under his direction.”

*Id.* at 273–74 (quoting *Hampton*, 484 F.2d at 609).

164. *Id.* at 273, 275–76.

165. 522 U.S. 118 (1997).

166. *Id.* at 122, 129, 131.

167. *Id.* at 129–30, 130 n.16.

168. 500 U.S. 478 (1991).

169. *Id.* at 491, 495.

170. Wright & Levine, *supra* note 71, at 1104.

171. Bowers, *supra* note 24, at 1686; Griffin & Yaroshefsky, *supra* note 133, at 318; ABA PROSECUTION STANDARDS, *supra* note 17, at 3-4.3.

charging decision, i.e., if prosecutors could simply rubber stamp arrests into formal charges without checking them, then the prosecutorial decision would add nothing to the police decision. Prosecutors would not play any special or mediating role at this stage in the criminal process, and they would be functionally indistinguishable from police, in which case they should receive only qualified immunity as they did in *Buckley*, *Kalina*, and *Burns*. But this is not the decisional model on which the doctrine rests. It is precisely because prosecutors are institutionally set up to check and rethink police decisions in their non-investigative, quasi-judicial role that prosecutors get heightened deference and protection. The anti-rubber stamp principle names and encapsulates this existing set of expectations about what it is that prosecutors are supposed to do.

#### E. *The Structural Significance of Declination Rates*

When prosecutors are diligent about declination, it has ripple effects throughout the criminal process. This means that declination rates are diagnostic. They provide indicia of intrabranched friction and institutional health because they reflect the extent to which prosecutors are acting as meaningful checks on the police power. And they vary wildly. In the federal system, the average declination rate is approximately one-third, but this is just an average. White collar declination rates are higher; civil rights declination rates are over 90%. By contrast, immigration declination rates are less than 2%.<sup>172</sup> Nationally, average state felony declination rates appear to be around 25% or more,<sup>173</sup> while—as discussed in detail below—misdemeanor declination rates are typically low, around 5% or less.

Robust declination rates are a key measure of prosecutorial autonomy from police. They provide concrete evidence that prosecutors are scrutinizing

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172. MARK MOTIVANS, U.S. DEP'T OF JUST., NCJ 304314, FEDERAL JUSTICE STATISTICS, 2020, at 7 tbl. 4 (rev. 2023), <https://bjs.ojp.gov/content/pub/pdf/fjs20.pdf> [<https://perma.cc/GZE4-TH2B>] (reporting federal declination rates); Brown, *supra* note 89, at 887 n.138 (“[B]etween 1995 and 2015, “[federal] prosecutors turned down 12,703 potential civil rights violations out of 13,233 total complaints. By contrast, prosecutors rejected only about 23 percent of referrals in all other types of criminal cases.” (second alteration in original) (quoting *U.S. Police Escape Federal Charges in 96 Percent of Rights Cases: Newspaper*, REUTERS (Mar. 13, 2016, 10:12 AM), <https://www.reuters.com/article/us-usa-police/u-s-police-escape-federal-charges-in-96-percent-of-rights-cases-newspaper-idUSKCN0WF0KM> [<https://perma.cc/6MRG-CYJV>])); see also Michael Edmund O’Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1444 (2004) (documenting a 26% overall federal declination rate in 2000); Richman, *supra* note 59, at 762–65 (describing federal prosecutorial declination process).

173. See, e.g., DEASON CTR., *supra* note 25, at 8 (documenting 28.7% felony declination rate in one studied jurisdiction); Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2265 n.100 (2014) (documenting state felony declination rates between 20%–50%); Luna, *supra* note 3, at 795 (“As a rule of thumb, 25%–50% of all cases referred to prosecutors are declined for prosecution.”); cf. Ouziel, *supra* note 17, at 1102 (describing pervasive lack of data on state declination decisions).

police decisions, evidence, and the equities involved in filing a case. This is not the only thing they measure, of course. High declination rates might also reflect inappropriate prosecutorial bias or underenforcement.<sup>174</sup> For example, DOJ has been criticized for its high declination rates in criminal civil rights cases on the theory that this particular exercise of prosecutorial discretion impedes the enforcement of civil rights laws against police.<sup>175</sup> Similar arguments have been made regarding excessive corporate crime declinations.<sup>176</sup> Rape cases have infamously high declination rates.<sup>177</sup> In other words, prosecutors can screen too much.

They can also affirmatively and intentionally decide to screen very little. This might be the case in federal immigration, for example, where almost all cases brought by ICE are prosecuted by DOJ; the fact that almost none are dismissed later on suggests that the initial charging decisions are intentional and that full enforcement is a matter of substantive immigration policy.<sup>178</sup> Such heavy handed enforcement policies pose substantive and normative problems but not necessarily intrabranched checking ones. Prosecutors may make laudable or terrible decisions on the merits, but as long as they do not unduly defer to police, postpone, or rubber-stamp, they are still interposing their gatekeeping authority between the police and the rest of the system. We can disagree with *how* prosecutors exercise that discretion, but first and foremost they must actually exercise it. Or as Sunstein and Vermeule put it in the agency context, the obligation to decide is procedural; the necessary implication of the authority structure is that they “must make a finding one way or another.”<sup>179</sup>

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174. See, e.g., Ouziel, *supra* note 17, at 1101 (criticizing declination as lacking accountability because “[u]nlike dismissals, declinations take place in the shadows”); Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1749 (2006) (documenting inegalitarian harms of underenforcement).

175. *U.S. Police Escape Federal Charges in 96 Percent of Rights Cases: Newspaper*, *supra* note 172.

176. E.g., Brandon L. Garrett, *Declining Corporate Prosecutions*, 57 *AM. CRIM. L. REV.* 109, 143–44 (2020).

177. See Ouziel, *supra* note 17, at 1102 n.114 (documenting studies of high rape declination rates); Eleanor Klibanoff, *Prosecution Declined*, *LOUISVILLE PUB. MEDIA* (Dec. 5, 2019, 8:00 PM), <https://www.lpm.org/investigate/2019-12-05/prosecution-declined> [<https://perma.cc/4XVM-4CCS>] (reporting investigation of high rape declination rates).

178. U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-172, *IMMIGRATION ENFORCEMENT: IMMIGRATION-RELATED PROSECUTIONS INCREASED FROM 2017 TO 2018 IN RESPONSE TO U.S. ATTORNEY GENERAL’S DIRECTION 26* (2019) [hereinafter GAO REPORT], <https://www.gao.gov/assets/gao-20-172.pdf> [<https://perma.cc/VT8M-9TCJ>] (documenting declination rates between 2–4% from 2014–2018, rising to 8% in 2018); *id.* at 59–73 (documenting specific jurisdictions); Ingrid V. Eagly, *Prosecuting Immigration*, 104 *NW. U. L. REV.* 1281, 1332–34 (2010) (noting that “[o]ccasionally, even agents themselves serve as prosecutors in court”).

179. Sunstein & Vermeule, *supra* note 143, at 183, 188 (arguing that when agencies have an obligation to make a decision they cannot abdicate by continually deferring; this “anti-abdication principle is strictly procedural. It is an obligation to *decide the issue* eventually”).

Conversely, when low declination rates reveal a failure to exercise that all-important declination discretion, it constitutes an abdication of the prosecutorial checking role, an absence of prosecutorial gatekeeping at the outset of the adversarial process. Where prosecutors fail to screen, police in effect get to decide who will become a defendant simply by arresting them. This is not how the criminal system is supposed to work: the structural allocation of charging authority to prosecutors implies that police arrest decisions should not be the end of the matter. Prosecutorial abdication at this stage thus undermines the integrity and logic of the entire executive penal process.

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Criminal legal scholarship has not grappled with the full implications of the declination dynamic, although seeds have been planted over the years. Decades ago, for example, Ron Wright and Marc Miller argued for rigorous declination practices and “hard screening” as a regulatory device capable of reducing reliance on plea bargaining, curtailing overcharging, and improving the general normative transparency of the criminal process.<sup>180</sup> They also acknowledged that such prosecutorial practices “risk[] more strained relations with the local police.”<sup>181</sup> More recently, Lissa Griffin and Ellen Yaroshefsky have written about the ethics of prosecutorial charging decisions in light of the ABA’s Prosecution Standards, which make clear that prosecutors are not supposed to defer to police.<sup>182</sup> Griffin and Yaroshefsky describe the charging stage as the “point at which the prosecutor’s role as mediator between the police and the courts is most significant.”<sup>183</sup> They also mourn the fact that in too many cases “prosecutors have abdicated this responsibility by deferring to the charging decisions of the police.”<sup>184</sup> Josh Bowers has similarly argued that prosecutorial dependence on and fealty to police interfere with the declination process and make “prosecutors . . . inclined to file [misdemeanor] charges to provide cover for police arrests.”<sup>185</sup>

As a doctrinal matter, William Ortman has bemoaned how prosecutorial abdication is invited by the practical fact that probable cause can justify both arrest and charge.<sup>186</sup> That shared probable cause standard, he argues, “means that the prosecutor is free to defer to the investigating law enforcement agency rather than make an independent judgment. That is shirking. The

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180. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 49, 96–97 (2002).

181. *Id.* at 97.

182. Griffin & Yaroshefsky, *supra* note 133, at 320, 323.

183. *Id.* at 317.

184. *Id.* at 323.

185. Bowers, *supra* note 24, at 1701.

186. William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511, 561 (2016).

logic of the administrative system of criminal justice is that the prosecutor will make a reasoned determination of the defendant's guilt."<sup>187</sup>

Each of these authors identifies the structural importance of prosecutorial review of police arrest and probable cause decisions, even if they do not explicitly label it as a form of internal separation of powers. But for the most part, the full significance of this form of intrabranch checking within the carceral state has been underexplored; it has not been brought into meaningful conversation with the internal separation of powers literature at all.<sup>188</sup> The next Part advances that conversation by analyzing the penal arena in which prosecutorial screening is both in highest demand and lowest in quality: the abdication of the prosecutorial declination function in the misdemeanor system.

### III. A Case Study in Intrabranch Dysfunction: Declination in the Misdemeanor System

Misdemeanor charges comprise 80% of American criminal dockets, namely, the vast majority of the prosecutorial job.<sup>189</sup> At the same time, most misdemeanors are initiated by police arrest, which means that they also trigger the majority of prosecutorial declination decisions.<sup>190</sup> Here, in the space where prosecutorial declination authority is most commonly exercised, we see a lack of friction, sometimes abdication, sometimes outright collusion, and the widespread failure of internal separation of powers mechanisms.

#### A. *The Power of Misdemeanor Declination*

In general, a dismissal can occur at any stage during the criminal process, all the way up until the day of a guilty plea or trial, which means it can take weeks or months. Declination is thus a unique species of dismissal because it occurs immediately after arrest, preventing a formal case from coming into being at all and thus short-circuiting the criminal process. Many misdemeanor cases are eventually dismissed but these are not declinations—they take place sometime after initial charges have been filed. Another large

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187. *Id.*

188. Richardson, *supra* note 59, at 91 (calling it “curious” that internal “[b]ranch-wide checks and balances are not part of the account of the legitimacy of criminal law enforcement”); Epps, *supra* note 4, at 73–74 (noting that internal separation of powers might create “interesting possibilities” as applied to criminal law but that an exploration “is beyond the scope of this Article”).

189. NATAPOFF, *supra* note 33, at 41.

190. Harmon, *supra* note 131, at 335 (“[A]rrests remain the default mechanism for starting the criminal process.”). Police can also issue citations in lieu of arrest, most commonly in traffic stops. SUSANNAH N. TAPP & ELIZABETH J. DAVIS, U.S. DEP’T OF JUST., NCJ 304527, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2020, at 8 tbl.5 (2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cbpb20.pdf> [<https://perma.cc/J7YK-9TZJ>] (reporting that 44% of traffic stops in 2018 and 43% in 2020 resulted in the issuance of a citation).



category of misdemeanor dismissals are conditional, and they are not declinations either: they are the result of a diversionary disposition in which charges are filed or perhaps held in abeyance, the defendant completes a probationary period, and then charges are dismissed. Diversion programs typically last months, sometimes a year.<sup>191</sup>

Although they are offered as lenient alternatives to conviction, eventual dismissals and diversions can be highly punitive in their own informal ways. Defendants whose cases are eventually dismissed may spend time in jail, lose their jobs, housing, and credit, and undergo intrusive supervision while they await resolution of their case. In other words, the fact that a misdemeanor charge is ultimately dismissed and no conviction is formally entered does not reveal how much time the defendant actually spent going through the criminal process or the costs and burdens imposed on them and their families. That time and those burdens are often substantial.<sup>192</sup>

Declination is thus a different normative animal from the dismissals that take place after charges have been filed. Declination means that the arrestee will never become a full-fledged defendant: they will avoid the filing of formal criminal charges against them, the attendant public records created by that filing, additional pretrial detention, and the stigma that goes with all these experiences.<sup>193</sup> Through declination the state can avoid imposing the enormous personal, familial, economic, and community costs that go with the filing of misdemeanor criminal charges.<sup>194</sup> New empirical evidence indicates that there are large social and public safety benefits to declination. A first-of-its kind study on the long-term effects of declination in Boston found that nonprosecution of nonviolent misdemeanor offenses led to large reductions in recidivism with no negative effect on public safety.<sup>195</sup>

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191. Ronald F. Wright & Kay L. Levine, *Models of Prosecutor-Led Diversion in the United States and Beyond*, 4 ANN. REV. CRIMINOLOGY 331, 332 (2021); Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/us/crime-criminal-justice-reform-diversion.html> [<https://perma.cc/3JJV-AEPX>].

192. Cf. 1 LAFAVE ET AL., *supra* note 131, § 1.11(c-1) & n.40.1370 (arguing that “assembly line” and other common criticisms of the misdemeanor system may be unwarranted because “at least one third of those dispositions have not been convictions”).

193. In jurisdictions that permit prosecutors to delay filing decisions and thus delay the formal onset of the adversarial process, detained suspects will still experience many of these costs based solely on police allegations. See Metzger & Hoeffel, *Criminal (Dis)appearance*, *supra* note 14, at 418 (“Between the investigative and the adjudicative stages of a criminal case lies a constitutional wasteland.”).

194. See NATAPOFF, *supra* note 33, at 19–38 (documenting extensive impact of encounters with the misdemeanor process).

195. Amanda Y. Agan, Jennifer L. Doleac & Anna Harvey, *Misdemeanor Prosecution* 3, 7–8 (Nat’l Bureau of Econ. Rsch., Working Paper 28600, 2022), <https://www.nber.org/papers/w28600> [<https://perma.cc/CAZ5-MQ8Q>]; see also FELIX OWUSU, PRESUMPTIVE DECLINATION AND DIVERSION IN SUFFOLK COUNTY, MA (2022), <https://www.hks.harvard.edu/sites/default/files/>

At the same time, declinations relieve pressure on the misdemeanor process itself in ways that differ substantially from later dismissals. Declinations save jail costs, court costs, and the time and energy required of prosecutors, public defenders, and judges to handle cases. In a rare empirical study of the fiscal cost savings of declination, Texas A&M researchers evaluated an early screening process in the El Paso prosecutor's office. That program screened approximately two-thirds of misdemeanor arrests and maintained a declination rate of approximately 20%. The study concluded that if prosecutors had screened all misdemeanor cases, the county would have saved over \$1.5 million, or approximately \$1,900 per declined case, in the aggregate costs of jail, court appearances, and public defense.<sup>196</sup>

Related studies regarding incarceration and court costs suggest that declinations produce substantial savings because every filed misdemeanor case imposes costs on every legal institution and actor in the system. A day in jail, for example, costs the state somewhere between \$60 and \$200.<sup>197</sup> According to BJS, the average jail stay is twenty-five days, but that includes longer pretrial felony detentions: the average misdemeanor jail stay is likely closer to a week.<sup>198</sup> A Harris County study estimated that each misdemeanor

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Taubman/RIGB/Presumptive%20Declination%20and%20Diversion%20in%20Suffolk%20County%2C%20MA.pdf [https://perma.cc/XPA6-TW67] (studying impact of declination policies); DURHAM CNTY. DIST. ATT'Y'S OFF., 2021 ANNUAL REPORT 1, <https://drive.google.com/file/d/1KZ55mo313hKe88pDYAFG0sLjjuaaGDBr/view?usp=sharing> [https://perma.cc/M6H5-89N7] ("A 2021 analysis of 35 jurisdictions, including Durham, found that prosecutorial reforms—such as reducing prosecution of nonviolent misdemeanors, diverting people dealing with mental illness and substance use for treatment, and reducing reliance on cash bail—did not affect local crime rates."); SABA ROUHANI, CATHERINE TOMKO, NOELLE P. WEICKER & SUSAN G. SHERMAN, EVALUATION OF PROSECUTORIAL POLICY REFORMS ELIMINATING CRIMINAL PENALTIES FOR DRUG POSSESSION AND SEX WORK IN BALTIMORE, MARYLAND 9–11, 16 (2021), <https://publichealth.jhu.edu/sites/default/files/2021-10/prosecutorial-policy-evaluation-report-20211019.pdf> [https://perma.cc/7JJ8-N75D] (finding that declination policies led to fewer new arrests, almost no rearrests for serious crimes, and fewer 911 calls).

196. Adam M. Gershowitz, *Justice on the Line: Prosecutorial Screening Before Arrest*, 2019 U. ILL. L. REV. 833, 867 (describing Texas A&M study and potential \$1.5 million cost savings); CARMICHAEL ET AL., *supra* note 34, at 7–8, 103–04 (identifying 4,129 unscreened cases). The El Paso declination rate was 19%. Had it applied to the 4,129 unscreened sheriff arrests, an additional 784 cases would not have been filed.

197. CHRISTIAN HENRICHSON, JOSHUA RINALDI & RUTH DELANEY, VERA INST. OF JUST., THE PRICE OF JAILS 26–31 (2015), <https://www.vera.org/downloads/publications/price-of-jails.pdf> [https://perma.cc/AY9H-N2UM] (a few jurisdictions reported daily costs per inmate as low as \$50 or as high as \$500); *cf.* Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1428–29, 1436 (2017) (concluding that the average marginal cost of one additional day in jail is approximately \$20 and substantially lower than the average daily cost of incarceration).

198. ZHEN ZENG, U.S. DEP'T OF JUST., NCJ 253044, JAIL INMATES IN 2018, at 8 (2020), <https://bjs.ojp.gov/content/pub/pdf/ji18.pdf> [https://perma.cc/LNH7-D2QN]; Andrea Woods, Sandra G. Mayson, Lauren Sudeall, Guthrie Armstrong & Anthony Potts, *Boots and Bail on the Ground: Assessing the Implementation of Misdemeanor Bail Reforms in Georgia*, 54 GA. L. REV. 1235, 1259 (2020) (average misdemeanor jail stay was 8.7 days in Georgia); Paul Heaton, Sandra Mayson &

marijuana case cost the prosecutor's office \$478, the public defender's office \$440, and courts \$297.<sup>199</sup> An NIJ study of diversion programs estimated the cost to the state of a single litigated low-level case in Chittenden County, Vermont, to be between \$650–\$1,050; in Cook County, Illinois, it ranged from \$1,450–\$3,300.<sup>200</sup> The obligation to review and disclose police body camera footage has further raised the costs of litigating traffic and other low-level cases.<sup>201</sup> Taken together, all this suggests that the declination of a single misdemeanor could save taxpayers anywhere between \$1,000 and \$4,700 or more.<sup>202</sup>

The prosecutorial bar itself recognizes the centrality and influence of declination. In its prosecution standards, the National District Attorneys Association requires prosecutors to make the declination decision “at the earliest practical time,” explaining in the comments that:

It could be argued that screening decisions are the most important made by prosecutors in the exercise of their discretion in the search for justice. The screening decision determines whether or not a matter will be absorbed into the criminal justice system. While the decision may be very easy at times, at others it will require an examination of

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Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 766 (2017) (median misdemeanor jail stay in Harris County is ten days); Robert C. Boruchowitz, *Fifty Years After Gideon: It Is Long Past Time to Provide Lawyers for Misdemeanor Defendants Who Cannot Afford to Hire Their Own*, 11 SEATTLE J. FOR SOC. JUST. 891, 894 (2013) (usual misdemeanor stay prior to sentencing is approximately one week); cf. Mosi Secret, *N.Y.C. Misdemeanor Defendants Lack Bail Money*, N.Y. TIMES (Dec. 2, 2010), <https://www.nytimes.com/2010/12/03/nyregion/03bail.html> [<https://perma.cc/CUB3-86CH>] (discussing a 2008 Human Rights Watch study showing that in misdemeanor cases where bail was set at \$1000 or less, most defendants spent an average of two weeks in jail).

199. HARRIS CNTY. DIST. ATT'Y, *THE ECONOMICS OF MISDEMEANOR MARIJUANA PROSECUTION* (2017), [https://app.dao.hctx.net/sites/default/files/2017-03/MMDPEconomics\\_0.pdf](https://app.dao.hctx.net/sites/default/files/2017-03/MMDPEconomics_0.pdf) [<https://perma.cc/33UD-D2SP>].

200. Michael Rempel, Melissa Labriola, Priscillia Hunt, Robert C. Davis, Warren A. Reich & Samantha Cherney, *NIJ's Multisite Evaluation of Prosecutor-Led Diversion Programs* 34 tbl.6.1 (2018), <https://www.ojp.gov/pdffiles1/nij/grants/251665.pdf> [<https://perma.cc/6XQU-4GUZ>].

201. Mark Bowes, *Chesterfield Prosecutors Plan to Stop Handling Misdemeanor Criminal Cases, Traffic Offenses Starting May 1 Because of Workload*, RICHMOND TIMES-DISPATCH (Feb. 21, 2018), [https://richmond.com/news/local/crime/chesterfield-prosecutors-plan-to-stop-handling-misdemeanor-criminal-cases-traffic-offenses-starting-may-1-because/article\\_a06b1fca-45e1-5eeb-a071-3fd4900b4117.html](https://richmond.com/news/local/crime/chesterfield-prosecutors-plan-to-stop-handling-misdemeanor-criminal-cases-traffic-offenses-starting-may-1-because/article_a06b1fca-45e1-5eeb-a071-3fd4900b4117.html) [<https://perma.cc/TRY8-B2RM>] (describing a local prosecutor's decision to stop prosecuting misdemeanor offenses, in part, due to their inability to fulfill an obligation to review police body camera footage).

202. See Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1108 (2013) (describing jurisdictions that have considered “prosecutorial rollbacks, including opting not to try some minor crimes” in response to the expense of litigating misdemeanors (quoting Jesse McKinley, *Money Shortage Forces Cut in Cases to Be Prosecuted*, N.Y. TIMES (May 8, 2009), <https://www.nytimes.com/2009/05/09/us/09tradeoffs.html> [<https://perma.cc/A7HS-S9U9>]); ALISA SMITH & SEAN MADDAN, NAT'L ASS'N OF CRIM. DEF. LAWS., *THREE-MINUTE JUSTICE* 19 (2011), <https://www.nacdl.org/getattachment/eb3f8d52-d844-487c-bbf2-5090f5ca4be3/three-minute-justice-haste-and-waste-in-florida-s-misdemeanor-courts.pdf> [<https://perma.cc/238N-ELMM>] (documenting costs of misdemeanor prosecution).

the prosecutor's beliefs regarding the criminal justice system, the goals of prosecution, and a broad assortment of other factors.<sup>203</sup>

### B. *Misdemeanor Declination Rates*

As a general matter, misdemeanor declination rates tend to be low, both in comparison to felonies and in comparison to dismissal and diversion rates later in the process.<sup>204</sup> For example, in 2009, when the Vera Institute collaborated with the prosecutor's office in Mecklenburg, North Carolina, they discovered that the office was declining only 3–4% of drug cases and that prosecutors mostly adopted all police charges. With respect to Black women arrestees, the declination rate was zero.<sup>205</sup> In Alaska in 2015, the misdemeanor declination rate was 3.7% although 30.6% of misdemeanor cases were eventually dismissed.<sup>206</sup> In 2008 in Iowa, declination rates rarely exceeded 5%; the overall Iowa declination rate for simple misdemeanors was less than 0.5%.<sup>207</sup> In the First Judicial District Court of Colorado, outside of Denver, the overall declination rate for *all* offenses between 2017 and 2021 was a mere 3%.<sup>208</sup>

A 2022 study compared overall declination and dismissal rates in fifteen different jurisdictions but did not distinguish between misdemeanor and felony cases. The report noted, however, that “some jurisdictions have implemented ‘auto-file’ policies, in which particular types of cases (e.g., drug offenses or low-level misdemeanors) are automatically filed rather than being reviewed by a prosecutor upon receipt from law enforcement” and that those jurisdictions thus had low overall declination rates.<sup>209</sup> In Cook County, the prosecutor's office is bypassed altogether: “For some specific types of arrests—including misdemeanor arrests and arrests for felony drug-law

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203. NATIONAL PROSECUTION STANDARDS 4-1.1, 4-1.8 cmt. (NAT'L DIST. ATT'YS ASS'N 3d ed. 2009), <https://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Ed.-w-Revised-Commentary.pdf> [<https://perma.cc/3WKG-TH7T>].

204. NATAPOFF, *supra* note 33, at 68–71 (documenting declination rates).

205. *McKenzie Testimony*, *supra* note 22, at 37.

206. ALASKA CT. SYS., *supra* note 23, at 135 tbl.5.12.

207. Bowers, *supra* note 24, at 1717 tbl.3.

208. PROSECUTORIAL PERFORMANCE INDICATORS, REJECT OR DISMISS? A PROSECUTOR'S DILEMMA 5 fig.1, 6 (2022), <https://prosecutorialperformanceindicators.org/wp-content/uploads/2022/07/PPI-Reject-Dismiss-Final.pdf> [<https://perma.cc/HU3B-5P4Q>]; *see also* Metzger & Hoeffel, *Charging Time*, *supra* note 14, at 1742 (documenting 5% declination rate prior to initial appearances in one mid-sized prosecutor's office with a subsequent 18% post-screening declination rate).

209. PROSECUTORIAL PERFORMANCE INDICATORS, *supra* note 208, at 4, 6.

violations—police directly file charges with the Clerk of the Circuit Court.”<sup>210</sup>

In other jurisdictions, by contrast, declination rates can be relatively high. In Baltimore, misdemeanor arrests are screened at the jail and approximately 16% are immediately declined—the figure reaches 25% for some order-maintenance crimes.<sup>211</sup> Ultimately, over 50% of cases may eventually be dismissed.<sup>212</sup> Florida prosecutors appear to decline over 15% of misdemeanor cases.<sup>213</sup> The El Paso County misdemeanor screening process has a declination rate of approximately 20%.<sup>214</sup>

In Charleston, South Carolina, a new pilot screening program in 2021 elevated the overall declination rate for all charges to nearly 30%, and almost 40% for drug charges.<sup>215</sup> The most common reason for dismissal was “lack of sufficient evidence.”<sup>216</sup> The pilot also discovered racial disparities in the office’s prior non-screening practices, largely related to delays in dismissal. Without screening, it took six weeks longer for Black men to have their cases dismissed relative to white men, and Black people waited an average of over two months longer than white people for dismissal of drug cases.<sup>217</sup> Once prosecutors started screening more rigorously, moreover, the rate of drug dismissals for Black arrestees more than doubled.<sup>218</sup>

Data in this space is obviously partial and piecemeal, which makes systemic conclusions hard to draw. LaFave reports that, nationally, as many as a quarter of misdemeanor cases are eventually dismissed or diverted but

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210. CTR. FOR CRIM. JUST. RSCH., POL’Y & PRAC., COOK COUNTY’S CRIMINAL JUSTICE SYSTEM: TRENDS AND ISSUES REPORT 4 (2d ed. 2019), <https://www.luc.edu/media/lucedu/ccj/pdfs/CookCountyTrendsandIssuesReportNovember2019.pdf> [<https://perma.cc/CC96-RQNR>].

211. U.S. DEP’T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 26 (2016) (“[S]upervisors at Central Booking and local prosecutors dismissed a significant percentage of these charges upon their initial review of arrest documents.”).

212. MD. JUDICIARY, ANNUAL STATISTICAL ABSTRACT: FY 2015, at DC-7 tbl.DC-4 (2015), <https://mdcourts.gov/sites/default/files/import/publications/annualreport/reports/2015/fy2015statisticalabstract.pdf> [<https://perma.cc/GP5J-LGX4>].

213. Florida Office of the State Courts Administrator, Summary Report System (SRS): County Criminal Dispositions by Circuit and County, January Through December 2015 (on file with author) (cases designated as “before trial no file”).

214. CARMICHAEL ET AL., *supra* note 34, at 73; Gershowitz, *supra* note 196, at 867 (describing Carmichael study).

215. Kelli L. Ross, ‘Case for Screening’ Report Identifies Ways Prosecutors Can Reduce Impact of Disparate Arrest Rates, JUST. INNOVATION LAB (July 27, 2022), <https://www.justiceinnovationlab.org/news-and-updates/2022-0727> [<https://perma.cc/4DCB-Y7AJ>]; Sorensen et al., *supra* note 34; *see also* DON STEMEN, RORY PULVINO, JJ NADDEO, BRANDEN DUPONT, LILY GRIER, JESS SORENSEN & JARED FISHMAN, JUST. INNOVATION LAB & LOYOLA UNIV. CHI., DISPARITY AND PROSECUTION IN CHARLESTON, SC, <https://charleston-disparity-in-prosecution.org/> [<https://perma.cc/T92A-WKMH>] (examining racial disparities at various points in prosecutorial decision-making).

216. Ross, *supra* note 215.

217. *Id.*

218. Sorensen et al., *supra* note 34.

does not distinguish between declination and other forms of later dismissals.<sup>219</sup> Many jurisdictions do not collect declination data at all, or they lump declinations under dismissals, thereby erasing differences in rates.<sup>220</sup> Connecticut tracks “nolle prosses” and dismissals, but does not distinguish declinations; the state relies heavily on diversion: up to 60% of misdemeanors may be diverted and ultimately dismissed.<sup>221</sup> In a detailed survey of eight cities, the Bureau of Justice Statistics found a mean overall misdemeanor dismissal rate of approximately 60%, but did not distinguish declinations.<sup>222</sup> Ignorance is widespread: Sandra Mayson and Megan Stevenson report that in their misdemeanor data survey of eight different jurisdictions, “[n]one of the people we interviewed knew the misdemeanor declination rate in their jurisdiction.”<sup>223</sup>

At the same time, these limited data represent a substantial increase in our knowledge. The past decade has seen new attention to misdemeanors in general and to declination and dismissal rates in particular. This new information permits the provisional conclusion that as a general matter, misdemeanor declination rates are relatively low and much less common than later forms of dismissal. Identifying and understanding this gap opens up substantial room for improvements in efficacy, cost-savings, and fairness. Moreover, the empirical picture continues to improve. Recent innovations in prosecutorial offices and in the research community revolve expressly around the effort to collect better data on declination rates.<sup>224</sup> As time goes on, we will know more and more about this important dynamic.

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219. 1 LAFAVE ET AL., *supra* note 131, § 1.11(c-1) & nn.40.945–1070 (annual report disposition tables from Alaska, California, Florida, Hawaii, Indiana, Kansas, Michigan, Missouri, New York, North Carolina, Ohio, Texas, Vermont, and Washington). These tables reflect misdemeanor dismissal rates of approximately 25% but most (except Alaska, Florida, and New York) do not distinguish declinations or pre-arraignment dismissals from overall dismissal rates.

220. A 2018 Urban Institute study of 158 prosecutor offices found that 70% of those offices collected internal data on declination rates but the study did not reveal what those rates actually were. ROBIN OLSEN, LEIGH COURTNEY, CHLOE WARNBERG & JULIE SAMUELS, URB. INST., COLLECTING AND USING DATA FOR PROSECUTORIAL DECISIONMAKING 1, 6 (2018), [https://www.urban.org/sites/default/files/publication/99044/collecting\\_and\\_using\\_data\\_for\\_prosecutorial\\_decisionmaking\\_0.pdf](https://www.urban.org/sites/default/files/publication/99044/collecting_and_using_data_for_prosecutorial_decisionmaking_0.pdf) [<https://perma.cc/BN5C-2L9L>].

221. See Conn. Jud. Branch, Performance Mgmt. & Stats. Unit, Disposition Outcomes (2015) (on file with author) (showing nearly 60% of misdemeanor charges were “nolled”).

222. TOM RICH & KEVIN M. SCOTT, U.S. DEP’T OF JUST., NCJ 305157, DATA ON ADJUDICATION OF MISDEMEANOR OFFENSES 11 tbl.8 (2022), <https://bjs.ojp.gov/sites/g/files/xykuh236/files/media/document/damorfs.pdf> [<https://perma.cc/J2DC-VDFG>].

223. Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. REV. 971, 987 (2020).

224. *Reshaping Prosecution Initiative*, VERA INST. OF JUST., <https://www.vera.org/ending-mass-incarceration/criminalization-racial-disparities/prosecution-reform/reshaping-prosecution-initiative> [<https://perma.cc/XNV3-87QQ>] (describing program that works with prosecutors to decline and divert cases and collect data on the benefits of these alternatives); see RICH & SCOTT,

C. *What Do Low Declination Rates Mean?*

Low declination rates can occur for a variety of reasons. As noted above, prosecutors might affirmatively adopt a full enforcement policy for special offense classes such as immigration crimes or domestic violence, charging all cases and thus pushing down declination rates.<sup>225</sup> Conversely, in jurisdictions where prosecutors have announced their intention to decline certain types of cases, police might proactively reduce arrests in response. For example, when District Attorney Gonzalez announced in 2017 that his Brooklyn office would no longer prosecute marijuana possession or smoking cases, arrest rates “slowed to a trickle,” which made declinations less necessary.<sup>226</sup> Indeed, some argue that strong declination policies are a good way of training and incentivizing police to reduce arrests.<sup>227</sup>

More commonly, however, low misdemeanor declination rates do not reflect substantive prosecutorial policy but rather decisional failure and an abdication of the screening function. At that all-important moment of decision whether to initiate a criminal case, a decision that the Supreme Court says is “far from a mere formalism,”<sup>228</sup> misdemeanor prosecutors all too often defer to police and uncritically charge arrests. The practice is a structural byproduct of routine features of misdemeanor prosecution that include: heavy caseloads; lack of institutional resources devoted to the initial screening process; professional and institutional fealty to and dependence on police; and inexperienced junior prosecutors assigned to misdemeanor dockets. A wide array of bureaucratic and professional incentives exert

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*supra* note 222, at 1 (reporting House Committee on Appropriations’ “concern[] with the lack of reliable data from States and local jurisdictions on the processing of misdemeanor arrests” (quoting H.R. REP. NO. 116-101, at 68 (2019))).

225. See GAO REPORT, *supra* note 178, at 26; Eagly, *supra* note 178, at 1334 (noting that “low [declination] rate reflects a certain prioritization of immigration referrals”); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1672 & n.76 (describing prosecutorial “no-drop” rules that create a heavy presumption against dropping cases).

226. *Brooklyn District Attorney Eric Gonzalez Dismisses Over 3,500 Marijuana Cases Following Legalization*, BROOKLYN DIST. ATT’Y’S OFF. (July 27, 2021), <http://www.brooklynnda.org/2021/07/27/brooklyn-district-attorney-eric-gonzalez-dismisses-over-3500-marijuana-cases-following-legalization/> [https://perma.cc/22HE-9QJG]. *But see* Nicholas Goldrosen, *Null Effects of a Progressive Prosecution Policy on Marijuana Enforcement*, CRIMINOLOGY, CRIM. JUST., L. & SOC’Y., Apr. 2022, at 23, 33 (finding that a similar 2014 declination policy in Brooklyn had no effect on police marijuana arrest rates).

227. Wright & Miller, *supra* note 180, at 65 (describing rigorous prosecutorial screening “as a necessary part of training police officers to investigate more thoroughly”); Gershowitz, *supra* note 58, at 1535–36 (describing “information flow problem” if police do not know reasons for dismissals); Metzger & Hoeffel, *Charging Time*, *supra* note 14, at 1764 (describing reduced arrests as a result of Dallas District Attorney declination policies). *But see* Goldrosen, *supra* note 226, at 33 (finding that the Brooklyn District Attorney’s 2014 policy of presumptive declination of marijuana cases had no effect on police marijuana arrest rates).

228. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion).

pressure on prosecutors—especially new ones—to defer to the initial police arrest decision and to postpone the substantive evaluation of the merits of the case until later. In other words, prosecutors are under pressure to rubber-stamp arrests.<sup>229</sup>

Like their public defender counterparts, state and local prosecutor's offices often confront enormous misdemeanor caseloads.<sup>230</sup> Many offices respond by skimping on the initial charging decision, filing almost everything up front, and postponing case evaluations until later in the process.<sup>231</sup> Under pressure to move cases along, “prosecutors subject the public order arrests to a paper screen only—and a cursory one at that. The screen is ineffective . . . .”<sup>232</sup> As one author put it:

The large numbers of dismissals in certain jurisdictions, and the way in which they often occur, literally days before or on the day of a scheduled trial, are evidence that the “crunch” of caseloads is driving prosecutorial decisions far more than . . . legal or policy considerations about the prosecutorial merit of individual cases.<sup>233</sup>

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229. See Metzger & Hoeffel, *Charging Time*, *supra* note 14, at 1742 (describing similar pressures in connection with felony screening that cause junior prosecutors to avoid declination and “let it slide”).

230. See Gershowitz & Killinger, *supra* note 29, at 270 (documenting excessive prosecutorial misdemeanor caseloads); JOAN E. JACOBY, PETER S. GILCHRIST, III & EDWARD C. RATLEDGE, JEFFERSON INST. FOR JUST. STUD., PROSECUTOR'S GUIDE TO MISDEMEANOR CASE MANAGEMENT 33–34 (2001), <https://udspace.udel.edu/server/api/core/bitstreams/e83beb77-fde1-47c3-b10a-495b819b811f/content> [<https://perma.cc/WW7X-JC2Y>] (documenting understaffing of misdemeanors in various prosecutor offices); Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 743 (2017) (describing caseload pressures and criticizing how public defender offices “minimize the resources dedicated to misdemeanor representation so they can concentrate their efforts on felony representation”).

231. Josh Bowers, Response, *Physician, Heal Thyself: Discretion and the Problem of Excessive Prosecutorial Caseloads*, *A Response to Adam Gershowitz and Laura Killinger*, 106 NW. U. L. REV. COLLOQUY 143, 146 (2011) (pointing out that “the problem of excessive prosecutorial caseloads, in fact, may be a problem (at least partially) of prosecutors’ own making” because of their reluctance to decline misdemeanors); Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775, 801–02 (2016) (noting that “screeners in some prosecutor’s offices are required to seek supervisory approval before filing a felony charge, but they are not required to obtain such approval before filing a misdemeanor charge”).

232. Bowers, *supra* note 24, at 1702 (footnote omitted).

233. Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 24 (2000); see also Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1361–62 (1997) (“Typically, the prosecutor will make the charging decision by consulting the report the police have provided. As long as the report contains elements of a prima facie case . . . this report in testimonial form typically will be sufficient to . . . justify the detention and charging of the defendant.” (footnote omitted)). Lloyd Weinreb described basically the same process nearly fifty years ago. “With his [charging] task so defined, it is easy to understand how the prosecutor works. The police report ordinarily is a sufficient source of all the information he needs.” LLOYD L. WEINREB, DENIAL OF JUSTICE 58 (1977).



Observers describe prosecutors standing at counsel table in court, going through piles of files for the first time, making decisions on the fly.<sup>234</sup>

This cursory initial treatment is both fueled and compounded by prosecutorial dependence on police. A decade ago, Josh Bowers described the numerous incentives for prosecutors to defer to police when deciding whether to decline misdemeanors, an institutional architecture that Bowers described as “pathological”:

Prosecutors and police are teammates, and a smoothly operating prosecution office depends upon a functional relationship with the local force. . . . [C]ooperation is threatened if prosecutors decline too many police-initiated arrests. Such declinations are not just affronts to police personally; they expose police to media backlash and public outcry that the unprosecuted order maintenance arrests were unwarranted. Accordingly, police watch prosecutors to ensure that they are charging sufficiently high numbers of arrestees. Just as police are inclined to make arrests to provide cover for searches, prosecutors are inclined to file charges to provide cover for police arrests.<sup>235</sup>

Griffin and Yaroshefsky likewise describe the “weak prosecutorial screening of police complaints” that characterizes the misdemeanor system that “has resulted [in] a police-dominated charging process.”<sup>236</sup>

At the same time, deference to police is typically more pronounced for the junior, inexperienced prosecutors who tend to work the misdemeanor docket. Like public defenders, most junior prosecutors train in the misdemeanor docket before advancing to felonies. As Kay Levine and Ron Wright describe in their studies of prosecutorial office culture, “inexperienced prosecutors tend to take everything the police say ‘as holy writ.’”<sup>237</sup> One prosecutor explained that “when she was a young attorney, she ‘didn’t have the words’ to challenge a police officer.”<sup>238</sup> Compared to senior prosecutors, junior prosecutors consider a “good relationship with police” and “low declination rates” to be more important measures of success.<sup>239</sup>

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234. Brady, *supra* note 233, at 22 (“For many misdemeanor cases, . . . the prosecutor is likely to see the case file for the first time the day before or the morning of the scheduled trial.”); *see also* Metzger & Hoeffel, *Charging Time*, *supra* note 14, at 1741 (noting that prosecutors often make their ultimate charging “decision based on precisely the same information that was available to them when they first received the case”).

235. Bowers, *supra* note 24, at 1700–01, 1724 (footnotes omitted).

236. Griffin & Yaroshefsky, *supra* note 133, at 310, 323; *see also* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 655–56 (2014) (describing same in New York where at arraignment “[p]rosecutors typically flip through the paperwork contained in the file for somewhere between one and five minutes”).

237. Kay L. Levine & Ronald F. Wright, *Prosecutor Risk, Maturation, and Wrongful Conviction Practice*, 42 LAW. & SOC. INQUIRY 648, 658 (2017).

238. Wright & Levine, *supra* note 71, at 1101 n.190.

239. *Id.* at 1104.

Other scholars have described the same phenomenon: “newer prosecutors . . . may be less confident in their ability to confront law enforcement officers or decline their cases. As a consequence, these prosecutors may be more likely to accept questionable cases.”<sup>240</sup> In a related vein, many prosecutor offices rely on unpaid volunteer prosecutors—many of them seeking job experience—to handle misdemeanors.<sup>241</sup> These institutional training and personnel dynamics mean that the initial screeners of police misdemeanor arrest decisions will often be the worst equipped to make independent evaluative decisions.<sup>242</sup>

Not only is this prosecutorial deference and deferral a form of professional abdication: it gets case outcomes wrong. High dismissal rates later on in the process—as high as 50% or more in some jurisdictions—are strong evidence that prosecutors themselves believe that the initial filing decision was just a placeholder and that these misdemeanor cases should not have been charged in the first place. This is true by definition in “auto-file” jurisdictions: those offices expressly eschew any initial review at all and defer all decision-making through auto-file policies which automatically convert all police arrests into formal charges.<sup>243</sup> In many other jurisdictions, prosecutors mechanically file initial charges even though later dismissals routinely occur based on exactly the same file, which is to say, no more evidence or information than the prosecutor had at the initial moment of filing.<sup>244</sup> Such delay adds no informational value to the case which means that a prosecutor could have made the dismissal decision right away.<sup>245</sup> This

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240. Don Stemen & Bruce Frederick, *Rules, Resources, and Relationships: Contextual Constraints on Prosecutorial Decision Making*, 31 QUINNIPIAC L. REV. 1, 63 (2013) (footnote omitted).

241. Russell M. Gold, *Volunteer Prosecutors*, 59 AM. CRIM. L. REV. 1483, 1488, 1518 (2022) (finding that volunteer prosecutors exist in at least thirty-one states).

242. Josh Bowers has noted:

[P]rosecuting petty cases offers low-stress opportunities for new assistants to gain prosecutorial experience (and, notably, these new assistants are the very prosecutors who are most deferential to supervisory authority and are therefore least likely to buck policy by exercising case-specific equitable discretion in the rare case where the need for such discretion is readily apparent pre-charge).

Bowers, *supra* note 24, at 1703–04.

243. PROSECUTORIAL PERFORMANCE INDICATORS, *supra* note 208, at 6.

244. Brady, *supra* note 233, at 24 (describing injustices that flow from charging arrests that are later dismissed).

245. Such legally unjustified delays might also be conceptualized as an effort to exercise social control over the defendant population. Sociologists have pointed out for decades that the criminal system often uses the penal process to inflict informal punishments and exercise social control over the disadvantaged even in the absence of legal guilt and short of formal conviction. Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 613 (1956) (describing vagrancy courts as devoted to the management of poverty); MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* xxii (1st paperback ed. 1992) (“The courts are one of society’s primary

will arguably be especially true for defendants who lack counsel since they will have no one to advocate for them and potentially affect the evidence and the equities.<sup>246</sup>

Diversory dismissals are a somewhat different category since by hypothesis the defendant has successfully completed the terms of the diversion and thus provided prosecutors with additional information justifying dismissal. But even diversory dismissals will contain many cases that should have been declined at the outset. Diversion is a well-known net-widener: it incentivizes prosecutors to keep more cases in the system than they otherwise would and to divert cases that could and should be declined. As a result, many diverted defendants will have been strong candidates for declination.<sup>247</sup>

Finally, postponing the declination decision has a substantive impact on case outcomes: some defendants will plead guilty to charges that might have otherwise eventually been dismissed. The mere fact of being charged, incarcerated, stigmatized, frightened, and hauled into court induces many misdemeanor defendants to plead guilty, often to time served, in order to terminate the experience.<sup>248</sup> If they had sufficient personal, financial, and legal resources to wait, their cases might eventually be dismissed on the merits, but the punitive quality of the process itself heavily incentivizes a

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institutions for managing [the poor and the disadvantaged] and their continuing problems.”); JOHN IRWIN, *THE JAIL* 2 (1985) (“[J]ail was invented, and continues to be operated, in order to manage society’s rabble.”); STANLEY COHEN, *VISIONS OF SOCIAL CONTROL* 41–43 (1985) (analogizing informal controls in the carceral system to dragnet fishing); Forrest Stuart, Amada Armenta & Melissa Osborne, *Legal Control of Marginal Groups*, 11 *ANN. REV. L. & SOC. SCI.* 235, 240–43 (2015) (surveying extensive literature); ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND* 61, 71–72 (2018) (labeling the New York misdemeanor system as “managerial” rather than “adversarial”); Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 *CALIF. L. REV.* 1637, 1700 (2021) (describing how the offense of disorderly conduct paradigmatically functions as a racist, sexist, and ableist “mechanism for social control”).

246. ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, *NAT’L ASS’N OF CRIM. DEF. LAWS., MINOR CRIMES, MASSIVE WASTE* 14–15 (2009), <https://www.nacdl.org/getattachment/20b7a219-b631-48b7-b34a-2d1cb758bdb4/minor-crimes-massive-waste-the-terrible-toll-of-america-s-broken-misdemeanor-courts.pdf> [<https://perma.cc/M73Q-SFHL>] (documenting pervasive lack of counsel for misdemeanor defendants); *cf.* BRONX DEFS. FUNDAMENTAL FAIRNESS PROJECT, *NO DAY IN COURT* 2–3 (2013), <https://www.bronxdefenders.org/wp-content/uploads/2013/05/No-Day-in-Court-A-Report-by-The-Bronx-Defenders-May-2013.pdf> [<https://perma.cc/6TFC-5TBQ>] (documenting dozens of well-represented misdemeanor defendants who eventually pled guilty under pressure from extensive prosecutorial delays).

247. NATAPOFF, *supra* note 33, at 225; COHEN, *supra* note 245, at 53 (on net widening); Wright & Levine, *supra* note 191, at 333; Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 *GEO. L.J.* 1587, 1614–15 (2012); *see also* Dewan & Lehren, *supra* note 191 (describing for-profit prosecution-run diversion programs).

248. NATAPOFF, *supra* note 33, at 87–111 (documenting pressures on innocent misdemeanor defendants to plead guilty); Josh Bowers, *Punishing the Innocent*, 156 *U. PA. L. REV.* 1117, 1136–37 (2008) (noting that an offer of time served will often induce a misdemeanor guilty plea).

plea; the prosecutorial incentive is likewise to accept it.<sup>249</sup> In this way, dismissal delayed becomes dismissal denied.

All these sorts of bureaucratic and professional dynamics are institutionally understandable. But they are not substantively defensible reasons to charge a person with a crime. Covering for police, building institutional solidarity, professional convenience, and saving money are not among the legitimate purposes of punishment. The filing of a criminal charge is a profound state decision and a highly impactful one for the individual. It is also a constitutional moment of great significance. It should not be made millions of times a year based on bureaucratic sloppiness, poor office training habits, or the failure to devote sufficient time and resources to one of the most significant formal decisions made by the office of the prosecutor.

#### *D. Systemic Implications*

Weak declination practices reflect some core dysfunctions of the misdemeanor system. They flow from an underlying legal culture that devalues the significance of misdemeanors and underestimates their costly consequences for individuals and for the criminal system. This disregard permits prosecutors to skimp and rubber stamp in ways that are inconsistent with their basic job description, their constitutional mandate, and their intrabranch checking obligations. Weak declination practices demonstrate a studied lack of prosecutorial judgment, namely, the very function for which prosecutors—in contrast to police—are protected from judicial review and awarded the special protections of absolute immunity.

Like many other misdemeanor dysfunctions, the routine, systematic deferral of the dismissal decision until later in the criminal process is wildly expensive. It triggers all the costs described above incurred by defendants, public defenders, prosecutors, jails, courts, and taxpayers. Those costs are individual, communal, and systemic. The failure to decide—and the resulting gap between that initial failure and the ultimate decision to dismiss—shakes out as the unjustified criminalization and punitive treatment of millions of defendants and a multimillion-dollar waste of taxpayer resources.

Theoretically speaking, weak misdemeanor declination represents an erosion of basic principles of accountability, evidence, and due process at the lowest echelons of the criminal system.<sup>250</sup> The casual deference to police

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249. See BRONX DEFS. FUNDAMENTAL FAIRNESS PROJECT, *supra* note 246, at 14 (describing how misdemeanor guilty pleas were induced by prosecutorial delay and the creation of numerous barriers to litigation); FEELEY, *supra* note 245, at 30–31 (“The time, effort, money, and opportunities lost as a direct result of being caught up in the system can quickly come to outweigh the penalty that issues from adjudication and sentence.”).

250. I have described this general erosion of rule of law in more detail in Alexandra Natapoff, *The Penal Pyramid*, in THE NEW CRIMINAL JUSTICE THINKING 71, 72 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

contradicts principles of prosecutorial professionalism and independence. The failure to screen before charging is a form of disrespect for legality, evidence, and burdens of proof: the probable cause sufficient to support arrest was never supposed to be sufficient for adjudication.<sup>251</sup> And the abdication of the prosecutorial quasi-judicial screening obligation is a watering-down of due process itself, the formal guarantees built into the adjudication process meant to offer protection to the defendant and legitimacy to the system.

These devaluations run deep in the misdemeanor system and prosecutors are not the only culprits. Public defender offices are infamous for cutting legal corners when it comes to misdemeanors. Junior defenders train in misdemeanor dockets in much the same way that junior prosecutors do. Like prosecutors who rubber-stamp out of inexperience, new defense attorneys may press clients to plead rather than litigate and risk losing.<sup>252</sup> The epithet “meet ’em and plead ’em lawyering” refers to the widespread defense practice, by junior and senior attorneys alike, of pressuring clients to plead guilty in order to save resources and to clear heavy caseloads.<sup>253</sup> Courts, too, are part of the problem. Low level courts often shortchange the time and processes needed to protect defendant rights and dignity, in what the Supreme Court once disparagingly referred to as “assembly-line justice.”<sup>254</sup> In these ways, each institutional player in the misdemeanor system contributes to its normative erosions.

Sometimes the law itself is the problem: the misdemeanor system is often excused from core criminal procedures and other formality constraints on the theory that low-level cases are a different class of legal animal and do not need or deserve full procedural attention. Municipal courts, for example, which process approximately one-quarter of the national criminal misdemeanor docket, are not bound by separation of powers at all.<sup>255</sup> The

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251. *Compare* Gerstein v. Pugh, 420 U.S. 103, 119 (1975) (“The standard of proof required of the prosecution is usually referred to as ‘probable cause,’ but in some jurisdictions it may approach a prima facie case of guilt.”), with *Illinois v. Gates*, 462 U.S. 213, 235 (1983) (“[T]he term ‘probable cause’ . . . means less than evidence which would justify condemnation . . .” (alteration in original) (quoting *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813))).

252. Joe, *supra* note 230, at 774, 787 (describing how inexperienced misdemeanor attorneys produce worse outcomes for clients including greater pressure to plead). To be sure, not all public defenders train in plea-oriented cultures. See, e.g., *Public Defender Training: Core 101*, GIDEON’S PROMISE, <https://www.gideonspromise.org/core-101/> [https://perma.cc/T28E-8266] (client-centered training for junior public defenders with 1–3 years’ experience); *Bronx Defenders 2024 Fall Training Team*, BRONX DEFS., <https://careers-bronxdefenders.icims.com/jobs/1724/the-bronx-defenders-2024-fall-training-team/job?mode=view&mobile=false&width=900&height=500&bga=true&needsRedirect=false&jan1offset=-300&jun1offset=-240> [https://perma.cc/C7LT-QERJ] (describing rigorous misdemeanor training program for entry-level attorneys).

253. AM. BAR ASS’N, GIDEON’S BROKEN PROMISE 16 (2004); see also NATAPOFF, *supra* note 33, at 74–78 (describing pressures on defense counsel to get clients to plead).

254. *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972); see also NATAPOFF, *supra* note 33, at 7–8 (describing lower court dysfunction).

255. Natapoff, *supra* note 110, at 997, 1008–10.

jury trial—a classic mechanism for separating powers—is often unavailable.<sup>256</sup> The fine-only misdemeanors that flood lower courts are exempt from the Sixth Amendment right to counsel.<sup>257</sup> Sometimes police get to file and prosecute their own low-level arrests.<sup>258</sup> Sometimes all these deviations converge to create courtrooms that are nearly unrecognizable from a traditional due process perspective. In dozens of South Carolina summary courts, for example, there is no prosecutor, only a police officer bringing charges.<sup>259</sup> There are no defense counsel—often in open violation of the Constitution<sup>260</sup>—and the presiding judge may not be a lawyer.<sup>261</sup> That means that a defendant can be arrested, charged, convicted, and incarcerated for a misdemeanor without a single attorney ever checking the arrest, the evidence, or the law.<sup>262</sup>

This flouting of basic criminal procedural norms is endemic to a misdemeanor culture that treats petty offenses and the people who are most often arrested for them as unimportant. It helps explain why misdemeanor prosecutors behave in ways that would be deeply countercultural in the more formalized felony arena in which legal roles, evidence, and due process are taken more seriously.<sup>263</sup> It explains why prosecutor offices—as well as public defender offices—feel comfortable treating misdemeanors as a training ground for inexperienced junior lawyers, thereby inviting error and poor

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256. *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968) (“Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses.”). *See generally* Andrea Roth, *The Lost Right to Jury Trial in “All” Criminal Prosecutions*, 72 DUKE L.J. 599 (2022) (challenging validity of petty offense exception to the jury trial right).

257. *Scott v. Illinois*, 440 U.S. 367, 373 (1979).

258. *See infra* subpart IV(D).

259. DIANE DEPIETROPAOLO PRICE, COLETTE TVEDT, EMMA ANDERSSON & TANYA GREENE, NAT’L ASS’N OF CRIM. DEF. LAWS., SUMMARY INJUSTICE 19 (2016), <https://www.nacdl.org/getattachment/c5b6c511-3d0d-41f2-b4ba-41f953af05dc/summary-injustice-a-look-at-constitutional-deficiencies-in-south-carolina-s-summary-courts-report-final.pdf> [<https://perma.cc/M3RK-4KUL>].

260. Or as South Carolina Supreme Court Justice Jean Hoefler-Toal bluntly put it:

*Alabama v. Shelton* [requiring the appointment of counsel is] one of the more misguided decisions of the United States Supreme Court, I must say. If we adhered to it in South Carolina we would have the Right to counsel probably . . . by dragooning lawyers out of their law offices to take these cases in every magistrate’s court in South Carolina, and I have simply told my magistrates that we just don’t have the resources to do that. So I will tell you straight up we [are] not adhering to *Alabama v. Shelton* in every situation.

BORUCHOWITZ ET AL., *supra* note 246, at 15 (second alteration in original).

261. PRICE ET AL., *supra* note 259, at 10.

262. *Id.* at 10, 19.

263. Gabriel J. Chin & John Ormonde, *Infamous Misdemeanors and the Grand Jury Clause*, 102 MINN. L. REV. 1911, 1921 (2018) (describing more rigorous prosecutorial screening practices in white collar cases); Lynch, *supra* note 28, at 2125–26 (describing same).

decision-making. And it helps explain why courts and scholars have historically paid less attention to the phenomenon.

All of this is to say that a more robust commitment to prosecutorial declination takes aim at a species of democratic failure at the bottom of the penal pyramid.<sup>264</sup> Defendants down here are deprived of the kind of Madisonian governance accountability that flows from constrained authority.<sup>265</sup> Defendants lack access to legal process, counsel, and appellate review in ways that would be unthinkable in the felony environment.<sup>266</sup> Some of this is due to carelessness and lack of resources, and some of it is by design. Courts have shortchanged the usual mechanisms for institutional accountability on the theory that checks and balances are unnecessary for low-level offenses in the ways that we demand for serious crimes and at the federal level. Or as the Supreme Court once wrote bluntly, “inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts of convenience, to provide speedy and inexpensive means of disposition of charges of minor offenses.”<sup>267</sup>

These devaluations are category mistakes. Modern misdemeanors are anything but minor for the people who are arrested for and charged with them. A brush with the misdemeanor system can strip people of their jobs, licenses, housing, welfare benefits, credit, and immigration status. Of the approximately ten million people who pass through American jails every year, nearly one-third spend time for misdemeanors, an annual carceral population of approximately three million people.<sup>268</sup> The burden of a misdemeanor charge or conviction is a permanent mark that can derail a person’s personal and economic prospects for a lifetime.<sup>269</sup> Racial disparities in misdemeanor policing and prosecution deform the entire criminal

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264. Natapoff, *supra* note 250, at 72.

265. See Matthew C. Stephenson, *Does Separation of Powers Promote Stability and Moderation?*, 42 J. LEGAL STUD. 331, 332 (2013) (describing Founders’ nascent theory of separation of powers).

266. Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U. L. REV. 1933, 1938 (2019) (describing near total lack of misdemeanor appeals); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 694 (2007) (explaining that “when ineffectiveness claims are not addressed until collateral review, the grim reality is that the performance of trial counsel in almost all misdemeanor and many felony cases is largely unchecked”).

267. *Colten v. Kentucky*, 407 U.S. 104, 117 (1972) (quoting *Colten v. Commonwealth*, 467 S.W.2d 374, 379 (Ky. 1971)).

268. ZENG, *supra* note 198, at 1, 6.

269. See RACIALLY CHARGED: AMERICA’S MISDEMEANOR PROBLEM (Brave New Films 2020), <https://misdemeanorfilm.org> [<https://perma.cc/2XCC-VQ5N>] (interviewing numerous people whose lives were devastated by their experiences in the misdemeanor system).

system.<sup>270</sup> The misdemeanor process, in other words, is a serious engine of criminalization and punishment. When prosecutors reflexively charge minor crimes, they should be held accountable for imposing this vast array of individual and systemic costs.

#### IV. Declination Reform: Strengthening Internal Separation of Powers

The ABA Criminal Justice Standards for the Prosecution Function reflect the conventional understanding that the prosecutorial job is to perform a substantive, equitable evaluation of the filing of criminal charges, separate and independent from the police decision to arrest.<sup>271</sup> The Standards state, among other things, that: “While the decision to arrest is often the responsibility of law enforcement personnel, the decision to institute formal criminal proceedings is the responsibility of the prosecutor.”<sup>272</sup> Prosecutors’ offices “should establish standards and procedures for evaluating [police] complaints to determine whether formal criminal proceedings should be instituted.”<sup>273</sup> The decision to file charges exceeds the question of whether there is probable cause: “A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.”<sup>274</sup> An arrest supported by probable cause is not enough to justify filing: “[T]he prosecutor is not obliged to file or maintain all criminal charges which the evidence might support.”<sup>275</sup> Rather, prosecutors should consider sixteen specified “factors” before filing.<sup>276</sup> And finally, the ABA Standards remind prosecutors to keep their professional distance from police: “When investigating or prosecuting a criminal matter, the prosecutor does not represent law enforcement personnel who have worked on the matter and such law enforcement personnel are not the prosecutor’s clients.”<sup>277</sup>

The ABA Standards reflect the broader proposition that prosecutors have a structural intrabranch responsibility to check police arrests and not to

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270. NATAPOFF, *supra* note 33, at 149–57 (documenting racial disparities throughout the misdemeanor process and their impact on the rest of the criminal system).

271. ABA PROSECUTION STANDARDS, *supra* note 17, at 3-1.2, 3-4.2, 3-4.3, 3-4.4(a).

272. *Id.* at 3-4.2(a).

273. *Id.* at 3-1.2(b).

274. *Id.* at 3-4.3(a).

275. *Id.* at 3-4.4(a).

276. *Id.*

277. *Id.* at 3-1.3; see Griffin & Yaroshesky, *supra* note 133, at 317–20 (analyzing the Standards); see also Irene Oritseweyinmi Joe, *Regulating Mass Prosecution*, 53 U.C. DAVIS L. REV. 1175, 1229 (2020) (arguing that prosecutors have an ethical duty to charge in ways that reduce caseloads so that public defenders can meet their constitutional obligations and the adversarial system can function).



defer or to rubber-stamp. There are numerous ways to strengthen and enforce this prosecutorial mandate to screen and evaluate police arrests before filing charges. Some of the most promising are sketched below.

A. *Strengthen Declination Policies*

The most obvious way to improve prosecutorial checking of police arrests is to strengthen office-wide screening and declination policies directly.<sup>278</sup> Prosecutors should take their misdemeanor screening obligations more seriously and structure their internal practices to better scrutinize police arrests decisions. They should also collect more and better data on declination rates and on the reasons for declination decisions.<sup>279</sup>

Prosecutorial offices in various states have already embarked on this path.<sup>280</sup> In a particularly high profile example, District Attorney Rachael Rollins won election in Boston—the first woman of color to do so—on a platform promising to presumptively decline a list of fifteen misdemeanors.<sup>281</sup> That policy produced substantial declines in recidivism without an increase in crime.<sup>282</sup> It also produced substantial police backlash: a police organization filed an ethics complaint against Rollins for her misdemeanor declination policy even before she formally took office.<sup>283</sup>

In response to the pandemic, State’s Attorney Marilyn Mosby in Baltimore stopped prosecuting a range of low-level non-violent offenses; in

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278. See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 997 (2009) (arguing that the most effective way to regulate prosecutors is through internal office culture and policy).

279. California, for example, requires prosecutors to code their declination decisions based on various factors including a lack of evidence or unconstitutional police conduct. CAL. DEP’T OF JUST., JUS8715/8715A INSTRUCTIONS AND CODE EXPLANATIONS, <https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/jus8715-inst-code.pdf> [<https://perma.cc/7MBJ-J97Z>] (describing California Department of Justice disposition reporting requirements); see also *supra* notes 219–24 and accompanying text (describing paucity of declination data and new efforts to collect it).

280. See POLICE EXEC. RSCH. F., *supra* note 12, at 7 (describing reform-minded prosecutorial initiatives); see also *infra* notes 292–97 and accompanying text (describing Gascón Special Directive); Warren v. DeSantis, No. 22cv302-RH-MAF, 2023 WL 345802, at \*5 (N.D. Fla. Jan. 20, 2023) (describing low-level declination policy); Agan et al., *supra* note 195, at 38–41 (describing data made available by Rollins’ office).

281. SUFFOLK CNTY. DIST. ATT’Y, THE RACHAEL ROLLINS POLICY MEMO app. C (2019), <https://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf> [<https://perma.cc/H227-XT2G>] (describing presumptions and exceptions governing prosecutorial discretion).

282. Agan et al., *supra* note 195, at 41–42; OWUSU, *supra* note 195, at 17 (studying impact of declination policies).

283. Radley Balko, Opinion, *Boston’s First Black Woman Prosecutor Has Yet to Take Office, But She’s Already Facing an Ethics Complaint*, WASH. POST (Dec. 28, 2018, 5:07 PM), <https://www.washingtonpost.com/opinions/2018/12/28/bostons-first-black-prosecutor-has-yet-to-take-office-shes-already-facing-an-ethics-complaint/> [<https://perma.cc/6S9V-23MQ>].

2021 she made the policies permanent.<sup>284</sup> Prosecutor offices in South Carolina and Georgia are currently working with the Justice Innovation Lab to develop stronger screening policies.<sup>285</sup> Several Texas counties have instituted electronic filing systems through which prosecutors prescreen all police warrantless arrests.<sup>286</sup>

Many reform-minded prosecutors have been explicit about the racial equity implications of stronger misdemeanor declination. In Minnesota, County Attorney John Choi announced that his office would no longer prosecute non-public safety traffic stops. The decision was made in honor of Philando Castile who was killed by police during a routine traffic stop.<sup>287</sup> In Florida, State Attorney Andrew Warren created a presumption against prosecuting bicycle stops because of significant racial disparities.<sup>288</sup> In Milwaukee, District Attorney John Chisholm instituted stricter declination and screening policies after a Vera Institute study revealed widespread racial disparities in charging patterns.<sup>289</sup> In Brooklyn, District Attorney Gonzalez explained his decision to presumptively decline marijuana possession prosecutions as follows: “Aggressive enforcement and prosecution of personal possession and use of marijuana does not keep us safer, and the glaring racial disparities in who is and is not arrested have contributed to a sense among many in our communities that the system is unfair.”<sup>290</sup>

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284. Joshua Vaughn, *The Pandemic Prompted Marilyn Mosby to Stop Prosecuting Low-Level Crimes. Will Other D.A.s Follow?*, THE APPEAL (Apr. 12, 2021), <https://theappeal.org/the-pandemic-prompted-marilyn-mosby-to-stop-prosecuting-low-level-crimes-will-other-d-a-s-follow/> [https://perma.cc/7NC4-PV85]; see also ROUHANI ET AL., *supra* note 195, at 9–16 (documenting benefits of the declination policy).

285. Ross, *supra* note 215; Jake Shore, *New Partnership Opens Chatham County DA Case Files to Data Analysis*, THE CURRENT (Oct. 5, 2022), [https://thecurrentga.org/2022/10/05/new-partnership-opens-chatham-county-da-case-files-to-data-analysis/?mc\\_cid=89b4e3bd99](https://thecurrentga.org/2022/10/05/new-partnership-opens-chatham-county-da-case-files-to-data-analysis/?mc_cid=89b4e3bd99) [https://perma.cc/TR5Q-VP4L].

286. Gershowitz, *supra* note 196, at 867–69.

287. Memorandum from John Choi, Ramsey Cnty. Att’y, to the Adult Trial Div., Pretrial Just. Div., Youth Just. & Wellness Div., and Victim, Witness & Postconviction Just. Div. Att’y’s (Sept. 8, 2021), <https://www.ramseycounty.us/sites/default/files/County%20Attorney/Charging%20Policy%20Regarding%20Non-Public-Safety%20Traffic%20Stops%209.8.21.pdf> [https://perma.cc/Y56H-TV3L]; Amir Vera & Christina Carrega, *Minnesota County Attorney to Stop Prosecuting Non-Public Safety Traffic Stops in Honor of Philando Castile*, CNN (Sept. 9, 2021, 7:50 PM), <https://www.cnn.com/2021/09/09/us/minnesota-prosecutor-traffic-stop-prosecutions/index.html> [https://perma.cc/6LSZ-5DYJ].

288. Warren v. DeSantis, No. 22cv302-RH-MAF, 2023 WL 345802, at \*4 (N.D. Fla. Jan. 20, 2023) (describing policy designed to alleviate harms of “biking while Black”).

289. Jeffrey Toobin, *The Milwaukee Experiment*, NEW YORKER (May 4, 2015), <https://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment> [https://perma.cc/7PC7-YZAX].

290. *Low-Level Marijuana Prosecutions in Brooklyn Plunged by Over 91% This Year as District Attorney’s Office Expanded Declination Policy*, BROOKLYN DIST. ATT’Y’S OFF. (July 27, 2018), <http://www.brooklynda.org/2018/07/27/low-level-marijuana-prosecutions-in-brooklyn-plunged-by-over-91-this-year-as-district-attorneys-office-expanded-declination-policy/> [https://perma.cc/2UUT-RRLL].

A common way that prosecutor offices institute such policies is through internal guidance memoranda.<sup>291</sup> By way of example, upon taking office in Los Angeles in 2020, District Attorney George Gascón created strong presumptive misdemeanor declination policies. Those policies resulted in a declination rate of over 50%, representing over 42,000 misdemeanors declined in 2021, mostly for public intoxication or simple drug possession.<sup>292</sup> Gascón instituted the policy through Special Directive 20-07, “Misdemeanor Case Management,” which provides line attorneys with both guidance and discretion in deciding whether to decline a misdemeanor case.<sup>293</sup> The directive instructs prosecutors that a specified list of thirteen misdemeanors “shall be declined or dismissed before arraignment and without conditions unless ‘exceptions’ or ‘factors for consideration’ exist.”<sup>294</sup> The exceptions and factors include such things as whether the person has committed repeat offenses, or if there is “[n]o indicia of substance use disorder and/or mental illness, or homelessness,” in which case the presumption of declination is lifted.<sup>295</sup> The Directive further limits declinations by clarifying that “each deputy district attorney retains discretion to seek a deviation from this policy when a person poses an identifiable, continuing threat to another individual or there exists another circumstance of similar gravity.”<sup>296</sup> At the same time, the Directive encourages declination by stating that “[t]hese charges do not constitute an exhaustive list. Each deputy district attorney is encouraged to

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291. See SUFFOLK CNTY. DIST. ATT’Y, *supra* note 281, at 26, app. C (identifying “15 [misdemeanor] charges that in most cases are best addressed through diversion or declined for prosecution entirely”).

292. Special Directive 20-07 from George Gascón, L.A. Cnty. Dist. Att’y to All Deputy Dist. Att’ys 1–2 (Dec. 7, 2020), <https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-07.pdf> [<https://perma.cc/NJ47-3YKY>]; James Queally, *Is It Fair to Blame Gascón Alone for L.A.’s Violent Crime Surge? Here’s What the Data Show*, L.A. TIMES (April 1, 2022, 5:00 AM), <https://www.latimes.com/california/story/2022-04-01/violent-crime-surge-la-county-george-gascon> [<https://perma.cc/ZFR2-HQVT>]; see also DURHAM DIST. ATT’Y’S OFF., *Durham District Attorney’s Office Releases 2021 Annual Report*, MEDIUM (Feb. 9, 2022), <https://medium.com/durham-district-attorneys-office/durham-district-attorneys-office-releases-2021-annual-report-e37da5d47412> [<https://perma.cc/8PE5-6M4J>] (“A 2021 review of 35 jurisdictions, including Durham, found that prosecutorial reforms—such as reducing prosecution of nonviolent misdemeanors, diverting people dealing with mental illness and substance use for treatment, and reducing reliance on cash bail—did not affect local crime rates.”); *Reshaping Prosecution Initiative*, *supra* note 224 (explaining the Vera Institute’s work with prosecutors on declination).

293. Full disclosure: I served as a consultant to the Gascón transition team drafting the new office misdemeanor policies.

294. Special Directive 20-07, *supra* note 292, at 2–4. “Dismissal before arraignment,” i.e., before a defendant’s first court appearance, prevents initiation of a formal case. The specified misdemeanors are: trespass, disturbing the peace, driving without a valid license, driving on a suspended license, criminal threats (not including domestic violence or hate crimes), drug and paraphernalia possession, minor in possession of alcohol, drinking in public, under the influence of controlled substance, public intoxication, loitering, loitering to commit prostitution, and resisting arrest. *Id.* The list does not include domestic violence misdemeanors or driving under the influence.

295. *Id.*

296. *Id.* at 2.

exercise his or her discretion in identifying a charge falling within the spirit of this policy directive and proceed in accordance with its mandate.”<sup>297</sup>

Some prosecutor offices strengthen their declination practices by assigning senior prosecutors to oversee the screening process. This measure is designed to counteract junior prosecutorial inexperience and deference to police. Many prosecutors describe the ability to engage in more rigorous declination as a function of experience and a learned sense of proportionality and equity. Levine and Wright specifically identify “an ability to distinguish small crimes from large crimes” as a measure of prosecutorial maturing.<sup>298</sup> Ron Paschal, for example, is a senior prosecutor in Sedgwick County, Kansas. In 2017, he explained to me that their misdemeanor division is supervised by a senior trial attorney with thirty years of experience: as he put it, “prosecutors who handle primarily misdemeanor or traffic offenses should be supervised by experienced trial lawyers to ensure results consistent with the ends of justice.”<sup>299</sup> In Milwaukee, District Attorney Chisholm instituted a supervised screening policy in response to the finding of substantial racial disparities in public order and drug cases. When Milwaukee misdemeanor prosecutors now want to charge a low-level order, drug, or paraphernalia case, the decision must be reviewed and approved by a more experienced prosecutor, much in the same way that felony filings typically require supervisory approval.<sup>300</sup>

This kind of institutional reorganization has additional benefits. Not only does it improve junior prosecutorial training and decision-making, it also signals the importance of misdemeanors within the office more broadly. It should be accompanied by professional incentives so that declination is rewarded as an appreciated skill and that performance on the misdemeanor docket is not devalued as a mere training exercise.<sup>301</sup>

Taken together, these examples show that strengthening internal office declination policies is eminently practical and realistic. It is also consistent

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297. *Id.* In 2020, line prosecutors in the Gascón office sued him for various other directives constraining their discretion in seeking three strikes and other sentencing enhancements. *Ass’n of Deputy Dist. Att’ys for L.A. Cnty. v. Gascón*, 295 Cal. Rptr. 3d 1, 11–12 (Cal. Ct. App. 2022) (affirming in part and reversing in part the trial court’s grant of injunction enjoining the district attorney from enforcing parts of the Special Directives), *cert. granted*, 515 P.3d 657 (Cal. 2022). The misdemeanor directive was not among those challenged directives.

298. Levine & Wright, *supra* note 237, at 661; *see also* Wright & Miller, *supra* note 180, at 58–59, 62 (discussing New Orleans’ “hard screening” policy implemented in part by assigning more senior trial attorneys to screening office).

299. Telephone Interview with Ron Paschal, Senior Prosecutor, Sedgwick Cnty., Kan. (Jan. 24, 2017).

300. *McKenzie Testimony*, *supra* note 22, at 38–39.

301. *See* Wright & Miller, *supra* note 180, at 62–63 (noting that the hard screening division in New Orleans is “no political backwater” but rather staffed by high level prosecutors); *cf.* Joe, *supra* note 230, at 785–87 (arguing for similar shift for public defender offices).

with the administrative insight that intrabranch functions like these are particularly amenable to internal agency regulation.

*B. A Heightened Standard for Filing Formal Charges*

One barrier to robust declination is the idea that probable cause suffices for both arrest and prosecution. The idea is not entirely accurate—the decision to prosecute requires more than mere evidence—but it is commonly understood that charging is at least constitutional as long as there is probable cause.<sup>302</sup> This arrangement opens the door for prosecutors to rely on the bare fact of arrest as a basis for filing a formal charge. As a result, it permits charging to operate as an easy default rather than as a considered decision requiring additional inputs.

This evidentiary floor of probable cause, however, is contested and upwardly adjustable. Prosecutor offices and legislatures can and should elevate the quantum of evidence required to support filing various charges so that the probable cause that suffices for arrest alone becomes insufficient to trigger the full adjudicatory machinery. This would make declination the default response to arrest, absent additional evidence.

Such an adjustment would comport with the protean history of the charging function. William Ortman points out that using probable cause as a basis for criminal charges is a modern artifact, “neither inevitable nor ancient, but instead contingent and of fairly recent vintage.”<sup>303</sup> Founding-era judges required grand juries to apply more demanding evidentiary standards before issuing a true bill, even going so far as to require a grand jury to find guilt with certainty.<sup>304</sup> Probable cause evolved as a lower standard along with modern criminal procedure and the dominance of plea bargaining. As Ortman writes, “Criminal charging standards represent a choice.”<sup>305</sup>

Put differently, it is misleading to say that the probable cause sufficient for arrest is also legally sufficient for a formal charge.<sup>306</sup> The Supreme Court has noted that the amount of evidence needed to support a charge will often exceed probable cause: “The standard of proof required of the prosecution is usually referred to as ‘probable cause,’ but in some jurisdictions it may

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302. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

303. Ortman, *supra* note 186, at 514.

304. *Id.* at 519–21, 525, 530–31.

305. *Id.* at 568; *see also* Russell M. Gold, *Power Over Procedure*, 57 WAKE FOREST L. REV. 51, 82 (2022) (arguing that weak pretrial criminal screening procedures should be elevated and brought into closer conformity with more rigorous civil pretrial procedural protections).

306. 4 LAFAVE ET AL., *supra* note 131, § 13.1(b) (“It is not possible to state categorically how much evidence is required before the prosecutor is justified in charging a suspect with a crime, as the law does not expressly provide a distinct probability of guilt standard for the charging decision.”).

approach a prima facie case of guilt.”<sup>307</sup> Similarly, the ABA Standards make clear that the bare fact of probable cause does not capture the full content of prosecutorial charge decisions: prosecutors are supposed to make equitable, normative, and resource-sensitive decisions about filing, not bare evidentiary ones. The U.S. Attorney’s Manual likewise states that probable cause “is, of course, a threshold consideration only. Merely because this requirement can be met in a given case does not automatically warrant prosecution.”<sup>308</sup>

A heightened charging standard is especially appropriate for low-level order offenses and crimes of poverty that are prone to inaccurate and racialized policing. In those cases, the bare fact of arrest is a poor indicator that formal criminal charges should be filed, both as an evidentiary and as a normative matter. Police often make misdemeanor arrests for reasons that have nothing to do with evidence of crime: to clear a corner, for example, to assert authority, or to meet an implicit performance quota.<sup>309</sup> Such arrests are especially likely to lack an evidentiary basis and thus deserve special scrutiny. By contrast, DUI arrests based on breathalyzer tests do not pose the same evidentiary risks and thus might not require a heightened standard.

Similarly, where police are known to arrest people of color in numbers disproportionate to underlying offense rates, those arrests should be presumptively suspect and screened by prosecutors with great care. Indeed, it was this rationale, in connection with the death of Philando Castile, that motivated Minnesota County Attorney Choi to stop prosecuting routine traffic stops that do not involve public safety.<sup>310</sup> The same rationale led State Attorney Warren to stop prosecuting people of color for “biking while Black.”<sup>311</sup> By changing their default policies, these offices better calibrated their charging decisions to actual policing practices and to the full equitable picture.

A heightened charging standard is also good evidentiary policy because it would compensate for the psychological tendency to water down the probable cause standard in misdemeanor cases. Scholars have pointed out that factfinders often unconsciously adjust the relevant burden of proof upwards for more serious offenses and downwards for less serious ones, giving standards like “probable cause” or “beyond a reasonable doubt”

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307. *Gerstein v. Pugh*, 420 U.S. 103, 119–20 (1975) (citing MODEL CODE OF PRE-ARRAIGNMENT PROC. Art. 330, cmt. at 90–91 (AM. L. INST., Tentative Draft No. 5, 1972)).

308. U.S. DEP’T OF JUST., JUSTICE MANUAL § 9-27.200 cmt. (2018), <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.200> [<https://perma.cc/YE2N-D43E>].

309. Natapoff, *supra* note 31, at 123; NATAPOFF, *supra* note 33, at 87–106.

310. Vera & Carrega, *supra* note 287; Memorandum from John Choi, *supra* note 287, at 1–3.

311. *Warren v. DeSantis*, No. 22cv302-RH-MAF, 2023 WL 345802, at \*4 (N.D. Fla. Jan. 20, 2023) (describing policy designed to alleviate harms of “biking while Black”).

different meanings depending on the severity of the penalty.<sup>312</sup> In other words, misdemeanor defendants do not actually get the benefit of the probable cause standard in the first place. Raising the formal burden of proof for charging minor crimes would ameliorate this tendency.

For all these reasons, prosecutor's offices should elevate their formal charging standards through internal policies, something they already do informally for various classes of high-profile cases.<sup>313</sup> For the same reasons, legislatures should mandate it.<sup>314</sup> For example, legislatures could permit prosecutors to file low-level charges only where they conclude that the evidence shows guilt by a preponderance of the evidence; the more problematic the prosecutions, the higher the evidentiary burden should be. This would be a rational policy response to the fact that sloppy prosecutorial filing practices impose enormous costs on the entire criminal system for which taxpayers must eventually pay.

Heightened pleading standards are commonplace in civil litigation and some scholars have argued that criminal law should borrow them.<sup>315</sup> But they are not unheard of in the criminal realm. Wright and Miller, for example, described heightened screening standards in New Orleans designed to “gauge[] the strength of the case” and “weed out those cases really not worthy of being on the criminal docket, so more courtroom emphasis can be devoted to the violent offender.”<sup>316</sup> ABA prosecution standards specifically permit charges to stand only if the prosecutor “reasonably believes . . . that admissible evidence will be sufficient to support conviction beyond a reasonable doubt.”<sup>317</sup> If enforced, this standard would effectively require the

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312. Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 MICH. L. REV. 597, 600–04 (2012) (surveying research showing that “fact finders do not apply a fixed standard of proof, but instead adjust it in proportion to the size of potential punishment”); see also Wright & Levine, *supra* note 71, at 1115 (finding that weak evidence mattered less to prosecutors for misdemeanors than for felonies at the plea-offer stage).

313. See Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 767 (2016) (arguing that the heightened standards of pre-charge investigation and care that prosecutors lavish on police suspects should be extended to all ordinary non-law-enforcement suspects); Daniel Epps, *One Last Word on the Blackstone Principle*, 102 VA. L. REV. ONLINE 34, 46 (2016) (speculating that “defendants who can afford high-quality counsel receive a de facto heightened charging standard not enjoyed by the bulk of defendants”).

314. See Metzger, *supra* note 38, at 425–26 (on using interbranch checks to reinforce intrabranch ones).

315. See Gold, *supra* note 305, at 53–54 (“Unlike in the civil system where a plaintiff’s complaint must survive a plausibility threshold, criminal pleading requires very little.”); see also Russell M. Gold, Carissa Byrne Hessick & F. Andrew Hessick, *Civilizing Criminal Settlements*, 97 B.U. L. REV. 1607, 1609 (2017) (explaining how the criminal and civil systems handle settlement in “extremely different ways”).

316. Wright & Miller, *supra* note 180, at 61–63 (quoting Chris Segura, *Most of Connick’s Attention on Violent Juvenile Offender*, TIMES-PICAYUNE, Mar. 14, 1974, at A1).

317. ABA PROSECUTION STANDARDS, *supra* note 17, at 3-4.3(a). The Standard does not distinguish between felony and misdemeanor charges.

declination of many misdemeanor cases. In 2009, the ABA proposed elevating this standard to affirmatively require dismissal if prosecutors “reasonably believe[] that proof of guilt beyond reasonable doubt is lacking.”<sup>318</sup> Such standards would impose sensible constraints on misdemeanor prosecutors who should not be filing criminal cases only weakly supported by the evidence in the first place.

Some legislatures already impose heightened standards for misdemeanor arrests. Minnesota Rule of Criminal Procedure 6.01 requires police to issue a citation in all misdemeanor cases “unless it reasonably appears: (1) the person must be detained to prevent bodily injury to that person or another; (2) further criminal conduct will occur; or (3) a substantial likelihood exists that the person will not respond to a citation.”<sup>319</sup> Kentucky law prohibits police from making a physical arrest in most misdemeanor cases unless there are reasonable grounds to believe that the defendant will not appear in response to a citation.<sup>320</sup> Virginia law requires police to issue a summons and release most of the people they initially detain in connection with low level misdemeanors.<sup>321</sup>

In each of these scenarios, policymakers have recognized that the bare probable cause standard is neither institutionally appropriate nor in the interests of justice and have thus heightened the burden on law enforcement to justify arrest or prosecution. In this same spirit, an elevated misdemeanor charging standard would serve a salutary sorting function and force prosecutors to vet low-level offenses more thoroughly.

### C. *Withhold Absolute Immunity for Malicious Prosecution*

Another institutional adjustment that would incentivize prosecutors to screen misdemeanors involves the recognition that screening is part of the reason that they receive absolute immunity. It follows that prosecutors who rubber stamp police arrest decisions should receive no more than qualified immunity. They are not acting in the quasi-judicial role that historically justifies absolute immunity; rather, like the prosecutors in *Buckley*, *Kalina*, and *Burns*, they are acting like an extension of the police and should receive no greater deference or protection.<sup>322</sup> In particular, rubber-stamping prosecutors resemble the prosecutors in *Burns* who gave the police bad legal

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318. SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES 84 & n.28 (11th ed. 2022) (alteration in original) (quoting STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION 3-5.5(c) (Proposed Revisions 2009)).

319. MINN. R. CRIM. P. 6.01.

320. KY. REV. STAT. ANN. § 431.015 (West 2018).

321. VA. CODE ANN. § 19.2-74 (West 2021); cf. *Virginia v. Moore*, 553 U.S. 164, 171 (2008) (state law prohibition against arrest for driving on a suspended license did not render arrest unreasonable for Fourth Amendment purposes).

322. See *supra* text accompanying notes 162–69.



advice. If prosecutors who advise police about probable cause only get qualified immunity, then prosecutors who rely uncritically on police evaluations of probable cause should get no more.<sup>323</sup>

Under this theory, where prosecutors are shown to have abdicated their prosecutorial role by rubber stamping, they would be amenable to suit when they file charges based on illegal arrests. This is the tort of malicious prosecution, namely, the paradigmatic tort against which prosecutors have long been protected by absolute immunity.<sup>324</sup> The Supreme Court recently explained that “the malicious prosecution tort generally allowed recovery against an individual who had initiated or caused the initiation of criminal proceedings despite having ‘no good reason to believe’ that criminal charges were ‘justified by the facts and the law.’”<sup>325</sup> Specifically, the elements of the tort require a showing that:

- (i) the suit or proceeding was “instituted without any probable cause”;
- (ii) the “motive in instituting” the suit “was malicious,” which was often defined in this context as without probable cause and for a purpose other than bringing the defendant to justice; and (iii) the prosecution “terminated in the acquittal or discharge of the accused.”<sup>326</sup>

In order to meet the third element, a plaintiff need only show that his or her prosecution ended without a conviction, which includes any unexplained dismissal.<sup>327</sup> The Court has also explained that the tort, sometimes referred to as “a claim for unreasonable seizure pursuant to legal process,”<sup>328</sup> can occur “when legal process itself goes wrong—when, for example, a judge’s

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323. *Burns v. Reed*, 500 U.S. 478, 482, 491, 494–96 (1991).

324. *Imbler v. Pachtman*, 424 U.S. 409, 421, 424 (1976) (“The function of a prosecutor that most often invites a common-law tort action is his decision to initiate a prosecution, as this may lead to a suit for malicious prosecution if the State’s case misfires.”); *cf.* *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 n.5 (1993) (noting that under traditional principles of immunity “a prosecutor would be entitled to absolute immunity for the malicious prosecution of someone whom he lacked probable cause to indict”).

325. *Thompson v. Clark*, 142 S. Ct. 1332, 1338 (2022) (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 180 (Chicago, Callaghan & Co. 1880)).

326. *Id.* (quoting COOLEY, *supra* note 325, at 181).

327. *Id.* at 1335, 1338–39 (under common law, “plaintiff could maintain a malicious prosecution claim when, for example, the prosecutor abandoned the criminal case or the court dismissed the case without providing a reason”).

328. *Id.* at 1337. Justice Kennedy has pointed out that the constitutional tort might also sound in due process which would protect against the “unjustified torment and anguish” caused by malicious prosecution, even in the absence of detention. *Albright v. Oliver*, 510 U.S. 266, 283–86 (1994) (Kennedy, J., concurring in the judgment).

probable-cause determination is predicated solely on a police officer's false statements."<sup>329</sup>

In those jurisdictions where prosecutors uncritically file misdemeanor charges based on clearly unsupported arrests that are later dismissed, such cases could qualify as malicious prosecution. Such prosecutors arguably have "no good reason to believe" that criminal charges [are] "justified."<sup>330</sup> The legal process has gone "wrong."<sup>331</sup> Where arrests lack probable cause, moreover, filing charges based on them is obviously unreasonable under clearly established law,<sup>332</sup> which means that prosecutors who rubber-stamp would be unprotected by qualified immunity.

Specifically, in order to bring such a claim, litigants would have to show first that prosecutors abdicated their screening function, thus stripping them of absolute immunity, and second that the underlying arrests lacked probable cause, thus rendering the prosecutions potentially malicious. There are plenty of U.S. jurisdictions in which both these elements could be relatively straightforward to show. Prosecutor offices with persistently low declination rates, weak screening procedures, and/or no supervision over junior prosecutors who make initial filing decisions could well be found to have abdicated their screening function. Their practices functionally defer to police arrest determinations and thus should receive no greater immunity. The case for auto-file jurisdictions is even stronger. Since auto-filing is the intentional, formal rubber-stamping of police decision-making and a policy of expressly refraining from any exercise of prosecutorial discretion at all, such prosecutor offices should be presumptively accorded only qualified immunity. Indeed, the Supreme Court has held that prosecutors performing "administrative tasks" are not entitled to absolute immunity at all.<sup>333</sup> Auto-

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329. *Manuel v. City of Joliet*, 137 S. Ct. 911, 918–19 (2017) ("All that the judge had before him were police fabrications about the pills' content. The judge's order holding Manuel for trial therefore lacked any proper basis.").

330. *Thompson*, 142 S. Ct. at 1338 (quoting COOLEY, *supra* note 325, at 180). Definitions of "malicious" vary between jurisdictions. See *Manuel*, 137 S. Ct. at 925 (Alito, J., dissenting) (describing "severe mismatch" between Fourth Amendment objective standards and some state tort subjective mens rea standards for malicious prosecution). The Supreme Court has declined to decide "whether a plaintiff bringing a Fourth Amendment claim under § 1983 for malicious prosecution must establish malice (or some other *mens rea*) in addition to the absence of probable cause." *Thompson*, 142 S. Ct. at 1338 n.3.

331. *Manuel*, 137 S. Ct. at 918–20 (explaining by example that where judge relied on police fabrications to hold defendant over for trial, the resulting court order lacked probable cause).

332. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

333. *Van de Kamp v. Goldstein*, 555 U.S. 335, 342, 344 (2009) (noting that absolute immunity does not protect "administrative tasks" while extending absolute immunity to those tasks that "require legal knowledge and the exercise of related discretion"); cf. *Atherton v. D.C. Off. of the*

file policies—which eschew any exercise of prosecutorial discretion or legal expertise—can fairly be viewed as “administrative” and thus entitled to no special protection.

Second, there are also numerous jurisdictions where police have been shown to systemically engage in baseless misdemeanor arrests that lack probable cause. In Baltimore, police routinely arrest young Black men for loitering under circumstances where the men are clearly innocent.<sup>334</sup> In New York, public housing police engaged for years in stop-and-frisk and arrest policies that swept up thousands of people of color who clearly were not trespassing.<sup>335</sup> Prosecutors who reflexively rubber-stamped those obviously invalid arrest decisions arguably had no good reason to believe that charges were justified and thus could have been liable for malicious prosecution, namely, the institution of a criminal prosecution without probable cause in a manner clearly unreasonable under existing law. While showing malice, required by some state tort laws, could pose a higher bar, it is far from insurmountable: courts have held that malice can be inferred from the lack of probable cause as well as from misrepresentations or the suppression of evidence.<sup>336</sup>

To be clear, the argument for retracting absolute prosecutorial immunity is not a substantive endorsement of qualified immunity. Congress and several states have considered abolishing it, while numerous scholars have roundly criticized the efficacy, legality, and fairness of the doctrine.<sup>337</sup> Rather, the

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Mayor, 567 F.3d 672, 685–87 (D.C. Cir. 2009) (holding that neither court juror officer nor Assistant U.S. Attorney were entitled to absolute immunity in connection with their removal of a grand juror).

334. U.S. DEP’T OF JUST., *supra* note 211, at 36–37 (documenting widespread and unfounded loitering arrests); *see also* Williams v. State, 780 A.2d 1210, 1217 (Md. Ct. Spec. App. 2001) (pointing out that the conduct of simply being near a group of people who may be “hanging out,” for which defendant was arrested, does not legally constitute loitering).

335. *See* Davis v. City of New York, 959 F. Supp. 2d 324, 332, 348–49 (S.D.N.Y. 2013) (denying summary judgment for defendant NYC on claim about unconstitutional trespass arrest policy); Ligon v. City of New York, 925 F. Supp. 2d 478, 483–84, 495 (S.D.N.Y. 2013) (finding that “there is a clear and substantial likelihood that plaintiffs will be able to prove at trial that NYPD officers in the Bronx repeatedly stopped and questioned people on suspicion of trespass simply because they were observed exiting or entering and exiting a Clean Halls building”).

336. *See, e.g.,* Armstrong v. Ashley, 60 F.4th 262, 279 (5th Cir. 2023) (discussing circuits in which a showing of malice is unnecessary); Newman v. Township of Hamburg, 773 F.3d 769, 772 (6th Cir. 2014) (stating that a § 1983 malicious prosecution claim required showing deliberate or reckless falsehoods); Hayes v. City of Seat Pleasant, 469 F. App’x 169, 174 (4th Cir. 2012) (“[T]he ‘malice’ element of malicious prosecution may be inferred from a lack of probable cause.” (quoting Okwa v. Harper, 757 A.2d 118, 133 (Md. 2000))); Gannon v. City of New York, 917 F. Supp. 2d 241, 244 (S.D.N.Y. 2013) (“[A] lack of probable cause generally creates an inference of malice.” (quoting Boyd v. City of New York, 336 F.3d 72, 78 (2d Cir. 2003))).

337. *See, e.g.,* Fred O. Smith, Jr., *Beyond Qualified Immunity*, 119 MICH. L. REV. ONLINE 121, 122 (2021) (describing congressional efforts to eliminate qualified immunity); Schwartz, *supra* note 158, at 9 (“[C]ontrary to judicial and scholarly assumptions, qualified immunity is rarely the formal reason that civil rights damages actions against law enforcement end.”); William Baude, *Is*

argument here takes aim at the differential and deferential treatment of prosecutors when they do no more than rubber-stamp policing decisions. In such circumstances, prosecutors should lose the enormous benefits of absolute immunity and face the same potential liability as their police counterparts, whatever that happens to be.

*D. Eliminate Police–Prosecutors*

No discussion of the police–prosecutor relationship would be complete without acknowledging that sometimes police are permitted to prosecute. As is so often the case, the misdemeanor system evades the formalistic strictures of criminal procedure; in this looser legal space the police–prosecutor distinction can get blurry. In at least ten, and perhaps as many as fourteen U.S. jurisdictions, police are permitted to direct file formal charges in misdemeanor cases and then handle the prosecution, meaning they act as both police and prosecutors at the same time.<sup>338</sup>

At the risk of stating the obvious, this arrangement completely eliminates any intrabranch checking of the charging decision by permitting the law enforcer to serve as the adjudicator. This particular role conflation famously offends separation of powers. Rachel Barkow, for example, has zeroed in on this problematic joinder of functions within individual prosecutors themselves. As she puts it, “[o]ne need not be an expert in separation-of-powers theory to know that combining these powers in a single actor can lead to gross abuses. Indeed, the combination of law enforcement and adjudicative power in a single prosecutor is the most significant design flaw in the federal criminal system.”<sup>339</sup> Arguably, letting police act as prosecutors on their own arrests is an even more egregious combination.

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*Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 47 (2018) (concluding that the legal justifications for qualified immunity do not withstand scrutiny); Joanna C. Schwartz, *Qualified Immunity’s Boldest Lie*, 88 U. CHI. L. REV. 605, 608–09 (2021) (describing scholarly criticism of qualified immunity and taking aim at the “clearly established” standard).

338. Andrew Horwitz, *Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 ARIZ. L. REV. 1305, 1331–32, 1343 & n.230 (1998) (documenting states that either expressly or implicitly permit the practice, including Delaware, Iowa, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, South Carolina, Vermont, and Virginia); *see also* *Argersinger v. Hamlin*, 407 U.S. 25, 49 (1972) (Powell, J., concurring) (noting that the “government often does not hire lawyers to prosecute petty offenses; instead the arresting police officer presents the case”).

339. Barkow, *Institutional Design*, *supra* note 4, at 871.

Almost no attention has been paid to the police–prosecutor phenomenon, either by scholars or by the Supreme Court. This means, among other things, that no one has ever worked out the precise doctrinal status of these police–prosecutors or, for example, whether they would be entitled to qualified or absolute immunity for the cases they file and prosecute. As one commentator has noted, “[t]here is no reason to believe that the [Supreme] Court . . . ever contemplated a situation in which a police officer was acting as a prosecutor.”<sup>340</sup> No state court has ever decided whether police who direct file cases are entitled to absolute immunity.<sup>341</sup> The closest any court has come to addressing the question was in a footnote in a Justice Ruth Bader Ginsburg concurrence, in which she noted that there are “serious questions about whether [a] police officer would be entitled to share the prosecutor’s absolute immunity” when initiating a case and noting that the question remains open.<sup>342</sup>

As an empirical matter, the full extent of current police prosecutorial authority is unclear.<sup>343</sup> A 1998 law review article named fourteen states that authorized the practice at the time,<sup>344</sup> a more recent survey identified nine states that still permit police to prosecute.<sup>345</sup> According to that 2019 survey,

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340. Horwitz, *supra* note 338, at 1314 n.49; *see also* Kay L. Levine, Joshua C. Hinkle & Elizabeth Griffiths, *Making Deflection the New Diversion for Drug Offenders*, 19 OHIO STATE J. CRIM. L. 75, 106 (2021) (noting in passing that “[e]xcept in a very small number of jurisdictions in which police direct-file misdemeanors, prosecutors are the exclusive gatekeepers of the criminal legal system”); Alexandra Natapoff, Opinion, *When the Police Become Prosecutors*, N.Y. TIMES (Dec. 26, 2018), <https://www.nytimes.com/2018/12/26/opinion/police-prosecutors-misdemeanors.html> [<https://perma.cc/H5PL-B2L8>] (stating that “police quietly wield a lot of prosecutorial authority” and that police can “end up as de facto prosecutors, even without formal charging authority”).

341. Horwitz, *supra* note 338, at 1306–07. Although police can be sued for malicious prosecution, such claims are allegations that police led prosecutors or courts to make wrongful decisions, not that police themselves actually prosecuted the case. *Albright v. Oliver*, 510 U.S. 266, 283–86 (1994) (Kennedy, J., concurring in the judgment) (describing common law tort of malicious prosecution).

342. *Albright*, 510 U.S. at 279 n.5 (Ginsburg, J., concurring).

343. Special thanks to the Harvard Law School library for research assistance on the subject.

344. Horwitz, *supra* note 338, at 1331–32, 1343 & n.230.

345. Harry August & Julia Rock, *Rhode Island Police Don’t Just Make Arrests. Some Also Act As Prosecutors*, THE APPEAL (Oct. 10, 2019), <https://theappeal.org/rhode-island-police-prosecutors/> [<https://perma.cc/ZR3J-BQXE>].

Rhode Island<sup>346</sup>, New Hampshire<sup>347</sup>, New Mexico<sup>348</sup>, South Carolina<sup>349</sup>, and Virginia<sup>350</sup> permit police officers to act as prosecutors throughout the entire misdemeanor process—from a defendant’s first appearance through a plea or trial.<sup>351</sup> By contrast, in Alaska, Delaware, Pennsylvania, and maybe Massachusetts,<sup>352</sup> police can only arraign cases, which is to say, initiate formal criminal proceedings.<sup>353</sup> In addition, Maine authorizes the practice by statute.<sup>354</sup> In Cook County, Illinois, police direct file misdemeanor cases with

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346. Andrew Horwitz, *The Right to Counsel in Criminal Cases: The Law and the Reality in Rhode Island District Court*, 9 ROGER WILLIAMS U. L. REV. 409, 421 (2004) (highlighting that in misdemeanor cases “the State is generally represented at arraignment by a police officer, not a licensed attorney”); David M. Zlotnick & Carly Beauvais Iafrate, *Touch This! Over-Criminalization of Offensive Conduct*, R.I. BAR J., Jan/Feb 2002, at 5, 25 (“[Misdemeanor] matters ranging from plea offers to allocation at sentencing are handled by many towns with ‘police prosecutors,’ rather than by an attorney.”).

347. N.H. REV. STAT. ANN. § 41:10-a (2023) (“Nothing in this section shall be construed to prohibit the state police from prosecuting any violation or misdemeanor in any district or municipal court in this state.”); Nikolas Frye, Note, *Allowing New Hampshire Police Officers to Prosecute: Concerns with the Practice and a Solution*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 339, 339 (2012).

348. Lisa Torraco, *The New Mexico District Attorney Clinic: Skills and Justice*, 74 MISS. L.J. 1107, 1111–12 (2005) (“[A]t the time [in the 1970s] the local district attorney’s office did not handle misdemeanor prosecutions. These cases were handled by the police officer . . .”).

349. PRICE ET AL., *supra* note 259, at 19; *see also* ALISA SMITH, SEAN MADDAN, DIANE DEPIETROPAOLO PRICE & COLETTE TVEDT, NAT’L ASS’N OF CRIM. DEF. LAWS., RUSH TO JUDGMENT 16 (2017), <https://www.nacdl.org/getattachment/ab9d6b03-2b45-4235-890e-235461a9bb2d/rush-to-judgment-how-south-carolina-s-summary-courts-fail-to-protect-constitutional-rights.pdf> [<https://perma.cc/44Z7-AWVR>] (reporting that in 89% of observed cases, the charging officers served as prosecutors in summary court proceedings).

350. Henry H. Perritt Jr., *Pro-se Prosecution in Virginia*, VA. LAW., Dec. 2020, at 30, 30 (“In many places in Virginia, misdemeanors are prosecuted not by commonwealth’s attorneys, but by city or county attorneys, police officers, private criminal complainants, or rarely, by private attorneys appointed as special prosecutors.”).

351. August & Rock, *supra* note 345.

352. *But see* MASS. R. CRIM. P. 2(b)(13) (“‘Prosecutor’ means any prosecuting attorney or prosecuting officer, and shall include a city solicitor, a police prosecutor, or a law student approved for practice pursuant to and acting as authorized by the rules of the Supreme Judicial Court.”); *City of Cambridge v. Phillips*, 612 N.E.2d 638, 641 (Mass. 1993) (“In the administration of the law concerning civil motor vehicle infractions, the police act as prosecutors as a practical matter in presenting such infractions to clerk-magistrates and to judges.”); *see also* Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15, 42 n.134 (2016) (describing how “[i]nto the 1970s, nonattorney police officers prosecuted district court cases in Boston—a practice the Boston Lawyers’ Committee for Civil Rights decried as possibly ultra vires and as ‘demean[ing to] the criminal process’” (second alteration in original) (quoting STEPHEN R. BING & S. STEPHEN ROSENFELD, *THE QUALITY OF JUSTICE IN THE LOWER CRIMINAL COURTS OF METROPOLITAN BOSTON* 30 (1970))).

353. August & Rock, *supra* note 345.

354. ME. STAT. tit. 30-A, § 2671(2) (2007) (“Police officers may serve criminal and traffic infraction processes and arrest and prosecute offenders of the law.”).

the Circuit Court clerk.<sup>355</sup> At least two state supreme courts have upheld the constitutionality of the practice.<sup>356</sup>

A commitment to intrabranch checks and the anti-rubber stamp principle logically requires the elimination of police–prosecutors. When police are permitted to direct file their own charges, there is no screening of arrests at all. Indeed, the incentives run against screening: presumably police will not invalidate their own arrest decisions and potentially expose themselves to suit by dismissing them. The practice also blurs the all-important line between investigation and adjudication, rendering arrest the functional equivalent of a formal criminal charge. To put it mildly, this elision potentially destabilizes an enormous amount of arrest and charging doctrine, from *Miranda* to *Massiah*.<sup>357</sup> The Supreme Court treats the charging decision as a bright line, “far from a mere formalism. It is the starting point of our whole system of adversary criminal justice.”<sup>358</sup> Letting police initiate judicial criminal proceedings based on their own arrests effectively renders that initiation a mere formality.

Police–prosecutors are also problematic from a traditional separation-of-powers perspective. They permit the executive to flood the judiciary with unchecked charging decisions made by the institutional actor least qualified to make objective evidentiary, legal, and policy decisions. This contradicts the Court’s extraordinary deference to prosecutorial discretion. The lack of judicial review, the presumption of regularity, and the conferral of absolute immunity are all doctrines that rest on the special status of prosecutors as gatekeepers to the judiciary and servants of law.<sup>359</sup> Police are neither.

If jurisdictions are unwilling to eliminate police–prosecutors, courts should ensure that those police do not receive the benefits of absolute prosecutorial immunity. Rather, they should get only the same qualified

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355. CTR. FOR CRIM. JUST. RSCH., POL’Y & PRAC., *supra* note 210, at 4; *see also* JACOBY ET AL., *supra* note 230, at 21 (reporting that “[i]n Florida, the defendant can appear and plea[d] on a notice to appear which acts as a formal charge. This eliminates the need for a prosecutor to draft and sign a formal information.”).

356. *State v. Messervy*, 187 S.E.2d 524, 525 (S.C. 1972) (“It has long been the practice in the magistrates’ courts of this State for the arresting patrolman to prosecute the cases which he has made.”); *State v. La Palme*, 179 A.2d 284, 285 (N.H. 1962) (“The prosecution of misdemeanors by police officers is a practice that has continued in one form or another since 1791 and is still permissible under existing statutes.”); *see also* *Commonwealth v. Wilkerson*, No. CR21000618-01, 2021 WL 8315071, at \*5 (Va. Cir. Ct. Sept. 1, 2021) (upholding conviction produced in the absence of a prosecuting attorney: “Where the Commonwealth’s Attorney elects not to prosecute a matter, law enforcement may facilitate the orderly presentation of witnesses without electing to assume the separate role of the Commonwealth’s Attorney . . .”).

357. *Compare* *Miranda v. Arizona*, 384 U.S. 436, 499 (1966) (holding that the Fifth, not the Sixth Amendment, governs post-arrest pre-charge interrogations), *with* *Massiah v. United States*, 377 U.S. 201, 205 (1964) (holding that the Sixth Amendment governs post-charge interrogations).

358. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

359. *See supra* Part II.

immunity against suits for malicious prosecution that they would receive for the underlying arrest. There is no common law history of absolute immunity for policing, so arguably absolute immunity should not be available in the first place.<sup>360</sup> Police are not quasi-judicial gatekeepers of the judiciary, even when they are given charging authority, so the standard prosecutorial rationales for absolute immunity do not apply. As a practical matter, police should not be permitted to proactively insulate themselves against suit for false arrest and malicious prosecution by filing charges to which defendants are likely to plead.<sup>361</sup>

Police–prosecutors have been around for centuries. Because no court has ever decided these definitional questions, the practice has been permitted to persist even though it sits in tension with numerous basic assumptions about the prosecutorial role and the need for checks on the police power. This inattention is consistent with the judiciary’s generally cavalier treatment of the misdemeanor system, an inattentiveness that routinely tests the boundaries of fundamental criminal doctrines and principles.<sup>362</sup> Such cavalier treatment, however, is unjustified. Among other things, mass incarceration teaches that the intrabranch allocations of authority between police and prosecution are matters of utmost importance and systemic influence.

### Conclusion

The historic costs of unchecked penal power have been high. Mass incarceration is only the most obvious result; the systemic integrity of the criminal process itself has eroded through overextension and a lack of checks and balances—both internal and external. In the misdemeanor arena, prosecutorial failure to check police decisions has been especially expensive. It has permitted the many racial and economic biases in policing to pass relatively unfiltered into the criminal pipeline, exacerbating the criminalization of both race and poverty while causing misdemeanor dockets to balloon.

But the U.S. criminal system is also undergoing significant changes. Arrests rates are down from their peaks in 1990s; racial disparities are beginning to decrease; jail and prison populations are at their lowest since

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360. See *Imbler v. Pachtman*, 424 U.S. 409, 422–23 (1976) (“The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges . . .”).

361. See *Thompson v. Clark*, 142 S. Ct. 1332, 1335 (2022) (in order to show favorable termination in support of a malicious prosecution claim, “plaintiff need only show that his prosecution ended without a conviction”); *cf.* *Town of Newton v. Rumery*, 480 U.S. 386, 397 (1987) (concluding that fears about prosecutorial manipulation of charging decisions were overblown in light of “tradition and experience [that] justify our belief that the great majority of prosecutors will be faithful to their duty”).

362. Natapoff, *supra* note 250, at 78–79; Natapoff, *supra* note 110, at 970.



2004.<sup>363</sup> The COVID pandemic destabilized misdemeanor arrest and jail practices across the country.<sup>364</sup> The murder of George Floyd triggered a national reckoning with race and policing that has yet to reveal its full expression.<sup>365</sup> New priorities have begotten new data that make it possible to diagnose dysfunction with more rigor. There is broad-based consensus around the harms of mass incarceration, and new thinking about misdemeanors.<sup>366</sup> It is no longer unrealistic to challenge and change the once-hegemonic carceral politics of the tough-on-crime era.

Part of this change is showing up in new prosecutorial policies: some 21st-century prosecutors are taking misdemeanors more seriously in general, and the declination decision more seriously in particular. They recognize that declination is central to their institutional role in checking police practices, in conserving systemic resources, and in protecting the community.<sup>367</sup> They also recognize it as an obvious opportunity to shrink the misdemeanor pipeline and to combat some of the harms of racialized overcriminalization and mass incarceration.<sup>368</sup> These recognitions represent a large reversal of policy and culture: for too long, misdemeanors were devalued as minor and petty, while declination was an undertheorized and nearly invisible moment in the criminal process. But no more. It is time to take misdemeanor declination very seriously.

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363. *See supra* note 52.

364. ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME* 258 (1st trade paperback ed. 2023).

365. *Id.* at 254–55.

366. *Id.* at 252–55.

367. POLICE EXEC. RSCH. F., *supra* note 12, at 10.

368. *See supra* notes 280–90 and accompanying text.