

2015

Charging on the Margin

Paul Crane

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CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 540



CHARGING ON THE MARGIN

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THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

August 2015

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Charging on the Margin

Paul T. Crane*

(forthcoming 57 WM. & MARY L. REV. (2016))

Abstract

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

Critically, the ability to impose certain collateral consequences through a misdemeanor conviction unlocks an array of additional charging options for prosecutors. As a result, prosecutors are now more likely to engage in a practice I term “strategic undercharging.” A prosecutor engages in strategic undercharging when she charges a lesser offense than she otherwise could, but does so for reasons that advance her own aims—and not as an act of prosecutorial grace or leniency. In other words, prosecutors can sometimes gain more by charging less. By explaining why (and when) prosecutors are likely to engage in strategic undercharging, this Article complicates the conventional wisdom that prosecutors reflexively file the most severe charges available.

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

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INTRODUCTION

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

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

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

This Article's primary claim is that attaching those sorts of collateral consequences to misdemeanor offenses provides prosecutors with strong incentives to charge a borderline case as a misdemeanor rather than a felony. This claim rests principally on two widely-accepted facts.

First, in many criminal cases, the most significant penalty at stake is a collateral consequence rather than incarceration.⁴ This is especially true

¹ See *infra* notes __ and accompanying text.

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

³ See *infra* notes __ and accompanying text.

⁴ Many criminal defendants are sentenced to little or no jail time upon conviction. See, e.g., Gabriel J. Chin, *What Are Defense Lawyers Good For?: Links Between Collateral Consequences and the Criminal Process*, 45 TEX. TECH L. REV. 151, 153-54 (2012) (observing that 80% of all convictions are for misdemeanors and that only 20% of those cases result in any term of incarceration; also observing that 60% of all felony convictions result in little or no incarceration). But nearly every conviction carries with it one or more collateral

for cases involving relatively low-level prosecutions, which I consider here to be prosecutions for either a low-grade felony or a misdemeanor. In those cases, a collateral consequence will often be a prosecutor's most potent and enduring sanction.

Collateral consequences can frequently be used to further a prosecutor's sentencing aims, including the standard goal of reducing threats to public safety.⁵ Such consequences take on even more significance in low-level prosecutions given their relative duration. While incarceration terms for low-level convictions typically top out at a couple of months—and rarely more than a few years—several key collateral consequences last for decades or even life. For example, the obligation to register as a sex offender lasts for a minimum of 15 years and sometimes for life.⁶ Firearm prohibitions are typically lifetime bans. And deportation results in a permanent exclusion from the United States. In short, as the drafters of the Uniform Collateral Consequences of Conviction Act correctly observed, “collateral consequences in many instances are what is really at stake, the real point of achieving a conviction.”⁷

The second key point involves the relationship between collateral consequences and adjudicatory procedures. Collateral consequences are generally deemed irrelevant for purposes of determining what procedural safeguards must be afforded a criminal defendant.⁸ Felony defendants possess a bundle of heightened procedural entitlements—such as rights to a grand jury, a preliminary hearing, increased discovery, and a jury trial—that misdemeanor defendants are often denied.⁹ Critically, the fact that a

consequence. *See, e.g.*, Michael Pinar, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1214 (2010) (“All individuals convicted of criminal offenses, regardless of their sentences, are forced to confront the various collateral consequences—the additional legal penalties—that result from their convictions.”).

⁵ *See infra* notes __ and accompanying text.

⁶ Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1088 (2012).

⁷ Uniform Collateral Consequences of Conviction Act, Prefatory Note at 4 (2010); Chin, *Defense Lawyers*, *supra* note __, at 161-62 (“Congress and state legislatures have made imposing collateral consequences on individuals one of the central functions of the criminal justice system.”); Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699 (2002) (“[T]he imposition of collateral consequences has become an increasingly central purpose of the modern criminal process.”).

⁸ *See infra* notes __ and accompanying text.

⁹ *See infra* notes __ and accompanying text. To be clear, not all misdemeanor defendants are deprived of all such safeguards. Some misdemeanor defendants, for example, enjoy a constitutional right to a jury trial. *See, e.g.*, *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541 (1989) (defendants charged with an offense that threatens more than six months imprisonment have a right to a jury trial).

misdemeanor conviction will result in a severe collateral consequence does not trigger any heightened procedural protections.

Given these two facts—that collateral consequences are often the most important component of a criminal prosecution and that they do not trigger heightened procedural protections—it should become clear how the attachment of severe collateral consequences to misdemeanor offenses affects prosecutorial incentives. Prosecutors are more likely to file misdemeanor charges, because they can still achieve their most desired penalty without having to endure the greater costs generated by felony prosecutions.¹⁰

At first blush, the choice to file a misdemeanor charge involving a severe collateral consequence may appear to be a win-win for both sides: prosecutors can pursue that case in a more efficient manner, while the defendant is exposed to less potential incarceration. But, as is normally the case with first glances, it turns out the full picture is more complicated—especially for criminal defendants. This is because the decision of what charge to initially file can have a domino effect on nearly every other aspect of the case: the procedures afforded the defendant, the identity of the prosecutor handling the case, the identity of the defense attorney charged with holding the government to its burden (or negotiating a favorable plea), and the identity of the judge managing the case to its conclusion.¹¹ On each of those fronts, the defendant may be left at a greater disadvantage than if he had been charged with a felony.

As already noted, felony defendants enjoy a bundle of procedural safeguards that misdemeanor defendants typically do not.¹² These safeguards are not only designed to ensure fair and accurate adjudications but also provide defendants with meaningful bargaining chips during negotiations. Misdemeanor prosecutors, moreover, are usually the most junior members of the office and tend to be harsher than their felony colleagues.¹³ They are accordingly less likely to bargain away potential penalties on equitable grounds alone. As for misdemeanor defense attorneys, they tend to be the least experienced while carrying the most voluminous caseloads.¹⁴ Accordingly, a meaningful vetting of the government's case is usually the exception, not the rule. Finally,

¹⁰ The incentives to file misdemeanor charges can be further strengthened by the fact that misdemeanors are often easier to prove than felony offenses. Among other things, misdemeanor offenses tend to have fewer elements and relaxed mens rea requirements. See *infra* notes __ and accompanying text.

¹¹ See *infra* notes __ and accompanying text.

¹² See *infra* notes __ and accompanying text.

¹³ See *infra* notes __ and accompanying text.

¹⁴ See *infra* notes __ and accompanying text.

misdemeanor courts suffer the most acute docket pressures, meaning those judges are likely to prioritize speed and docket clearance above all else.¹⁵

This Article proposes that collateral consequences be considered when determining what procedural safeguards must be afforded defendants. Under existing law, that determination rests almost entirely on the maximum term of incarceration authorized by the offense with which the defendant is charged. But this longstanding approach fails to reflect an important new reality: that severe penalties in the form of collateral consequences are no longer reserved for felony convictions but are now triggered by misdemeanor convictions as well. As detailed below, adoption of this proposal could have several salutary effects on the administration of collateral consequences. At a minimum, it would honor a basic principle underlying our criminal justice system: the threat of serious penalties warrants serious procedures.

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

The first is to enrich our understanding of the various charging options available in a prosecutor's toolbox. Much ink has been spilled—and rightly so—about the strategy known as overcharging.¹⁶ This Article identifies an additional charging tactic that has thus far eluded scholarly attention—a practice I term “strategic undercharging.” A prosecutor engages in strategic undercharging when she charges a lesser offense than she otherwise could, but does so for reasons that advance her own aims—and not as an act of grace or leniency. The conventional wisdom, which is rooted in the lessons of overcharging, is that prosecutors file the most severe charges available.¹⁷ This Article complicates that narrative by

¹⁵ See *infra* notes __ and accompanying text.

¹⁶ At the risk of oversimplification, a prosecutor engages in overcharging when she charges a case more severely than she ultimately thinks is warranted—either by filing more charges or a single charge at a higher level than she ultimately thinks is merited. The prosecutor can then use the threat of “unduly harsh potential punishments” as “leverage in bargaining, offering substantial so-called concessions that merely lead to convictions and sentences only on the warranted charges.” Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1155-56 (2008).

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

¹⁷ See, e.g., Meares, *supra* note __, at 868-69 (claiming that “overcharging is systemic” and that prosecutors “often believe that it is in their best interests to charge the defendant with the most serious and as many crimes at the outset of the case”); ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 31 (2009) (“Prosecutors routinely engage

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

The second is to shine a light on the relationship between collateral consequences and procedural safeguards. There has been no shortage of scholarship examining collateral consequences and the right to counsel, including the advice defendants are constitutionally entitled to receive about potential consequences of conviction.¹⁸ But whether potential collateral consequences should impact a defendant's procedural entitlements has escaped sustained scholarly scrutiny. This Article begins to remedy that gap by interrogating the continued wisdom of relying solely on potential imprisonment as the metric for determining the procedural safeguards afforded a defendant.

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

in overcharging, a practice that involves 'tacking on' additional charges that they know they cannot prove beyond a reasonable doubt or that they can technically prove but are inconsistent with legislative intent or otherwise inappropriate.”).

¹⁸ See, e.g., John D. King, *Beyond “Life and Liberty”: The Evolving Right to Counsel*, 48 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 28 (2013); Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 591 (2011); Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119 (2009); Chin & Holmes, *supra* note __. See also, e.g., Jenny Roberts, *Proving Prejudice, Post-Padilla*, 54 HOWARD L.J. 693 (2011); Chin, *Defense Lawyers*, *supra* note __; Gabriel J. Chin, *Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675 (2011); McGregor Smyth, *Holistic is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOLEDO L. REV. 479, 494-95 (2005). The scholarly focus on defense counsel and advice, especially recently, is unsurprising given that was the issue in *Padilla v. Kentucky*, 559 U.S. 356 (2010).

By contrast, examination of the influence collateral consequences have on prosecutors and their charging decisions has been minimal. See, e.g., Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 8 (2012) (explaining that the “role of the prosecutor . . . has been largely unaddressed in the literature and advocacy materials that have emerged since” the Supreme Court's decision in *Padilla v. Kentucky*); MARGARET COLGATE LOVE ET AL., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* § 8:3 (2014) (leading treatise on collateral consequences stating that “there has been little attention paid to whether prosecutors should take collateral consequences into account when making charging decisions”). Altman's article appears to be the main exception to this trend. Her article, however, focuses exclusively on the role deportation plays during plea bargaining—not its impact on initial charging decisions. See Altman, *supra*, at 4-8.

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

I. THE SIGNIFICANCE OF COLLATERAL CONSEQUENCES

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

A. Collateral Consequences vs. Direct Consequences

The legal consequences that flow from a criminal conviction are often divided into two groups: direct and collateral.¹⁹ Although there is some dispute over how to precisely define each category,²⁰ the best rule of thumb—and the one suggested by the Supreme Court in its landmark decision in *Padilla v. Kentucky*—is that direct consequences are limited to those matters “within the sentencing authority of the state [or federal] trial court.”²¹ A collateral consequence, by contrast, is any sanction or disability

¹⁹ See, e.g., Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences: Involuntary Commitment of “Sexually Violent Predators,”* 93 MINN. L. REV. 670, 678 (2008). Of course, criminal convictions can also have significant *non-legal* consequences, including adverse effects on private employment prospects and generating various forms of social stigma. See generally INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002); Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103 (2013); Pinard, *Integrated Perspective*, *supra* note __, at 624 n.1 (collecting sources). See also John Bronsteen et al., *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1049-55 (2009) (“Researchers have discovered that any amount of incarceration creates a significantly higher likelihood that ex-inmates will suffer a variety of health-related, economic, and social harms with substantial negative hedonic consequences . . .”). Although the term collateral consequences has on occasion been used to refer to non-legal consequences, my use of the phrase is limited to a conviction’s legally-imposed consequences. See LOVE ET AL., *supra* note __, at § 1:8.

²⁰ See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 364 n.8 (2010); Roberts, *Mythical Divide*, *supra* note __, at 689-93 (detailing how courts have used at least three different verbal formulations when articulating the line between direct and collateral consequences).

²¹ *Padilla*, 559 U.S. at 364; *Chaidez v. United States*, 133 S. Ct. 1103, 1108 (2013). Commentators have similarly emphasized the role and authority of the sentencing court when attempting to delineate the realm of collateral consequences. See, e.g., LOVE ET AL.,

imposed by law as a result of a criminal conviction that is *in addition to* the conviction’s direct consequences.²² In other words, collateral consequences “are not part of the explicit punishment handed down by the court; they stem from the fact of conviction rather than from the sentence of the court.”²³

There is general consensus that incarceration, fines, criminal forfeiture, and terms of probation or supervised release are all direct consequences of conviction.²⁴ Consequences generally understood to be collateral include sex offender registration, civil commitment, civil forfeiture, firearm prohibitions, disenfranchisement, preclusion from juror service, bans on running for public office, disqualification from public benefits (such as public housing or food assistance), ineligibility for business and professional licenses, termination or limitation of parental rights, and—for non-citizen defendants—deportation.²⁵

The distinction between direct and collateral consequences first gained legal prominence following the Supreme Court’s decision in *Brady v. United States*.²⁶ *Brady* established that, in order to comply with the Due Process Clause’s voluntariness requirement, a trial court need only ensure

supra note __, at § 1:8 (“[W]e endorse ‘collateral consequences’ as a generally serviceable (if not entirely precise) term to describe the range of legal penalties and disabilities that flow from a criminal conviction over and above the sentence imposed by the court.”). A focus on the sentencing authority of the trial court makes particular sense given the origins of the collateral consequence rule. See *infra* notes __ and accompanying text.

²² See, e.g., Court Security Act of 2007, PUB. L. NO. 110-177, § 510(d), 121 STAT. 2534, 2544 (2008); Uniform Collateral Consequences of Conviction Act, § 2(1)-(2) (2010).

²³ Pinard, *Integrated Perspective*, *supra* note __, at 634.

²⁴ See, e.g., Roberts, *Ignorance*, *supra* note __, at 124.

²⁵ See, e.g., Chaidez, 133 S. Ct. at 1108 n.5; Padilla, 559 U.S. at 376-77 (Alito, J., concurring in the judgment); Chin & Holmes, *supra* note __, at 704-05.

Some collateral consequences are mandatory in nature, while others afford the pertinent decision-maker some degree of discretion when determining whether to apply them. The former, which are also known as “collateral sanctions,” typically apply immediately and automatically upon conviction. Common examples include sex offender registration, disenfranchisement, and firearm prohibitions. “Discretionary disqualifications,” on the other hand, involve penalties or disabilities “that an administrative agency, official, or a court is authorized, but not required, to impose on an individual convicted” of an offense. Court Security Act of 2007, PUB. L. NO. 110-177, § 510(d), 121 STAT. 2534, 2544 (2008); ABA Standards of Criminal Justice, *Collateral Sanctions and Discretionary Disqualifications of Convicted Persons*, Standard 19-1.1 (2003).

²⁶ 397 U.S. 742 (1970); see also Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 706, 726-30 (2002) (discussing *Brady*). *Brady* was not, however, the first time the Supreme Court had considered the potential relevance of collateral consequences. In a line of cases beginning in the 1940s, the Supreme Court held that a criminal defendant’s appeal of his conviction was not rendered moot by the completion of his sentence of incarceration, so long as he remained subject to potential collateral consequences from the challenged conviction. See, e.g., *Sibron v. New York*, 392 U.S. 40, 57 (1968) (summarizing earlier decisions); *Fiswick v. United States*, 329 U.S. 211 (1946).

that a defendant is aware of the “direct consequences” of conviction before entering a guilty plea.²⁷ In other words, a trial court had no obligation to inform a defendant of a conviction’s potential collateral consequences before it accepted the plea as valid.

Although *Brady* involved only a trial court’s constitutional duties during plea colloquies, it reflected a view that later took root in several other criminal law domains: a conviction’s collateral consequences do not warrant the same degree of procedural attention as a conviction’s direct consequences.²⁸

B. The Erosion of the Felony-Misdemeanor Line

The classification of offenses as felonies or misdemeanors has long been a foundational aspect of the American criminal justice system.²⁹ Among other things, the penalties facing the defendant typically turned on that classification. In most jurisdictions, felonies are defined as offenses that authorize more than one year imprisonment, whereas misdemeanors are offenses that authorize no more than one year imprisonment.³⁰

Although the line formally dividing felonies and misdemeanors is a prison-centric one, a substantial part of what previously distinguished felonies from misdemeanors was also the number and severity of collateral consequences that flowed from a conviction.³¹ Until relatively recently, the overwhelming majority of collateral consequences had been triggered only by a felony conviction.³² As Chief Justice Warren observed in 1960, “[c]onviction of a felony imposes a *status* upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities.”³³

²⁷ *Brady*, 397 U.S. at 755 (internal quotation marks omitted).

²⁸ *See, e.g.*, Chin & Holmes, *supra* note ___, at 703-23 (detailing how *Brady*’s collateral consequences rule infiltrated the Sixth Amendment’s effective assistance of counsel doctrine).

²⁹ *See* 1 Wayne R. LaFare et al., CRIM. PROCEDURE § 1.8(c) (3d ed. 2014).

³⁰ *See id.*

³¹ Indeed, this historic divide dates back to the English common law, where “[n]o crime was considered a felony which did not occasion a total forfeiture of the offender’s lands or goods or both.” *United States v. Watson*, 423 U.S. 411, 439 (1976) (Marshall, J., dissenting).

³² *See, e.g.*, Walter Matthews Grant et al., *The Collateral Consequences of Conviction (Special Project)*, 23 VAND. L. REV. 929, 955-60 (1970). To be sure, some misdemeanor offenses resulted in collateral consequences as well. *See, e.g.*, *Argersinger v. Hamlin*, 407 U.S. 25, 48 n.11 (1972) (Powell, J., concurring in the result) (noting that a “range of civil disabilities may result from misdemeanor convictions,” such as “forfeiture of public office,” “disqualification for a licensed profession,” and “loss of pension rights”). But those were dwarfed by the number of consequences triggered by felony offenses.

³³ *Parker v. Ellis*, 362 U.S. 574, 593-94 (1960) (Warren, C.J., dissenting) (emphasis added); *see also* *Baldasar v. Illinois*, 446 U.S. 222, 227 (1980) (Marshall, J., concurring) (emphasizing the significance of an offense being “transformed from a misdemeanor into a felony”

Since the 1990s, however, more and more collateral consequences are triggered by misdemeanor convictions.³⁴ As a result, the sharpness of the distinction between felonies and misdemeanors—at least in terms of post-conviction consequences—has been dulled.³⁵

C. Collateral Consequences and Prosecutors

While scholars have primarily focused on how collateral consequences impact defendants and defense attorneys,³⁶ these consequences can also play an important role in how prosecutors charge (and later negotiate) a case. Indeed, the National Prosecution Standards promulgated by the National District Attorney's Association,³⁷ the United States Attorney's Manual,³⁸ and the American Bar Association's Criminal

because of “all the serious collateral consequences that a felony conviction entails”); *Blackledge v. Perry*, 417 U.S. 21, 28 n.6 (1974) (“Moreover, even putting to one side the potentiality of increased incarceration, conviction of a ‘felony’ often entails more serious collateral consequences than those incurred through a misdemeanor conviction.”).

³⁴ See, e.g., Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1799 & n.49 (2012); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1323-27 (2012).

The recent upsurge in collateral consequences triggered by misdemeanor convictions is merely one part of an overall mushrooming of collateral consequences over the last three decades. For a taste of the extensive literature detailing how and why legislatures increasingly adopted collateral consequences beginning in the late 1980s, see, e.g., TRAVIS, *supra* note ___, at 66-68; Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1218 (2010); Kevin G. Buckler & Lawrence F. Travis III, *Reanalyzing the prevalence and social context of collateral consequence statutes*, 31 J. CRIM. JUSTICE 435, 451 (2003); Demleitner, *supra* note ___, at 154-55.

³⁵ Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 292 (2011) (“[H]owever a particular crime is labeled, the collateral consequences of misdemeanor convictions render less significant the line between felonies—at least low-level ones—and misdemeanors.”).

³⁶ For the effect collateral consequences have on defendants, see, e.g., JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISON REENTRY* (2005); INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced By Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623 (2006); Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 255 (2002); Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y R. 153, 154-55 (1999). And for the effect collateral consequences have on defense attorneys, see *supra* note ___.

³⁷ See NATIONAL PROSECUTION STANDARDS, Standards 4-1.3 (3d ed. 2009); see also Chin & Holmes, *supra* note ___, at 720 & n.202.

³⁸ See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL §§ 9-27.230, 9-27.240, 9-27.250. Interestingly, the Manual's most extensive discussion of collateral consequences is found in the section titled “Principles Of Federal Prosecution Of Business Organizations.” See *id.* § 9-28.1000.

Justice Standards³⁹ all recommend that prosecutors consider potential collateral consequences when making initial charging decisions.⁴⁰

To be sure, prosecutors will not always know every potential collateral consequence facing a defendant when deciding what charges, if any, to file in a given case.⁴¹ But they will know many of them, including several of the most severe. This is especially true for those collateral consequences that are triggered automatically by a conviction for a particular offense, and therefore do not vary according to the individual characteristics of the defendant.⁴² For example, a prosecutor will (or at least should) know “which sex offenses lead to registration [such] that this can be taken into account in the charging decision.”⁴³

For purposes of deciding what charges to file, prosecutors care about some consequences more than others. For example, prosecutors will be most interested in imposing collateral consequences that further the varied purposes of criminal prosecution, such as deterrence, retribution, rehabilitation, or incapacitation (or some combination thereof).⁴⁴ In particular, prosecutors are often animated by a desire to reduce threats to public safety.⁴⁵ Collateral consequences that advance that goal are therefore likely to be penalties of particular interest to prosecutors.⁴⁶

³⁹ See ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 3-3.9 (b) (3rd. ed. 1993).

⁴⁰ See LOVE ET AL., *supra* note __, at § 8:3; Chin & Holmes, *supra* note __, at 720-21. See also Robert M.A. Johnson, *Collateral Consequences*, 16 CRIM. JUSTICE 32 (Fall 2001) (then-President of the National District Attorneys Association advising all prosecutors to “comprehend the full range of consequences that flow from a crucial conviction”).

⁴¹ See LOVE ET AL., *supra* note __, at § 8:3.

⁴² *Id.* (“There are some cases where a prosecutor will or should know about potential collateral consequences even before filing formal charges.”); Robert M.A. Johnson, *A Prosecutor’s Expanded Responsibilities Under Padilla*, 31 ST. LOUIS U. PUB. L. REV. 129, 133 (2011).

⁴³ LOVE ET AL., *supra* note __, at § 8:3.

⁴⁴ See, e.g., U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEY’S MANUAL §§ 9-27.300 (identifying the “purposes of criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation”).

⁴⁵ See, e.g., Johnson, *Prosecutor’s Expanded Responsibilities*, *supra* note __, at 131 (former President of the National District Attorneys Association explaining that the “primary objectives” of sentencing “are protecting the public from future crime by the offender and punishing the offender”).

⁴⁶ Prosecutors are typically less concerned with other types of collateral consequences, such as voter disenfranchisement or disqualification from juror service. As one former prosecutor I interviewed explained, “I never thought about voting [rights]” when making charging decisions. Telephone Interview with Individual G, Former Prosecutor (June 5, 2015); see also Telephone Interview with Individual B, Former Prosecutor (June 3, 2015) (same). (For more details about my interviews with current and former prosecutors, see *infra* note __.) The point, of course, is not that such consequences are trivial (they are not), but rather that from the prosecutor’s perspective, they rarely move the charging needle one way or the other.

Beginning in the 1990s, legislatures greatly expanded the number and availability of collateral consequences that seek to curtail future risks to public safety.⁴⁷ Three prominent examples are sex offender registration, firearm prohibitions, and deportation.⁴⁸ Each is aimed, at least in part, at reducing threats to public safety.⁴⁹ And, critically, each is now triggered not only by certain felony convictions but also by a variety of misdemeanor offenses.⁵⁰

1. Sex Offender Registration

In 1986, eight states had laws requiring certain sex offenders to register with law enforcement.⁵¹ Twelve years later, all fifty states and the District of Columbia “had enacted legislation requiring that convicted sex offenders register with the police upon release from prison.”⁵² The obligation to register as a sex offender typically applies automatically upon conviction of a registerable offense, as defined by the pertinent jurisdiction.⁵³ Today, the vast majority of jurisdictions include some

⁴⁷ One quantitative study published in 2003, for example, found a “sharp rise in the use [by legislatures] of firearm restrictions, sex offender registration statutes, and the termination of parental rights.” Kevin G. Buckler & Lawrence F. Travis III, *Reanalyzing the prevalence and social context of collateral consequence statutes*, 31 J. CRIM. JUSTICE 435, 451 (2003); see also Demleitner, *supra* note __, at 154-55.

⁴⁸ These are not the only collateral consequences aimed at minimizing future threats to public safety. Additional examples include the termination or limitation of a defendant’s parental rights and involuntary civil commitment as a “sexually violent predator.” For a discussion of the latter, see, e.g., Roberts, *Mythical Divide*, *supra* note __, at 703-09 (noting that the first statute authorizing the civil commitment of persons deemed “sexually violent predators” was passed in 1990 and that now the Federal Government, 20 states, and the District of Columbia permit involuntary commitment on such grounds).

⁴⁹ For an interesting analysis of whether sex offender registration laws actually promote public safety, see Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J.L. & ECON. 207 (2011) (questioning the effectiveness of sex offender registries). For a discussion of whether the federal firearms ban for misdemeanor domestic violence has successfully incapacitated domestic abusers, see Robert A. Mikos, *Enforcing State Law in Congress’s Shadow*, 90 CORNELL L. REV. 1411, 1459-60 (2005). And for a thoughtful examination of the public safety rationale commonly offered as a justification for conviction-based deportation, see Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889 (2000).

⁵⁰ See, e.g., Stephanos Bibas, *Shrinking Gideon and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287 (2013) (explaining that “some misdemeanors carry grave, nearly automatic collateral consequences such as deportation [and] sex-offender confinement or registration”).

⁵¹ TRAVIS, *supra* note __, at 67; Buckler & Travis, *supra* note __, at 443.

⁵² TRAVIS, *supra* note __, at 68; Buckler & Travis, *supra* note __, at 443.

⁵³ For a helpful summary of the numerous and onerous obligations currently imposed on sex offenders, as well as expanded community notification schemes, see Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071 (2012).

misdemeanors in their lists of registerable offenses.⁵⁴ Registration periods range from 15 years to life, depending on the jurisdiction and qualifying offense.⁵⁵

2. *Firearm Prohibitions*

Congress began forbidding the possession of firearms by certain criminal offenders in 1938,⁵⁶ and eventually prohibited all felons from possessing a firearm in 1968.⁵⁷ It did not limit the ability of misdemeanants to possess firearms, however, until 1996.⁵⁸ Congress made it unlawful for any person “who has been convicted in any court of a misdemeanor crime of domestic violence” to purchase or possess a firearm that has travelled in interstate commerce.⁵⁹ In addition to the federal ban, 16 states currently prohibit the possession of firearms by persons convicted of misdemeanor domestic violence offenses.⁶⁰ Firearm prohibitions typically apply automatically and immediately upon conviction of a qualifying offense.

⁵⁴ See Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 298-99 (2011); John D. King, *Beyond “Life and Liberty”: The Evolving Right to Counsel*, 48 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 28 (2013); see also, e.g., N.Y. Correction Law Code §168-a (listing five misdemeanors as registerable offenses).

⁵⁵ See, e.g., Carpenter & Beverlin, *supra* note __, at 1088 (“Today, a tier I offender [the least serious offender] generally must register for a minimum of fifteen years or, often, twenty years. Additionally, many more crimes today have been assigned lifetime registration or recast to require lifetime registration.”).

⁵⁶ Federal Firearms Act, PUB. L. NO. 75-785, 52 Stat. 1250 (1938); see Conrad Kahn, *Challenging the Federal Prohibition on Gun Possession by Nonviolent Felons*, 55 S. TEX. L. REV. 113, 116 (2013).

⁵⁷ Omnibus Crime Control and Safe Streets Act of 1968, PUB. L. NO. 90-351, 82 Stat. 197; Gun Control Act of 1968, PUB. L. NO. 90-618, 82 Stat. 1213. See also C. Kevin Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL’Y 695, 698 (2009).

⁵⁸ See Mikos, *supra* note __, at 1457 & n.153.

⁵⁹ Omnibus Consolidated Appropriations Act, 1997, PUB. L. NO. 104-208, § 658, 110 Stat. 3009, 3009-371 (1996) (codified at 18 U.S.C. § 922(g)(9)); see 18 U.S.C. § 921(a)(33)(A) (defining a “misdemeanor crime of domestic violence” to include state and federal misdemeanor offenses).

⁶⁰ See, e.g., Law Center to Prevent Gun Violence, *Domestic Violence & Firearms Policy Summary* (May 11, 2014), available at <http://smartgunlaws.org/domestic-violence-firearms-policy-summary/> (last visited July 3, 2015).

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

3. Deportation⁶¹

The laws governing deportation were largely overhauled in the 1990s.⁶² Among other things, Congress “increased the number of crimes triggering deportation.”⁶³ Most relevant here, Congress significantly expanded the number of misdemeanor offenses that render a noncitizen deportable.⁶⁴ For example, Congress made a conviction for any offense “relating to a controlled substance”—subject to one narrow exception involving minor marijuana possession—automatic grounds for deportation.⁶⁵ Congress likewise made a wide swath of offenses involving domestic violence and child abuse grounds for deportation.⁶⁶ In short, a large number of “misdemeanors—a category of crimes where those convicted often serve no jail time—can lead to removal.”⁶⁷ And they often do.⁶⁸

⁶¹ The Court in *Padilla* observed that deportation is “uniquely difficult to classify as either a direct or a collateral consequence.” *Padilla*, 559 U.S. at 366. In my view, however, deportation is still best understood to be a collateral consequence for at least two reasons. First, the great weight of authority preceding *Padilla* consistently classified deportation as a collateral consequence, see, e.g., Roberts, *Ignorance*, *supra* note __, at 132, and *Padilla* expressly avoided upsetting that nearly uniform precedent. Second, the Supreme Court’s reticence to classify deportation as a collateral consequence appeared to dissipate in its subsequent decision in *Chaidez v. United States*, where it described deportation as a collateral consequence on multiple occasions. See, e.g., 133 S. Ct. at 1108. In any event, my central claim does not hinge on whether deportation is in fact classified as a collateral or direct consequence, since it is not accounted for when determining which set of adjudicatory procedures are required in a given case.

⁶² See The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546; Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5050. Congress first made certain criminal convictions a basis for deportation in 1917. See *Padilla*, 559 U.S. at 361 (citing The Immigration Act of 1917).

⁶³ Mikos, *supra* note __, at 1444 n.93; see also Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1722-1725 (2007).

⁶⁴ See, e.g., Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1758-63 (2013); Stephen Lee, *De Facto Immigration Courts*, 101 CAL. L. REV. 553, 560-61 (2013); Clapman, *supra* note __, at 591. Congress also “eliminated most statutory forms of relief” and abolished a sentencing court’s ability to prevent deportation through a procedure known as a “judicial recommendation against deportation.” See *Padilla*, 559 U.S. at 361-64; Mikos, *supra* note __, at 1444 n.93; see also Stumpf, *supra* note __, at 1722-1725.

⁶⁵ See 8 U.S.C. 1227(a)(2)(B)(i); see also *Padilla*, 559 U.S. at 368; Cade, *supra* note __, at 1760.

⁶⁶ See 8 U.S.C. 1227(a)(2)(E)(i).

⁶⁷ Lee, *supra* note __, at 561.

⁶⁸ See, e.g., Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES, at A1 (Apr. 7, 2014); Altman, *supra* note __, at 14. The Obama Administration’s recent actions regarding immigration enforcement continues to prioritize the removal of persons convicted of crimes, including several classes of defendants convicted only of misdemeanor offenses. See Memorandum from Jeh Charles Johnson, Secretary of Homeland Security to Thomas S. Winkowski, Acting Director U.S.

D. Collateral Consequences and Low-Level Prosecutions

To the extent the current scholarly literature discusses the impact collateral consequences have on prosecutors, it tends to focus on the exceptional case. Commentators often highlight instances where the prosecutor believes the imposition of a particular consequence is unwarranted, and how the prosecutor is then forced to engage in various charging machinations in order to avoid triggering that consequence.⁶⁹

But that is not the typical case.⁷⁰ More commonly, the prosecutor thinks the consequence is not only justified but also important. Indeed, for cases involving only low-grade felonies or misdemeanors, securing one of the aforementioned collateral consequences will likely be a key—if not *the* key—prosecutorial objective. This is true for several reasons.

First, the collateral consequence almost always lasts longer than the defendant's term of incarceration, which for low-level offenders is usually short or non-existent.⁷¹ For example, the obligation to register as a sex offender lasts for a minimum of 15 years and oftentimes for life. The federal prohibition on firearm possession is a lifetime ban. Similarly, deportation amounts to a permanent exclusion. As a result, a prosecutor's most potent and enduring weapon against future public safety risks may be a collateral consequence of conviction.⁷²

Second, collateral consequences often expose the defendant to a lengthy incarceration term if he violates the pertinent prohibition, thereby

Immigration and Customs Enforcement et al., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

⁶⁹ The literature is replete with such anecdotes and hypotheticals. See, e.g., Smyth, *supra* note __, at 494-95; Catherine A. Christian, *Awareness of Collateral Consequences: The Role of the Prosecutor*, 30 N.Y.U. REV. L. & SOCIAL CHANGE 621, 622 (2005); see also LOVE ET AL., *supra* note __, at §§ 8:3, 8:7. It is especially pronounced in discussions involving deportation. See, e.g., Lee, *supra* note __, at 579.

⁷⁰ See, e.g., Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1187 (2013) (finding that “immigration consequences are [often] an express prosecutorial goal of the conviction” in Maricopa County, Arizona); Altman, *supra* note __, at 29-32 (reporting that less than 5% of line prosecutors in King's County, New York (Brooklyn) surveyed responded that they “often” or “always” alter a plea offer because of the potential immigration consequences faced by the defendant; also reporting that approximately 45% responded “rarely” or “never”).

⁷¹ Most felony convictions result in little or no actual jail time. See, e.g., Chin, *Defense Lawyers*, *supra* note __, at 153; Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1145 n.139 (2008). And very few misdemeanor defendants spend any time in jail. See Chin, *supra*, at 153-54 & n.22 (observing that, between 2006 and 2010, less than 20% of persons arrested in New York on misdemeanor charges were ultimately sentenced to prison or jail).

⁷² See, e.g., Roberts, *Mythical Divide*, *supra* note __, at 674 (“collateral consequences often far outweigh the direct penal sanction of a conviction”); Demleitner, *supra* note __, at 154 (“[F]or many convicted offenders . . . these ‘collateral’ consequences ‘are . . . the most persistent punishments that are inflicted for [their] crime.’”).

bolstering the consequence's specific deterrent effect. For example, if a defendant fails to register properly as a sex offender, he can be charged with a criminal offense punishable by more than a decade in prison.⁷³ Similarly, an offender found in unlawful custody of a firearm may be sentenced up to 10 years in prison.⁷⁴ And a person who has been deported but then unlawfully reenters the country can be prosecuted and imprisoned for that reentry.⁷⁵ For each of these offenses, establishing a violation is usually straightforward—and typically much easier to prove than the underlying offense that triggered the collateral consequence.⁷⁶

Third, many collateral consequences—including two highlighted here—represent a guaranteed penalty upon conviction. In other words, these collateral consequences cannot be circumvented by a sentencing judge, which is significant for prosecutors concerned about controlling the penalties imposed on a defendant.⁷⁷ For example, if convicted of a qualifying offense, a defendant will be required to register as a sex offender. Firearm prohibitions work this way, too. While deportation is not formally guaranteed, a defendant rendered eligible for deportation likely will be removed if he is later detained by Immigration and Customs Enforcement.⁷⁸

In sum, prosecutors will often be attuned to collateral consequences that further the goals of criminal prosecution, especially those aimed at reducing threats to public safety. When it comes to low-level offenses,

⁷³ See, e.g., 18 U.S.C. § 2250.

⁷⁴ See 18 U.S.C. § 924(a).

⁷⁵ See 8 U.S.C. § 1326.

⁷⁶ Notice how much lighter the government's burden will be in these subsequent cases: Did the defendant fail to properly register? (Not did the defendant commit a sex offense.) Was the defendant found in possession of a firearm? (Not did the defendant commit an act of domestic violence.) Was the defendant found in the country after being removed? (Not did the defendant commit the deportable offense.)

In addition, the subsequent violations are easier to prove because they typically turn on law enforcement witnesses, not lay witnesses. Compared to police witnesses, "lay witnesses are less reliable, easier to impeach, and less certain to cooperate with pretrial investigation and trial preparation or even to appear and testify in the event of trial." Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Discretion Not to Prosecute*, 110 COLUM. L. REV. 1655, 1713 (2010).

⁷⁷ See, e.g., Johnson, *Collateral Consequences*, *supra* note __ ("These collateral consequences are simply a new form of mandated sentences. Prosecutors have often favored mandated sentences to counter the tendencies of some judges who seem incapable of giving serious consequences for serious crimes."). In this respect, mandatory collateral consequences work in many ways like mandatory minimum prison sentences, including by enhancing the prosecutor's relative power since she controls the penalty through her charging discretion. See, e.g., Demleitner, *supra* note __, at 161; William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2562 (2004).

⁷⁸ See Padilla, 559 U.S. at 363-64 (observing that deportation "is practically inevitable" in most cases after a defendant who was convicted of a removable offense has been detained).

those collateral consequences are often the most important goal of a criminal prosecution.⁷⁹

II. STRATEGIC UNDERCHARGING: WHY LESS IS SOMETIMES MORE

As detailed in Part I, several collateral consequences of considerable interest to prosecutors are now triggered by misdemeanor convictions. This has meaningfully expanded a prosecutor's charging options. For cases where imposition of the collateral consequence is a crucial prosecutorial aim, an inability to obtain that consequence through a misdemeanor conviction effectively forces the prosecutor to bring a felony case. The recent attachment of severe collateral consequences to misdemeanor offenses therefore unlocks an array of additional charging options for prosecutors keen on imposing such a consequence.

But do prosecutors actually exercise that newfound charging option? In this Part, I explain there are several reasons why a prosecutor might choose to file a misdemeanor charge instead of a felony charge—that is, why she might engage in strategic undercharging—when a critical collateral consequence is triggered by a misdemeanor conviction. To be clear, I do not claim that prosecutors will choose the misdemeanor option in every case. Rather, my claim is that we should expect prosecutors to file a misdemeanor charge in a significant number of cases, and far more often than the conventional wisdom suggests.⁸⁰

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

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

⁷⁹ *See, e.g.*, Uniform Collateral Consequences of Conviction Act, Prefatory Note at 4 (2010); Pinard, *Integrated Perspective*, *supra* note __, at 684 (recognizing “the centrality of collateral consequences to the criminal process”).

⁸⁰ *See, e.g.*, Meares, *supra* note __, at 868-69 (stating that “overcharging is systemic” and that prosecutors “often believe that it is in their best interests to charge the defendant with the most serious and as many crimes at the outset of the case”).

A. The Choice

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

One common practice, especially in larger offices, is to designate a group of prosecutors as having primary responsibility for screening incoming cases and making charging decisions.⁸¹ These prosecutors tend to be relatively senior and most of their time is dedicated to handling the influx of new cases.⁸² After the charging decision is made by the screening attorney, the case is then assigned to the pertinent line prosecutor.

Another common practice is for line prosecutors to screen cases on a rotating basis and, if charges are filed, continue to prosecute many of those same cases.⁸³ For those prosecutors, the process of screening cases is one way new matters are added to their caseload. But those prosecutors do not necessarily keep every case they screen, even if charges are filed. Line attorneys who moonlight as screeners often handle only felony matters. Therefore, if the new matter involves only misdemeanor charges, the case may be assigned to a prosecutor in that office's misdemeanor division.

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

Prosecutors enjoy tremendous discretion when deciding what criminal charges, if any, to pursue in a given case.⁸⁴ As one leading scholar

⁸¹ The screening attorneys studied by Ronald Wright and Marc Miller in their examination of the New Orleans District Attorney's Office generally fit this mold. See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002). As Wright and Miller detail, the New Orleans District Attorney's Office had a dedicated "Screening Section," in which "about fifteen of the eighty-five attorneys in the office" worked at any given time. See *id.* at 62-63. In New Orleans, the screening attorney exercises significant authority and discretion on behalf of the office: "The screener reviews the investigation file, speaks to all the key witnesses and the victims (often by telephone, but sometimes in person), and generally gauges the strength of the case." *Id.* at 63. "For the most serious crimes," Wright and Miller report, "the office conducts 'charge conferences' with senior prosecutors and police present to discuss the facts and potential charges." *Id.* at 64. But aside from those cases, which typically involved homicide and rape, the screening attorney made the charging decision for the office. *Id.* at 63-64.

⁸² See, e.g., *id.* at 63 (noting that all screening attorneys in the New Orleans District Attorney's Office "served previously (usually a couple of years) in the Trial Section").

⁸³ See *id.* at 104 n.290 (acknowledging that in "some systems, the same attorney screens and tries (or negotiates) the case"). See also Telephone Interview with Individual K, Current Prosecutor (July 8, 2015) (describing such a practice in a large Midwestern county prosecutor's office).

⁸⁴ See, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985) ("In our criminal justice system, the Government retains broad discretion as to whom to prosecute.").

put it, “[n]o government official in America has as much unreviewable power and discretion as the prosecutor.”⁸⁵ The Supreme Court has placed few limits on how prosecutors exercise their charging discretion, concluding that a prosecutor’s “decision to prosecute is particularly ill-suited to judicial review.”⁸⁶

The primary constraint is that the prosecutor must have “probable cause to believe that the accused committed an offense defined by [the applicable] statute.”⁸⁷ Probable cause, however, is not a particularly demanding standard. The Court has also imposed two other limitations—prohibitions on “selective prosecution”⁸⁸ and “vindictive prosecution”⁸⁹—but neither is particularly confining. In short, prosecutors are generally free to exercise their charging discretion and the “awesome” power that entails however they please.⁹⁰

Given today’s extensive criminal codes, prosecutors will typically have multiple options when choosing how to charge a particular course of conduct.⁹¹ This Article focuses on a prosecutor’s decision to file a felony

⁸⁵ Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960 (2009); see also, e.g., Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 Va. L. Rev. 271, 272 (2013) (“[Prosecutors] have almost unlimited and unreviewable power to select the charges that will be brought against defendants.”); Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1244 (2011).

⁸⁶ *Wayte*, 470 U.S. at 607.

⁸⁷ *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). For an interesting discussion about the Supreme Court’s “missed opportunity” in *Bordenkircher*, see William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 840-42 (2006).

⁸⁸ A prosecutor engages in selective prosecution when her decision to prosecute is “deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.” *Wayte*, 470 U.S. at 608. Proving such a violation, however, is extremely difficult. Selective prosecution claims are judged according to “ordinary equal protection standards,” which means the defendant must establish that he was treated differently from others and that the prosecutor’s decision was “motivated by a discriminatory purpose.” *Wayte*, 470 U.S. at 608-09; see also Pamela Cothran, *Prosecutorial Discretion*, 82 GEO. L.J. 771, 774 (1994) (observing that a “prosecutor’s decision to bring charges rarely violates the Equal Protection Clause”).

⁸⁹ The Supreme Court has narrowly defined what conduct qualifies as unconstitutionally vindictive. In *Blackledge v. Perry*, 417 U.S. 21, 28 (1974), the Supreme Court held that the government could not “retaliate” against a defendant for invoking his right to appeal a conviction “by substituting a more serious charge for the original one” upon remand from the appellate court. Critically, the Court has carefully distinguished post-appeal retaliation from “a pretrial decision to modify the charges against the defendant.” *United States v. Goodwin*, 457 U.S. 368, 380 (1982). Specifically, the Court has expressly held that “a prosecutor may file additional charges [before trial] if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded.” *Id.* As a result, vindictive prosecution claims are effectively limited to instances of post-trial retaliation. *Id.* at 381-82.

⁹⁰ *United States v. Lovasco*, 431 U.S. 783, 794 (1977).

⁹¹ See, e.g., Stuntz, *Plea Bargaining*, *supra* note ___, at 2549.

charge or misdemeanor charge. That choice is particularly important. Among other things, this initial decision has a lasting impact: cases usually finish on the same side of the felony-misdemeanor line as where they began.⁹²

As Ronald Wright and Rodney Engen detailed in their studies of North Carolina felony prosecutions, prosecutors and defense attorneys in felony cases “treat the felony-misdemeanor line as a major hurdle to cross.”⁹³ According to Wright and Engen, only 25% of cases initially charged as felonies end in a misdemeanor conviction.⁹⁴ The felony-misdemeanor hurdle is especially high when the jurisdiction’s criminal code contains multiple felony grade options for the same core offense. “In these areas of greatest depth,” Wright and Engen observed, “the criminal code is structured to make prosecutors especially reluctant to cross the felony-misdemeanor line.”⁹⁵ They found that when there were three or more felony grade options for an offense, a mere 12% of felony cases ended with a misdemeanor conviction only.⁹⁶

Similarly, cases that begin as misdemeanor prosecutions rarely turn into felonies. For example, as Issa Kohler-Hausmann documented in her discerning study of New York City, only 0.2% of cases in that jurisdiction that had a top arrest charge of a misdemeanor ended in a felony disposition.⁹⁷

⁹² See Telephone Interview with Individual A, Former Prosecutor (June 5, 2015). There are likely several reasons for these phenomena. Among other things, misdemeanor cases and felony cases are often handled by different sets of prosecutors and processed by entirely different trial courts. See *infra* notes ___ and accompanying text. In other words, institutional inertia likely plays a role. With respect to cases that start as felony prosecutions, prosecutors likely do not make a habit of reducing felony cases to misdemeanors because of concerns related to the setting of plea market prices. If felonies were routinely reduced to misdemeanors, then that would become the expectation of future defendants charged with felonies (or, more precisely, their attorneys), thereby weakening a prosecutor’s standard bargaining position. With respect to cases that start as misdemeanor prosecutions, increasing the charges to a felony would often require satisfying additional procedural requirements—such as approval by a grand jury. In addition, misdemeanor prosecutors would likely need to obtain supervisor approval to bump the case up to a felony. See Telephone Interview with Individual D, Current Prosecutor (June 8, 2015). Both considerations likely have a chilling effect on prosecutors contemplating turning a misdemeanor charge into a felony one.

⁹³ Ronald F. Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecutors*, 91 MARQ. L. REV. 9, 10 (2007).

⁹⁴ See *id.* at 24-28; see Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935 (2006).

⁹⁵ Wright & Engen, *Charge Movement*, *supra* note ___, at 27-28.

⁹⁶ See *id.* at 24-28.

⁹⁷ See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 651 n.108 (2014) (456 out of more than 226,000 dispositions). Kohler-Hausmann’s data is keyed off cases where the top *arrest* charge was a misdemeanor, rather than where the

B. Efficiency Gains

The strongest incentive prosecutors have for pursuing a case as a misdemeanor rather than a felony is that misdemeanors are typically much less costly to prosecute.⁹⁸ Prosecutors and their offices have two obvious reasons for wanting to resolve cases as efficiently as possible.⁹⁹ First, efficient resolution “free[s] up prosecutors to pursue many more cases,” thereby serving the general mission of the office.¹⁰⁰ Second, all prosecutors, but especially those managing bloated caseloads, have “personal incentives to reduce their workloads.”¹⁰¹

It is therefore unsurprising that several prosecutors I interviewed¹⁰² acknowledged that concerns about resource constraints often play an

top initial charge by the prosecution was a misdemeanor. But there is little reason to think that the latter would meaningfully differ from the former. Indeed, several prosecutors I interviewed confirmed it was “rare” for a case initially filed as a misdemeanor to finish as a felony. *See, e.g.*, Telephone Interview with Individual A, Former Prosecutor (June 5, 2015) (describing East Coast urban jurisdiction); Telephone Interview with Individual K, Former Prosecutor (July 8, 2015) (describing Midwestern urban jurisdiction).

⁹⁸ *See, e.g.*, Telephone Interview with Individual A, Former Prosecutor (June 5, 2015) (explaining that felony prosecutions are more time-intensive and resource-intensive); Telephone Interview with Individual G, Former Prosecutor (June 5, 2015) (same).

⁹⁹ While prosecutors are surely influenced by concerns about efficiency, I do not mean to suggest that is their only source of motivation. *See infra* notes __ (identifying conviction rates, potential penalties, and public safety as additional factors). Indeed, a definitive and comprehensive answer to what prosecutors maximize has proven elusive. *See, e.g.*, Stuntz, *Plea Bargaining*, *supra* note __, at 2554 & n.6 (“There is as yet no developed social science literature on what prosecutors maximize, probably because the solution is too complex to model effectively.”); Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors’ Syndrome*, 56 ARIZ. L. REV. 1065, 1067 (2014) (“Unfortunately, even though we understand much about *what* prosecutors do, we know remarkably little about *why* they do it.”). The point is simply that efficiency is one of several important considerations.

¹⁰⁰ Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471 (2004).

¹⁰¹ *Id.*; *see also, e.g.*, Bowers, *Punishing*, *supra* note __, at 1122, 1140-41 (explaining that prosecutors are “interested in reducing their own administrative costs” and “avoid[ing] process and work, where possible”).

Notice that if the prosecutor making the initial charging decision is a line attorney moonlighting as a screener, she may have additional incentive to charge a borderline case as a misdemeanor—and thereby shift future responsibility for the case to a separate prosecutor in the office rather than adding another felony case to her own caseload. This is especially likely for cases where the evidence appears to be relatively weak (and therefore less likely to plead quickly) or if the case appears to require disproportionate time and attention. *See* Telephone Interview with Individual C, Former Prosecutor (July 22, 2015) (describing such decisions).

¹⁰² I conducted semi-structured interviews with eleven current or former prosecutors. *See, e.g.*, Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 881 n.103 (2014) (describing semi-structured interview technique and citing examples of its use in law review literature). In exchange for their candor, I agreed to keep the interviewees’ identities confidential and their responses anonymous. The interviews were conducted over the phone and each typically lasted about one hour.

important role in charging decisions.¹⁰³ For example, a sensitivity to resource constraints is one reason why screeners in some prosecutor's offices are required to seek supervisory approval before filing a felony charge, but are not required to obtain such approval before filing a misdemeanor charge.¹⁰⁴

Misdemeanors are typically less costly and less time-consuming to prosecute because felony defendants possess a unique bundle of procedural guarantees.¹⁰⁵ Critically, those procedural entitlements do not extend to misdemeanor defendants charged with offenses that trigger serious collateral consequences. As a result, prosecutors can pursue a severe collateral consequence by filing a misdemeanor without triggering the more-costly procedural safeguards associated with felony prosecutions.

1. *Initial Felony Costs: Grand Juries and Preliminary Hearings*

A key difference between felony and misdemeanor cases is the costs prosecutors “must shoulder immediately” in felony cases, but not misdemeanor ones.¹⁰⁶ “At the outset of felony cases, prosecutors typically must present witnesses and evidence to establish probable cause to grand

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

¹⁰³ When asked what factors prosecutors in their respective office typically considered when deciding what charges to file in a given case, the prosecutors I interviewed repeatedly highlighted resource constraints as one of three principal considerations. *See, e.g.*, Telephone Interview with Individual F, Current Prosecutor (June 6, 2015) (admitting “surprise” when first serving as a prosecutor about “how much resource constraints and time constraints matter” during charging decisions and plea negotiations); Telephone Interview with Individual A, Former Prosecutor (June 5, 2015); Telephone Interview with Individual D, Current Prosecutor (June 8, 2015); Telephone Interview with Individual E, Current Prosecutor (June 5, 2015); Telephone Interview with Individual G, Former Prosecutor (June 5, 2015); Telephone Interview with Individual K, Current Prosecutor (July 8, 2015). The other two principal factors cited by the prosecutors I interviewed were strength of the evidence and the defendant's criminal history.

¹⁰⁴ *See, e.g.*, Telephone Interview with Individual D, Current Prosecutor (June 8, 2015).

¹⁰⁵ *See, e.g.*, 1 Wayne R. LaFare et al., CRIM. PROCEDURE § 1.8(c) (3d ed. 2014) (“Every jurisdiction provides for some procedural differences based upon a distinction between major and minor crimes.”); Natapoff, *Misdemeanors*, *supra* note __, at 1315-17. Of course, some criminal procedure entitlements do apply across-the-board, regardless of an offense's relative severity. For example, in all cases the government must establish each element of an offense beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358 (1970). And several trial rights, like those guaranteed by the Confrontation Clause, apply to all criminal prosecutions—no matter how minor. *See Sanjay Chhablani, Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 520 (2009).

¹⁰⁶ Bowers, *Legal Guilt*, *supra* note __, at 1713.

juries or to judges at preliminary hearings.”¹⁰⁷ Prosecutors have no such obligation in misdemeanor cases, even when a severe collateral consequence is at stake.

The Federal Government¹⁰⁸ and 18 states¹⁰⁹ provide criminal defendants the right to have felony charges—but only felony charges—initiated by a grand jury. The remaining states provide prosecutors the option of initiating felony charges either by filing an information or by seeking an indictment from a grand jury.¹¹⁰ In these jurisdictions, prosecutors overwhelmingly prefer the information option—indicating that, when given the choice, prosecutors tend to avoid the more burdensome grand jury process.¹¹¹ In all jurisdictions, prosecutors may initiate misdemeanor cases without proceeding before a grand jury.

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

¹⁰⁷ *Id.*

¹⁰⁸ See Fed. R. Crim. P. 7(a). Federal Rule of Criminal Procedure 7 tracks the requirements of the Fifth Amendment, which provides that, subject to limited exceptions, “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” U.S. Const. amend. V. The Supreme Court has long interpreted “infamous crime” as one that authorizes an “infamous punishment.” See, e.g., *Ex parte Wilson*, 114 U.S. 417, 426 (1885). The Supreme Court has further held that infamous punishments include imprisonment in a penitentiary or imprisonment for any period of time at hard labor. See *United States v. Moreland*, 258 U.S. 433 (1922). Because federal law has traditionally limited imprisonment in a penitentiary to offenders sentenced to incarceration for more than one year, only persons convicted of a felony under federal law could potentially be sentenced to a penitentiary. See 4 Wayne R. LaFave et al., CRIM. PROCEDURE § 15.1(b) (3d ed. 2014); see also 18 U.S.C. § 4083.

¹⁰⁹ See 4 Wayne R. LaFave et al., CRIM. PROCEDURE § 15.1(d) (3d ed. 2014). Although there is some variance in how each state defines the category of offenses requiring indictment by a grand jury, the effective rule for those 18 states and D.C. is that indictments are only necessary for felony offenses (i.e., those offenses where potential imprisonment exceeds one year). See *id.* (explaining the various ways in which those jurisdictions have defined the category of offenses for which a defendant is entitled to a grand jury).

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

¹¹¹ See 4 Wayne R. LaFave et al., CRIM. PROCEDURE § 15.1(g).

indictment. And if an office has thousands of ham sandwiches to process, the more that can be charged by information the better.

Where felony cases can be initiated by information instead of indictment, prosecutors must still bear the cost of a preliminary hearing.¹¹² A preliminary hearing is an adversarial proceeding conducted by a judicial officer relatively early in the adjudicatory process that inquires whether there is probable cause to believe the defendant committed the relevant offense. The government typically needs to establish probable cause in order for the case to proceed any further.¹¹³ In addition to serving as an initial screening mechanism,¹¹⁴ preliminary hearings often provide valuable information about the prosecution's case to the defense team at a relatively early stage in the life of a case.¹¹⁵ Like the right to a grand jury, however, the right to a preliminary hearing is typically reserved only for felony defendants.¹¹⁶

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

2. *Felony Discovery Costs*

Defendants charged with felonies also typically receive more ample discovery than defendants charged with misdemeanors.¹¹⁷ This is usually through a combination of additional mandatory discovery requirements being imposed on the government in a felony case, and the defendant having more mechanisms for developing discovery in felony cases.¹¹⁸ As a

¹¹² In those jurisdictions that require felonies to be initiated by a grand jury, or permit prosecutors to choose between information and indictment, preliminary hearings are typically rendered unnecessary once the grand jury has returned an indictment. *See, e.g.*, Fed. R. Crim. P. 5.1(a)(2); 4 Wayne R. LaFave et al., CRIM. PROCEDURE §§ 14.2(c), 14.2(d) (3d ed. 2014).

¹¹³ *See, e.g., id.*

¹¹⁴ *See, e.g.*, Telephone Interview with Individual K, Current Prosecutor (July 8, 2015) (identifying preliminary hearings as one of the reasons felonies are more burdensome to prosecute, in part because they are “one more evidentiary hearing you have to do”).

¹¹⁵ *See, e.g.*, Bibas, *Plea Bargaining*, *supra* note __, at 2494-95 (observing that, “in some states, preliminary hearings reveal much of the prosecution's evidence to defense lawyers in time for bargaining”).

¹¹⁶ *See, e.g.*, William A. Schroeder, *Factoring the Seriousness of the Offense into the Fourth Amendment Equations—Warrantless Entries into Premises: The Legacy of Welsh v. Wisconsin*, 38 KAN. L. REV. 439, 511 n.302 (1990). One exception is Utah, which requires preliminary hearings for some misdemeanors as well. *See* 4 Wayne R. LaFave et al., CRIM. PROCEDURE § 14.2(d) at n.59.1 (3d ed. 2014).

¹¹⁷ *See, e.g.*, Schroeder, *supra* note __, at 511 & n.300.

¹¹⁸ *See, e.g.*, 1 Wayne R. LaFave et al., CRIM. PROCEDURE § 1.8(c) (3d ed. 2014) (“Pretrial discovery is also likely to be different [for felony and misdemeanor defendants], with such discovery considerably narrower as to misdemeanor defendants. Similarly, pretrial

result, felony prosecutors are often forced to endure the additional costs of heightened discovery obligations—costs that add up quickly for prosecutors managing swollen caseloads. Additional discovery requirements can also reduce some of the government’s bargaining power during plea negotiations, especially if the additional disclosures would force the prosecutor to lay bare evidentiary weak spots. (This is yet another reason why borderline cases with evidentiary concerns might get routed to the misdemeanor track.)

The degree to which felony defendants are afforded more discovery varies across jurisdictions. In the federal system, for example, most (though not all) discovery rules apply equally to defendants facing misdemeanor charges as those facing felony charges.¹¹⁹ Many state jurisdictions, however, create significant disparities in how discovery is handled in felony and misdemeanor cases.

For example, several states that require “open file” discovery do so only in cases involving felony offenses. In Arizona, for instance, only felony defendants are entitled to receive at the outset of the prosecution “[a]ll then existing original and supplemental reports prepared by a law enforcement agency in connection with the particular crime with which the defendant is charged.”¹²⁰ Similarly, in North Carolina, a pioneering state for open file discovery, only felony defendants are entitled to the wealth of materials made available by such disclosure requirements.¹²¹

Some jurisdictions that do not require open file discovery also make significant distinctions between felony and misdemeanor offenses. In Georgia, for example, state law provides more expansive discovery regarding statements made by the defendant to members of law enforcement in felony prosecutions than in misdemeanor prosecutions.¹²² Moreover, Georgia prosecutors in felony cases must disclose to the defendant more information regarding potential witnesses and witness statements than is required in misdemeanor cases.¹²³

While many jurisdictions create differing discovery obligations for felony and misdemeanor prosecutions, I am not aware of any jurisdiction

procedures for developing evidence (e.g., depositions) and for sharpening the issues at trial (e.g., the bill of particulars or pretrial conferences) are likely to be restricted (or simply unavailable) in the process applicable to minor offenses.”); *id.* § 20.2(c) at nn.43-44.

¹¹⁹ See, e.g., Fed. R. Crim. P. 16. But see Fed. R. Crim. P. 15(c)(3) (making distinction between felony and misdemeanor offenses for purposes of depositions taken outside the United States).

¹²⁰ See Ariz. R. Crim. P. 15.1

¹²¹ See N.C. Gen. Stat. §§15A-901, 15A-903.

¹²² Compare Ga. Code Ann. § 17-16-4 with Ga. Code Ann. § 17-16-22.

¹²³ Compare Ga. Code Ann. § 17-16-8(a) and § 17-16-7(a) with Ga. Code Ann. §§ 17-16-20 to 23. Similarly, only in felony prosecutions must the government disclose before trial any “[s]tatements of coconspirators that are attributable to the defendant and arguably admissible against the defendant at trial.” See Ga. Code Ann. § 17-16-4(a).

where the discovery rules are altered based on an offense's potential collateral consequences.

3. *Potential Future Costs: Right to a Jury Trial*

A final set of procedural guarantees that varies across offense types is a defendant's right to demand a jury trial. According to the Supreme Court, the right to a jury trial provides the defendant "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."¹²⁴ From the perspective of the prosecutor, however, a jury trial is often unwelcome.

For starters, jury trials take longer to complete than bench trials. Jury trials require additional time for jury selection, jury instructions, and lengthier opening and closing statements. According to one analysis of federal prosecutions, jury trials on average took four-times longer to complete than bench trials.¹²⁵ As one former prosecutor I interviewed pithily put it: "a two-hour bench trial becomes a three-day event with a jury."¹²⁶

But the costs associated with the trial itself are only part of the equation. Jury trials often require prosecutors to engage in more intensive preparation than do bench trials, and frequently entail more pretrial litigation over procedural and evidentiary issues.¹²⁷ In sum, offenses that result in a jury trial are substantially more costly to prosecute than those that end with a bench trial.¹²⁸

¹²⁴ *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Blackstone described trial by jury as the "grand bulwark" of English liberties. See *Jones v. United States*, 526 U.S. 227, 246 (1999) (quoting Blackstone).

¹²⁵ See Uzi Segal & Alex Stein, *Ambiguity Aversion and the Criminal Process*, 81 NOTRE DAME L. REV. 1495, 1499 n.12 (2006).

¹²⁶ Telephone Interview with Individual G, Former Prosecutor (June 5, 2015)

¹²⁷ See Segal & Stein, *surpa* note ___, at 1514-15 (observing that jury trials "involve more ancillary litigation over procedural and evidentiary issues than bench trials"). See also, e.g., Telephone Interview with Individual G, Former Prosecutor (June 5, 2015) (explaining that preparation for jury trials is typically more extensive than preparation for bench trials).

¹²⁸ It is true, of course, that few cases ultimately reach an actual trial—jury or bench. But when prosecutors are making initial charging decisions, they do not always know in advance which cases will be the ones that go to trial and which ones will be resolved short of trial. This is particularly true for low-level offenses where the threatened incarceration is rarely exorbitant. Furthermore, defendants facing a severe collateral consequence (e.g., deportation) may be especially inclined to litigate instead of pleading guilty, since they have relatively little to lose. See Telephone Interview with Individual D, Current Prosecutor (June 8, 2015) (observing that defendants in one large East Coast jurisdiction typically "won't plead" to an offense that renders a non-citizen removable). Thus, prosecutors must charge a case with an eye towards who the ultimate adjudicator will be in the event the case does eventually go to trial. See *id.* (explaining that "potential jury appeal" is a factor prosecutors typically consider when making initial charging decisions, especially if there is reason to believe the case might ultimately go to trial).

It is no surprise, therefore, that several studies have documented prosecutors' preference for bench trials instead of jury trials. For example, Issa Kohler-Hausmann observed that the "standard practice" for misdemeanor prosecutors in New York City was, on the eve of trial, to reduce any Class A misdemeanor charges (which do trigger the right to a jury trial in New York City) to Class B misdemeanor charges (which do not) in order "to ensure a bench trial."¹²⁹ Put simply, "by withholding the jury trial right governments gain a major strategic advantage, depriving defendants of the option to threaten exercise of the right, with its associated adverse impact on dockets and justice system resources."¹³⁰

Given prosecutors' preferences to avoid jury trials—and the threat of jury trials—when feasible, it is important to understand when a defendant has a right to a jury trial. Under the Sixth Amendment, all felony defendants but only some misdemeanor defendants have a federal constitutional right to demand a jury trial. A misdemeanor defendant charged only with "petty" offenses has no federal constitutional right to a jury trial.¹³¹ The current lodestar for determining whether an offense is petty is the potential term of imprisonment it authorizes.¹³² An offense that threatens more than six months imprisonment is always considered serious

¹²⁹ See Kohler-Hausmann, *Managerial Justice*, *supra* note __, at 659 n.133, 662 n.142; see also M. Chris Fabricant, *Rethinking Criminal Defense Clinics in "Zero-Tolerance" Policing Regimes*, 36 N.Y.U. Rev. L. & Social Change 351, 372 n.106 (2012) (observing the same practice in the context of misdemeanor trespass prosecutions). Class A misdemeanors authorize up to one year imprisonment, whereas Class B misdemeanors authorize only up to three months imprisonment. See N.Y. Penal Code §§ 70.15(1)-(2). This practice has been upheld by New York courts, primarily on the grounds that the "District Attorney has almost unfettered discretion in determining how and when to prosecute, including the right to reduce, add or amend charges." *People v. Williams*, 120 Misc.2d 68, 78-79 (Crim. Ct. N.Y.C. 1983); see *People v. Urbacz*, 10 N.Y.3d 773 (Ct. App. 2008).

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

¹³⁰ Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143, 157-58 (2009).

¹³¹ See, e.g., *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541 (1989); *Baldwin v. New York*, 399 U.S. 66 (1970).

¹³² See *Blanton*, 489 U.S. at 541-42. The Court previously "focused on the nature of the offense and on whether it was triable by a jury at common law." *Id.* at 541 (citing *District of Columbia v. Colts*, 282 U.S. 63 (1930); *Callan v. Wilson*, 127 U.S. 540, 555-57 (1888)); see also Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 WIS. L. REV. 133 (1997) (tracing the Court's various approaches to the petty offense exception over time). According to the Court, it shifted its attention to an offense's potential term of imprisonment because that is a "more objective indication[] of the seriousness with which society regards the offense." *Blanton*, 489 U.S. at 541.

and, therefore, automatically triggers a defendant's right to trial by jury.¹³³ Conversely, an offense that carries a maximum term of imprisonment of six months or less is presumed to be petty.¹³⁴ The presumption is rebutted, and the defendant has a right to a jury trial, if "he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one."¹³⁵ Notably, the Supreme Court has thus far limited its "legislative determination" inquiry to the legislature that enacted the offense.¹³⁶ This is significant since other sovereigns—such as the federal government—may impose "additional statutory penalties" upon conviction.¹³⁷

While a number of states follow the federal constitutional baseline when determining the scope of a defendant's right to a jury trial, many others exceed the constitutional floor and provide more expansive jury trial rights.¹³⁸ Several states, for example, require a trial by jury for all offenses that authorize any amount of potential imprisonment.¹³⁹ And some jurisdictions provide all criminal defendants a right to a jury trial.¹⁴⁰

As for the relevance of an offense's collateral consequences, the Supreme Court's reference to "additional statutory penalties" in *Blanton* appears to suggest that at least some collateral consequences may be pertinent when determining whether a defendant has a federal constitutional right to a jury trial.¹⁴¹ Since *Blanton*, however, several significant collateral consequences have been deemed irrelevant by courts when deciding whether a presumptively petty offense is, in fact, serious for

¹³³ See *Blanton*, 489 U.S. at 542.

¹³⁴ See *id.* at 543. The Supreme Court has also clarified that the critical inquiry is whether any *single* offense authorizes a term of imprisonment in excess of six months. In *Lewis v. United States*, 518 U.S. 322, 323-24 (1996), the Court held that "no jury trial right exists where a defendant is charged with multiple petty offenses," even if "the aggregate prison term authorized for the offenses exceeds six months." *Id.* at 323-24. As a result, a prosecutor that carefully engages in misdemeanor charge stacking, *see infra* notes ___ and accompanying text, can avoid triggering a defendant's right to a jury trial.

¹³⁵ *Blanton*, 489 U.S. at 543. In *Blanton*, the Court predicted that it would be the "rare situation where a legislature packs an offense it deems 'serious' with onerous penalties that nonetheless do not puncture the 6-month incarceration line." *Id.* at 543; *see also* *United States v. Nachitgal*, 507 U.S. 1, 5 (1993) (repeating the "rare case" observation made in *Blanton*). Notably, the Court made these predictions when fewer collateral consequences were triggered by misdemeanor offenses than is the case today.

¹³⁶ *Blanton*, 489 U.S. at 543-44, 545 n.11.

¹³⁷ See *supra* note ___.

¹³⁸ See, e.g., *Murphy*, *supra* note ___, at 172-73.

¹³⁹ See, e.g., *id.*

¹⁴⁰ See, e.g., *id.*

¹⁴¹ See *Blanton*, 489 U.S. at 543. In *Blanton*, the Court concluded that an automatic 90-day license suspension imposed for a DUI conviction did not rebut the presumption of pettiness.

Sixth Amendment purposes. Federal and state courts have repeatedly concluded that a requirement to register as a sex offender is immaterial to the calculus. This conclusion has primarily rested on the assertion that sex offender registration is not formally a criminal punishment but rather a “remedial, collateral consequence of the conviction.”¹⁴² Similarly, state courts have consistently ignored the deportation consequences of a conviction when deciding whether an offense is petty or serious.¹⁴³ And state courts have also held that a federal firearm ban—such as the one for persons convicted of a misdemeanor domestic violence offense—is irrelevant because it was Congress that enacted the firearm prohibition, not the applicable state legislature.¹⁴⁴

In sum, as was the case with grand juries, preliminary hearings, and enhanced discovery obligations, prosecutors can often avoid triggering a defendant’s right to a jury trial by filing a misdemeanor charge instead of a felony one.

C. Increasing (Or At Least Not Decreasing) The Likelihood of Conviction

According to many scholars, “prosecutors consistently function as conviction maximizers.”¹⁴⁵ Regardless of whether prosecutors are in fact

¹⁴² See, e.g., *People v. Wrighton*, 82 A.D.3d 608 (N.Y. Sup. Ct. App. Div. 2011); *People v. Danthuluri*, 31 Misc.3d 56 (N.Y. Sup. Ct. App. Div. 2011); *People v. Shewbarran*, 188 Misc.2d 595 (N.Y. Sup. Ct. App. Div. 2001); *Thomas v. United States*, 942 A.2d 1180, 1186 (D.C.C.A. 2008). Some courts have also refused to consider a requirement to register as a sex offender because the jurisdiction imposing that obligation is different from the one prosecuting the offense. See, e.g., *Ivy v. United States*, 2010 WL 1257729 (W.D. Ky. March 26, 2010); *Rauch v. United States*, 2007 WL 2900181 (E.D. Cal. Sept. 28, 2007). Notably, one state’s supreme court has held as a matter of *state* law that being required to register as a sex offender does transform a presumptively petty offense into a serious one, thereby entitling the defendant to a trial by jury. See *Fushek v. State*, 183 P.3d 536 (Ariz. 2008).

¹⁴³ See, e.g., *Amezcuca v. Eighth Judicial District of the State of Nevada*, 319 P.3d 602 (Nev. 2014) (holding that deportation, which “arise[s] out of federal law,” is “not relevant” to the jury trial inquiry because it does “not reflect a determination by the Nevada Legislature that first-offense domestic battery is a serious offense”); *Olafisoye v. United States*, 857 A.2d 1078 (D.C.C.A. 2004) (concluding that the collateral consequence of “administrative deportation proceedings do not raise an otherwise petty offense to the level requiring a jury trial”).

¹⁴⁴ See, e.g., *Amezcuca*, 319 P.3d 602 (Nev. 2014). Federal courts have generally considered firearm prohibitions, but most have concluded that it is not sufficiently severe to render an offense “serious.” See, e.g., *United States v. Chavez*, 204 F.3d 1305 (11th Cir. 2000) (“We hold that the prohibition of firearm possession by persons convicted of a misdemeanor crime of domestic violence is not so serious as to entitle them to a jury trial for a presumptively petty offense.”); *United States v. Jardee*, 2010 WL 565242 (D.N.D. Feb. 12, 2010) (same); *United States v. Combs*, 2005 WL 3262983 (D. Neb. Dec. 1, 2005) (same). *But see* *United States v. Smith*, 151 F. Supp. 2d 1316 (N.D. Okla. 2001) (reaching opposite conclusion).

¹⁴⁵ Bowers, *Punishing*, *supra* note __, at 1128. For a small sampling of the many scholars that assert prosecutors are conviction maximizers, see the sources cited in Bibas, *Plea Bargaining*, *supra* note __, at 2471-72 nn.20-24 and Bowers, *supra*, at 1128 n.45.

maximizing convictions or something else,¹⁴⁶ there is little doubt that concerns about likelihood of conviction are often at the forefront of a prosecutor's mind when deciding what charges to pursue in a given case.¹⁴⁷ In a field where objective metrics for job success are thin, a prosecutor's "conviction rate" is often used as "the principal measure of prosecutorial job performance."¹⁴⁸ Thus, prosecutors concerned with career advancement (or even just career stability) are likely to place a premium on their own win-loss statistics.¹⁴⁹ And for offices where the chief prosecutor is elected, "the need to maximize convictions will be an inescapable environmental constraint."¹⁵⁰ As Daniel Richman has explained, "[t]hose elections that are contested are often fought on an incumbent's win-loss record, and an incumbent's concerns in this regard will be felt by his subordinates."¹⁵¹ For these reasons, prosecutorial office culture is often described as one dominated by the mantra of "nondefeat."¹⁵²

¹⁴⁶ See *supra* note ____.

¹⁴⁷ See, e.g., Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 967 (1997). See also *supra* note ____ (recounting that prosecutors interviewed identified strength of the evidence as one of three principal considerations for initial charging decisions).

¹⁴⁸ Bowers, *Legal Guilt*, *supra* note __, at 1710-11 & n.265; see also, e.g., Bowers, *Punishing*, *supra* note __ at 1149 ("The conviction rate, after all, is the most visible rubric of quality job performance."); Albert Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 106-07 (1968) ("Conviction statistics seem to most prosecutors a tangible measure of their success.").

¹⁴⁹ See, e.g., Bibas, *Plea Bargaining*, *supra* note __, at 2471 (observing that prosecutors "may further their careers by racking up good win-loss records"); Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036, 1045 (1972) ("[C]onvictions are the central performance standard, and departures from the average rate raise questions and create anxieties."). As Stephanos Bibas notes, "[f]avorable win-loss statistics" can also provide many psychic benefits, including "boost[ing] prosecutors' egos, their esteem, [and] their praise by colleagues." Bibas, *Plea Bargaining*, *supra* note __, at 2471.

¹⁵⁰ Richman, *supra* note __, at 967.

¹⁵¹ *Id.* This is not to suggest that appointed prosecutors care less about win-loss statistics than their elected peers. But the vast majority of chief prosecutors in the United States are elected, and the prospect of a future election is a variable unique to those offices. See, e.g., Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 734 (1996) (observing that over 95 percent of chief prosecutors at the state and local level are elected); see also Steven W. Perry, *Prosecutors in State Courts, 2005*, Bureau of Justice Statistics Bulletin (July 2006) (reporting that "[e]xcept for Alaska, Connecticut, the District of Columbia, and New Jersey, all chief prosecutors in 2005 were elected officials") (available at: <http://www.bjs.gov/content/pub/pdf/pSCO5.pdf>).

¹⁵² Bowers, *Punishing*, *supra* note __, at 1128 ("At bottom, prosecutors carry mindsets of 'nondefeat' . . ."); see also, e.g., Richman, *supra* note __, at 968 (same); Meares, *supra* note __, at 869 (noting that "an abhorrence of losing" "is central to prosecutorial culture"). For an old but still oft-cited study detailing this phenomenon, see Jerome H. Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOL. 52 (1967) ("In the county studied, the prosecutor's office cared less about winning than about *not losing*. The norm is so intrinsic

In its purest form, concerns about likelihood of conviction are trained on the strength of the evidence and whether the prosecutor thinks the ultimate adjudicator—a judge or jury—is likely to enter a judgment of conviction. But concerns about likelihood of conviction can also encompass other considerations, such as the likelihood that a particular set of charges will induce a defendant to plead guilty. The strength of the evidence (and how that evidence will be received by the ultimate adjudicator) still plays a leading role there, but other factors may also be relevant.¹⁵³

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

To the extent the strength of the government’s case does vary, however, it does so because of a difference in the elements of the offense seeking to be proven. In this respect misdemeanors are almost always easier to prove than felonies. Misdemeanors tend to have fewer elements than their felony counterparts.¹⁵⁴ Relatedly, felonies typically have more demanding injury or harm requirements than corresponding misdemeanors.¹⁵⁵

Finally, felonies sometimes have heightened mens rea requirements compared to misdemeanors.¹⁵⁶ Beyond simply being harder to prove,

to the rationale of the prosecutor’s office that one does not often hear it articulated. Nevertheless it is very powerful.”).

¹⁵³ See generally Bibas, *Plea Bargaining*, *supra* note ____.

¹⁵⁴ For example, under New York law, a person is guilty of criminal possession of a controlled substance in the seventh degree—a misdemeanor—if he “knowingly and unlawfully possesses a controlled substance.” See N.Y. Penal Law § 220.03. By contrast, in order to prove that a person committed criminal possession of a controlled substance in the fifth degree—a low-grade felony—the government must establish any one of several additional elements, such as “intent to sell” the substance or that he possessed at least a certain amount of the substance. See N.Y. Penal Law § 220.06 (government must prove one of eight additional elements). For those scoring at home, New York no longer has an offense labeled criminal possession of a controlled substance in the *sixth* degree.

¹⁵⁵ For example, under District of Columbia law, a person is guilty of felonious assault—and faces up to three years imprisonment—if he “unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another.” See D.C. Code § 22-404(a)(2). “Significant bodily injury” is defined in part as one that requires “immediate medical attention.” See *id.* Misdemeanor assault, by contrast, has no significant bodily injury requirement. See D.C. Code § 22-404(a)(1).

¹⁵⁶ For example, under New York law, a person is guilty of assault in the third degree—a misdemeanor—if “with criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.” See N.Y. Penal Code § 120.00(3). In order to establish that a person is guilty of assault in the second degree—a low-grade

heightened mens rea requirements can—depending on the jurisdiction—unlock additional lines of defense for the defendant. For example, in most jurisdictions, a defendant charged with a specific intent crime may claim that he was too intoxicated to form the requisite intent.¹⁵⁷ But that same defendant, if charged with an offense requiring only a general intent, will likely be prohibited from mounting a voluntary intoxication defense.¹⁵⁸ Accordingly, if the prosecutor expects that voluntary intoxication may be a credible line of defense, then he would have additional reason to consider charging a lesser offense that requires only a general intent instead of a higher grade offense that requires specific intent.

Another reason why a misdemeanor charge may have a higher likelihood of conviction (or, equally important for present purposes, the perception of a higher likelihood of conviction) in a particular case relates to differences between a bench trial and a jury trial.¹⁵⁹ Generally speaking, a defendant is more likely to be convicted after a bench trial than a jury trial. There are of course exceptions to this observation, depending both on the jurisdiction and the offense charged. But the best studies to date have concluded that judges are more likely to convict than juries.¹⁶⁰ Perhaps relatedly, judicial officers in most jurisdictions are subject to some form of election.¹⁶¹ Judges forced to navigate the perilous waters of electoral politics

felony—the government must instead prove that the defendant committed the assault “with intent to cause physical injury to another person.” See N.Y. Penal Code § 120.05(2).

¹⁵⁷ See *Montana v. Egelhoff*, 518 U.S. 37, 47-48 (1996) (observing that a majority of American jurisdictions permit a voluntary intoxication defense for specific intent crimes, but only specific intent crimes); see also, e.g., *State v. Fleck*, 810 N.W.2d 303, 307 (Minn. 2012) (explaining that voluntary intoxication defense is permissible for specific intent, but not general intent, crimes).

¹⁵⁸ See *Egelhoff*, 518 U.S. at 47-48; see also, e.g., *Fleck*, 810 N.W.2d at 307. Some states do not allow a voluntary intoxication defense to any offense. See, e.g., *Sanchez v. State*, 749 N.E.2d 509, 511 (Ind. 2001). But that is the minority position. See *Egelhoff*, 518 U.S. at 48 n.2.

¹⁵⁹ As noted earlier, some misdemeanor defendants lack the right to demand a jury trial. See *supra* notes ___ and accompanying text.

¹⁶⁰ See, e.g., Adam M. Gershowitz, 12 *Unnecessary Men: The Case for Eliminating Jury Trials in Drunk Driving Cases*, 2011 U. ILL. L. REV. 961, 971-76 (2011) (summarizing the “considerable empirical and qualitative evidence that judges are more willing to convict than juries”). But see Andrew D. Liepold, *Why Are Federal Judges So Acquittal Prone?*, 83 WASH. U. L. Q. 151 (2005) (exploring potential reasons why, since the late 1980s, acquittal rates for federal judges outpace the acquittal rates for federal juries).

¹⁶¹ See Hon. Lynn Adelman & Jon Deitrich, *Why Habeas Review of State Court Convictions is More Important than Ever*, 24 FED. SENTENCING REPORTER 292, 292 & n.5 (April 2012) (“39 states permit voters to elect or retain judges.”). In fact, “eighty-seven percent of all state judges stand for some form of election.” *Id.* (citing Roy A. Schotland, Comment, 61 *Law & Contemp. Probs.* 149, 154 (1998)).

may be more inclined to convict than a jury of the defendant's peers, none of whom face a future election challenge.¹⁶²

In some jurisdictions, including several that encompass the country's largest urban populations, juries have a well-earned reputation for being particularly hostile to certain criminal prosecutions. For example, the so-called "Bronx jury" became famous (or infamous) after juries in the Bronx consistently returned acquittals at a rate far above the national average.¹⁶³ The Bronx is far from alone on that score, and there is evidence of significantly higher acquittal rates in the District of Columbia, Baltimore, Detroit, and Los Angeles—just to name a few.¹⁶⁴ This phenomenon has been explained as the inevitable byproduct of drawing a jury pool from "communities that harbor such profound and problematic systemic distrust" of law enforcement.¹⁶⁵ Regardless of the reason, prosecutors in such jurisdictions are likely to believe that avoiding the prospect of a jury trial will significantly increase the odds of conviction.¹⁶⁶

Even when the defendant has a right to a jury trial, the nature of that right often varies depending on whether he has been charged with a felony or a misdemeanor. While nearly every state has 12 jurors sit on a felony case,¹⁶⁷ many states have fewer jurors serve on misdemeanor cases.¹⁶⁸ For example, in Texas only six jurors sit on a "trial involving a misdemeanor

¹⁶² See, e.g., *id.* at 292-94 (discussing various examples where judicial campaigns focused on an incumbent's record in criminal cases); Scott D. Wiener, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 201-02 (1996) ("Crime in general has become more of a high profile issue in political discourse, and no politician wants to be classified as 'soft on crime.' Elected judges are no exception."). See generally Joanna Cohn Weiss, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U. L. REV. 1101 (2006).

¹⁶³ See, e.g., Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 N.W. U. L. REV. 877, 899-900 (1999).

¹⁶⁴ See, e.g., Marder, *supra* note __, at 900 n.114. Prosecutors may also sometimes believe that jurors have skewed expectations about the level of evidence necessary to satisfy the beyond a reasonable doubt standard. For example, much has been made of the so-called "CSI effect" on juries. See, e.g., Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050 (2006). While there is no evidence confirming that the CSI effect is an actual phenomenon, it remains a widely-shared perception among many government officials.

¹⁶⁵ Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85, 110 n.119 (2007).

¹⁶⁶ See Telephone Interview with Individual D, Current Prosecutor (June 8, 2015) (acknowledging that, in a jurisdiction where the jury pool is understood to be generally distrustful of law enforcement, cases perceived to "not play well before a jury" were more likely to be charged as a misdemeanor in order to have a bench trial, even if that meant "the charging decision does not always line up with the brutality of the crime"); see also Telephone Interview with Individual A, Former Prosecutor (June 5, 2015); Telephone Interview with Individual G, Former Prosecutor (June 5, 2015).

¹⁶⁷ See 6 Wayne R. LaFave et al., CRIM. PROCEDURE § 22.1(d) at n.79 (3d ed. 2014) (observing that only "six states authorize juries of less than 12 in felony cases").

¹⁶⁸ See *id.*

offense.”¹⁶⁹ And some states permit even fewer than six jurors in petty offense cases (where the federal constitutional requirement of a six-juror minimum does not apply).¹⁷⁰ Smaller juries tend to favor the prosecution.¹⁷¹ This is yet another reason a prosecutor may prefer charging a misdemeanor instead of a felony.

Finally, regardless of whether the ultimate adjudicator is a judge or a jury, a “rich body of empirical and experimental studies indicates” that “fact finders adjust the burden of proof in accordance with the size of the applicable sanction.”¹⁷² Specifically, studies show that “judges and jurors often elevate the probative threshold for conviction as the severity of the punishment increases.”¹⁷³ Because felonies carry more punishment than misdemeanors, these studies suggest that the fact finder will be less likely to convict—even if marginally—for the felony than for the misdemeanor.¹⁷⁴

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

But there are other relevant considerations, and those additional factors present more of a mixed bag. For example, the threat of increased incarceration associated with a felony charge may give additional leverage to the prosecutor seeking to induce a plea. The actual difference in expected prison time, however, can often be relatively small, thereby minimizing the effectiveness of that threat.¹⁷⁵

¹⁶⁹ See Tex. Code of Crim. P. Art. 33.01(b).

¹⁷⁰ See, e.g., Utah Code § 78B-1-104 (four jurors sit on petty misdemeanor cases). If a defendant enjoys a federal constitutional right to a jury trial, the jury must include at least six persons. See *Ballew v. Georgia*, 435 U.S. 223 (1978) (declaring unconstitutional a five-person jury in a non-petty offense case).

¹⁷¹ See, e.g., *Brown v. Louisiana*, 447 U.S. 323, 332 (1980) (“[S]tatistical and empirical data established that because of a concomitant decrease in the number of hung juries, a reduction in the size of the jury panel in criminal cases unfairly disadvantages one side—the defense.”); see also *id.* at 332 n.10 (identifying three reasons why smaller juries tend to favor the prosecution).

¹⁷² Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 MICH. L. REV. 597, 598 (2012); see *id.* at 601-07 (surveying studies).

¹⁷³ *Id.*; see also Richman, *supra* note __, at 972 & n.115 (1997) (collecting studies).

¹⁷⁴ See Cade, *supra* note __, at 1795 (“Studies have suggested that adjudicators convict on less evidence where defendants are charged with minor offenses or face less severe criminal sanctions.”). Even though a jury is typically not aware of the specific penalties at stake, it will likely have a sense of the relative severity of an offense based on its name alone. Many offenses, for example, indicate whether they are a felony or a misdemeanor. And some, such as aggravated assault versus simple assault, can clue-in an otherwise unfamiliar jury.

¹⁷⁵ See *infra* notes __ and accompanying text. Vertical overcharging is most potent when the potential “trial penalty”—the difference between a post-trial sentence and guilty plea sentence—is especially severe. For many low-grade felonies, however, the potential trial penalty will not be exorbitant, since the maximum term of incarceration is typically only a few years.

In addition, a defendant facing a felony charge can threaten to impose more procedural and administrative demands on the prosecutor than he could if he were charged only with a misdemeanor.¹⁷⁶ As Josh Bowers has correctly recognized, the defense team typically enjoys one significant “advantage over the prosecutor: the defendant has a ‘call’ on the prosecutor’s time.”¹⁷⁷ Felony defendants can almost always “call” more of a prosecutor’s time than can misdemeanor defendants—meaning the threat to do so is more powerful when coming from a felony defendant.¹⁷⁸ And defendants facing one of the severe collateral consequences highlighted here, such as deportation or sex offender registration, may be especially inclined to fight the charges to the bitter end—and therefore be perceived at the time of charging as someone more likely to actually call the prosecutor’s time.¹⁷⁹

Potential differences in counsel may also play a role. A felony defendant is likely to have better and more experienced counsel, plus an attorney with superior resources and opportunity to investigate, file motions, and actually bargain with the prosecutor.¹⁸⁰ Misdemeanor defendants, by contrast, are often lucky to get their lawyer’s individual attention for more than a few minutes. And those lawyers are usually so overburdened that independent investigation and case analysis are often the exception rather than the rule.¹⁸¹

In the end, whether a felony or misdemeanor charge is more likely to induce a plea will probably vary from case to case. But more often than not, the government’s case is likely to be viewed as stronger—in terms of likelihood of conviction at trial—if charged as a misdemeanor rather than a felony. That fact alone means prosecutors will not reflexively choose the felony charge, assuming the misdemeanor offense also provides an adequate penalty (including the pertinent collateral consequence) upon conviction.

¹⁷⁶ See *supra* notes __ and accompanying text.

¹⁷⁷ Bowers, *Punishing*, *supra* note __, at 1151.

¹⁷⁸ As Bowers points out, “[t]he best defense tool in the face of an atypically high price then—or even just a price that the defendant does not particularly like—is to create the perception that the defendant is willing to engage her own process costs.” *Id.* at 1151-52. Because felony cases have more process costs, felony defendants generally have more procedural chips with which to bargain.

¹⁷⁹ See Telephone Interview with Individual A, Former Prosecutor (June 5, 2015) (observing that it was, on average, more difficult to secure a plea agreement when the defendant would be facing deportation or sex offender registration); Telephone Interview with Individual D, Current Prosecutor (June 8, 2015) (same); Telephone Interview with Individual G, Former Prosecutor (June 5, 2015) (same). See also Eagly, *supra* note __, at 1195-96 & nn.315-16 (reporting that noncitizen defendants in Harris County, Texas charged with deportable offenses appear to be “disproportionately inclined to take their cases to trial”).

¹⁸⁰ See *infra* notes __ and accompanying text.

¹⁸¹ See *infra* notes __ and accompanying text.

D. The (Minimal) Penalty Sacrifice

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

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

Critically, a prosecutor’s preferred penalty is seldom the most severe one she can possibly seek under the law. Put another way, prosecutors “rarely operate as sentence maximizers.”¹⁸² In the words of Professor Stuntz, “however prosecutors define their preferred sentence, there is no good reason to assume that their preference is always the harshest sentence they can possibly get.”¹⁸³ This is because, as Stuntz colorfully put it, prosecutors “are not like civil plaintiffs: they are not paid by the conviction, with bonuses for each additional month the defendant spends in prison.”¹⁸⁴ “Once the defendant’s sentence has reached the level the prosecutor prefers,” Stuntz observed, “adding more time offers no benefit to the prosecutor.”¹⁸⁵

Perhaps the best evidence that prosecutors have preferred penalties, and that those penalties are typically not the most severe available under the law, is a series of studies that examined how prosecutors exercise their charging discretion when navigating mandatory minimum sentences or “three-strike” repeat offender laws.¹⁸⁶ In one such study, David Bjerk demonstrated that after the imposition of a “three-strike” repeat offender law, “prosecutors became almost twice as likely to prosecute three-strikes

¹⁸² Bowers, *Punishing*, *supra* note __, at 1128; *see also, e.g.*, Bibas, *Plea Bargaining*, *supra* note __, at 2474. To the extent prosecutors ever act as sentence maximizers, it is only for those offenses at the top of the severity ladder. *See, e.g.*, Bowers, *Punishing*, *supra* note __, at 1153 (“In serious cases, prosecutors drive harder bargains and aim for sentence maximization to a greater degree.”). But those especially severe cases fall outside the scope of this Article.

¹⁸³ Stuntz, *Plea Bargaining*, *supra* note __, at 2553-54.

¹⁸⁴ *Id.* at 2554.

¹⁸⁵ *Id.*

¹⁸⁶ *See, e.g.*, Michael Tonry, *Sentencing in America, 1975-2025* at 26-29, in *CRIME AND JUSTICE IN AMERICA, 1975-2025* (Michael Tonry, ed. 2013) (summarizing “six major studies”).

arrestees for lesser misdemeanor crimes not covered by the laws.”¹⁸⁷ Bjerk also concluded that “such behavior [was] the result of prosecutors using their discretion to partially circumvent three-strikes laws owing to [the prosecutors’] own constraints and preferences, not simply in response to changes in behavior by other actors within the judicial system.”¹⁸⁸ In other words, prosecutors altered their charging behavior in order to achieve a preferred penalty, and this was based on their own belief about what each defendant deserved.

One further point bears mentioning. Recall that for low-level offenses, prosecutors will often view the imposition of certain collateral consequences—*e.g.*, sex offender registration, firearm prohibitions, deportation—to be as important, if not more important, than any term of incarceration. For that reason, there are likely many cases where a prosecutor is relatively indifferent to the amount of prison time imposed on a defendant, so long as the collateral consequence is imposed. For example, when a prosecutor is confronted with a low-grade sex offense, the most important penalty is likely to be sex offender registration, not the prospect of a few additional months in prison.¹⁸⁹

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

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

First, a significant number of felony convictions result in little or no actual jail time.¹⁹⁰ In 2006 (the most recent year reported by the Bureau of

¹⁸⁷ David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & ECON. 591, 593 (2005).

¹⁸⁸ *Id.*

¹⁸⁹ See, *e.g.*, Telephone Interview with Individual I, Current Prosecutor (June 16, 2015) (stating that sex offender registration “was the most important goal in sex cases” and that it was “very rare to give [that penalty] up” in exchange for a guilty plea, but that she was generally “willing to give up jail time and length of probation”); Telephone Interview with Individual E, Current Prosecutor (June 5, 2015) (explaining that sex offender registration was usually treated as non-negotiable in sex offense prosecutions and recounting cases where she agreed to reduced terms of incarceration in exchange for a guilty plea that included sex offender registration).

¹⁹⁰ See, *e.g.*, Chin, *Defense Lawyers*, *supra* note __, at 153; Bowers, *Punishing*, *supra* note __, at 1145 n.139.

Justice Statistics), 31% of *all* state criminal defendants convicted of a felony were sentenced to no term of imprisonment, and another 28% were sentenced only to a local jail (which is typically reserved for defendants incarcerated for less than one year).¹⁹¹ The average prison sentence in state courts that year for *all* felony defendants was about three years.¹⁹² The average prison sentence for defendants convicted only of low-grade felonies was likely much less.

Second, even if a defendant convicted of a felony was sentenced to incarceration for more than one year, it is not necessarily the case that the defendant would actually serve that full amount of time before being released. Defendants may obtain good time credits while in prison, which can reduce the total period of incarceration in some jurisdictions by at least one-third.¹⁹³

Third, some studies have indicated that courts with limited or specialized jurisdiction—including many misdemeanor courts and domestic violence misdemeanor courts—may sentence a borderline felony/misdemeanor case more harshly than would a general felony court that routinely adjudicates more serious offenses.¹⁹⁴ According to scholars, the differing responses stem from the courts' differing baselines. The borderline offense may appear relatively serious to a court where the typical case is a petty offense, but that same conduct might appear relatively mild to a court immersed in higher gravity cases.¹⁹⁵

Finally, if prosecutors are keen on seeking more than one year imprisonment, they need not always file a felony charge to achieve that goal. Instead, prosecutors can bring multiple misdemeanor charges—a practice sometimes called “stacking”—and request that the prison sentences for each convicted offense be served consecutively.¹⁹⁶ If successful, the ultimate prison sentence could be well in excess of one year. And, critically, the practice of stacking misdemeanors does not trigger the

¹⁹¹ See Sean Rosenmerkel et al., *Felony Sentences in State Courts, 2006-Statistical Tables*, Bureau of Justice Statistics (Dec. 2009; Revised Nov. 22, 2010), at page 2 (available at <http://www.bjs.gov/content/pub/pdf/fssco6st.pdf>).

¹⁹² See *id.*

¹⁹³ See, e.g., Bowers, *Punishing*, *supra* note __, at 1145 (“[U]nder New York law, defendants serve only two-thirds of their sentenced jail time, calculated from the moment of arrest.” (citing N.Y. Penal Law § 70.30)).

¹⁹⁴ See, e.g., Adi Leibovitch, *Relative Judgments* (working paper).

¹⁹⁵ See *id.* at 29 (“[W]hen recidivist domestic violence offenders in Chicago were charged with felonies (at the Criminal Court) instead of misdemeanors [(at the Domestic Violence Division)], the felony charges received lower sentences than those that would have been ordered for equivalent misdemeanors by the Domestic Violence Court.”).

¹⁹⁶ The ultimate effectiveness of such stacking will depend on whether the trial court orders that the sentences for multiple convictions run consecutively or concurrently. Most states “entrust to judges’ unfettered discretion the decision whether sentences for discrete offenses shall be served consecutively or concurrently.” *Oregon v. Ice*, 555 U.S. 160, 163-64 (2009).

bundle of procedural guarantees typically afforded defendants charged with a felony.

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

* * *

The upshot of all this is that while prosecutors do forego additional penalties by pursuing a misdemeanor case, that sacrifice may not be as significant as it first appears. As a result, prosecutors often have strong incentives to relinquish the possibility of additional incarceration in exchange for the efficiency and likelihood of conviction gains that typically accompany misdemeanor prosecutions. In cases where prosecutors care primarily about the imposition of the collateral consequence, the calculation is straightforward. Indeed, there is no real tradeoff at all.¹⁹⁷

III. STRATEGIC UNDERCHARGING’S RIPPLE EFFECTS

At first glance, the choice to file a misdemeanor instead of a felony may appear to be relatively insignificant. In a world of guilty pleas, one might ask, what difference does it really make? But misdemeanor prosecutions and felony prosecutions differ in critical ways, including in ways that can affect a case’s ultimate disposition.¹⁹⁸ As already detailed, misdemeanor defendants are typically afforded less procedural protections than felony defendants. This Part examines some of the other ripple effects caused by a prosecutor’s decision to engage in strategic undercharging.¹⁹⁹

¹⁹⁷ Consider the following experience of a domestic violence prosecutor in a large, Midwestern jurisdiction. According to this prosecutor, many domestic violence defendants in his jurisdiction, especially first-time offenders, are unlikely to receive any term of incarceration upon conviction, even when convicted of a felony. At the same time, his office (like many others) prioritizes the imposition of firearm prohibitions in domestic violence cases. Because the defendant’s expected prison “exposure” is often the same for a felony as a misdemeanor, the prosecutor acknowledged that he sometimes files a misdemeanor charge because the “defendant will get probation regardless,” “you still get the gun out of the house,” and the “process is much quicker.” Telephone Interview with Individual K, Current Prosecutor (July 8, 2015).

¹⁹⁸ See generally Natapoff, *Misdemeanors*, *supra* note __; Bibas, *Plea Bargaining*, *supra* note __.

¹⁹⁹ The effects highlighted in this Part primarily relate to state prosecutions, not federal ones. State prosecutions account for about 98% of all criminal prosecutions in the United States. See 1 Wayne R. LaFare et al., *CRIM. PROCEDURE* § 1.2(e) (3d ed. 2014).

A. Misdemeanor Courts

In most states, misdemeanors are adjudicated in different trial courts than felonies.²⁰⁰ While felony dockets have no shortage of cases, misdemeanor courts are typically bursting at the seams. According to one recent study, state trial courts of limited jurisdiction (those primarily responsible for misdemeanor cases) handled more than three times as many cases as state trial courts of general jurisdiction (those primarily responsible for felony cases).²⁰¹ The docket disparity is even greater when one focuses on criminal cases. In Washington, for example, state trial courts of limited jurisdiction processed nearly 300,000 criminal cases in 2010, while state trial courts of general jurisdiction processed about 38,500 criminal cases.²⁰² Other states experience similar disparities.²⁰³

In 1972, the Supreme Court cautioned that “the volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result.”²⁰⁴ A fixation on clearing dockets is likely even more pronounced today, as there are now twice as many misdemeanors as there were in 1972.²⁰⁵

²⁰⁰ See NACDL, *Minor Crimes*, *supra* note __, at 11; see also, e.g., Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AMER. J. OF SOCIOLOGY 351, 359 n.8 (2013).

²⁰¹ R. LaFountain et al., *Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads*, at 3 (National Center for State Courts 2012) (available at [http://www.courtstatistics.org/~media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.as hx](http://www.courtstatistics.org/~media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.as%20hx)). This figure includes all cases processed by the courts—criminal and civil.

²⁰² See *id.* at 21. Because courts of limited jurisdiction also process preliminary felony matters, some felony cases are “counted twice”—once in the court of limited jurisdiction for the preliminary matter and again in the court of general jurisdiction for subsequent proceedings. See *id.* at 19 (explaining methodology).

²⁰³ See, e.g., *id.* at 21 (courts of limited jurisdiction in Michigan processed 867,100 criminal cases and courts of general jurisdiction processed 63,224 criminal cases).

²⁰⁴ *Argersinger*, 407 U.S. at 34; see *id.* at 34-35 (“An inevitable consequence of [such] volume is the almost total preoccupation in such a court with the movement of cases.”).

²⁰⁵ In *Argersinger*, the Court estimated that there was between four and five million cases involving misdemeanors. 407 U.S. at 34 n.4. Today the best estimates place that number northward of ten million. See, e.g., Natapoff, *Misdemeanors*, *supra* note __, at 1320-21. Much (though not all) of the increase is likely attributable to widespread adoption of a policing strategy called “order maintenance” policing or the “broken windows” theory. See, e.g., Kohler-Hausmann, *Managerial Justice*, *supra* note __, at 639.

For a small but representative sampling of the extensive literature on order maintenance policing and the broken windows theory, see James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY (Mar. 1982) (introducing broken windows theory); BERNARD E. HARCOURT, THE ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2001); Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006); WILLIAM J. BRATTON & PETER KNOBBLER, TURNAROUND: HOW AMERICA’S TOP COP REVERSED THE CRIME EPIDEMIC (1998).

Given the pressures to process cases rapidly,²⁰⁶ misdemeanor judges must limit the amount of time they spend on any particular matter.²⁰⁷ This means less time for holding in-person hearings and instead deciding more issues on the papers alone. This also means less time for engaging defendants in searching plea colloquies, which are supposed to be the final backstop for ensuring that there is a factual basis for the plea and a knowing and voluntary waiver of various constitutional rights.²⁰⁸

Misdemeanor courts, moreover, usually operate with their own pool of judges. As Eve Brensike Primus has detailed, state “misdemeanor judges often have smaller salaries and occupy positions of less prestige than their felony counterparts. As a result, more qualified applicants are naturally attracted to the felony courts.”²⁰⁹ Moreover, in a “number of states, such as Arizona, Missouri, New York, and Pennsylvania, some of the judges in these [misdemeanor] courts are not lawyers.”²¹⁰ Perhaps unsurprisingly, the average difference between misdemeanor judges and felony judges—“both in terms of the judges’ knowledge of the law and their receptivity to legal arguments”—has been described by some as “astounding.”²¹¹

B. Misdemeanor Defense Counsel

Another key consequence of strategic undercharging relates to defense counsel. Misdemeanor defense attorneys are typically less experienced than felony defense attorneys.²¹² Among other things, this means they have had comparatively less time to establish credibility with local prosecutors—a trait that is often critical to counsel’s ability to plea bargain effectively.²¹³

²⁰⁶ Among other things, docket clearance rate is a common component of judicial performance evaluations. The National Center for State Courts, for example, has developed ten criteria to measure court performance, and three of those criteria rate a judge’s ability to effectively manage her docket. See NCSC, *CourTools: Trial Court Performance Measures* (available at <http://www.courttools.org/Trial-Court-Performance-Measures.aspx>).

²⁰⁷ See generally Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, XL *FORDHAM URB. L.J.* 101 (2013).

²⁰⁸ See, e.g., *id.* at 130. As Natapoff notes, some courts have even taken to doing pleas *en masse*. See *id.* at 130-31 (detailing practice in one Arizona court where judges routinely presided over 50-to-70 defendants pleading guilty at once).

²⁰⁹ Eve Brensike Primus, *Our Broken Misdemeanor Justice System: Its Problems and Some Potential Solutions*, 75 *S. CAL. L. REV. POSTSCRIPT* 80, 81 (2013).

²¹⁰ See NACDL, *Minor Crimes*, *supra* note __, at 11.

²¹¹ Primus, *supra* note __, at 81. Moreover, because “felony convictions get appealed at much higher rates than do misdemeanor convictions,” “misdemeanor judges are relatively insulated from higher court feedback and do not learn of their mistakes in the same way that felony trial court judges do.” *Id.*

²¹² See, e.g., Cade, *supra* note __, at 1787-88 (“[M]isdemeanor defenders typically have little experience.”).

²¹³ See, e.g., Bibas, *Plea Bargaining*, *supra* note __, at 2534. Depending on the greenness of the attorney, it may also mean that counsel is not yet aware of the various collateral consequences that may attach upon conviction. For now at least, the Supreme Court has

In addition, defense attorneys handling misdemeanors typically carry greater caseloads than their felony colleagues.²¹⁴ The most widely recognized caseload guidelines provide that defense attorneys should not exceed 400 misdemeanor cases annually.²¹⁵ Many defense attorneys, however, go far past that recommended limit.²¹⁶ One recent study found that public defenders in Chicago, Atlanta, and Miami average more than 2000 misdemeanor cases per year.²¹⁷ That same study reported similar excesses in a variety of other jurisdictions.²¹⁸

The defense attorneys managing these caseloads are usually public defenders compensated by a fixed salary, or court appointed attorneys operating under strictly-limited fee caps.²¹⁹ For the latter, the fees are typically capped at a fraction of the funding allotted for felony cases.²²⁰ In Illinois, for example, payment to court-appointed counsel “may not exceed \$500 for a defendant charged with a misdemeanor” (yet may not exceed “\$5,000 for a defendant charged with a felony”).²²¹ The combination of a demanding caseload with either a fixed salary or depressed fee caps can have deleterious effects on an attorney’s ability and incentive to perform the costly work of investigating potential defenses, filing motions, negotiating with the prosecutor, or personally meeting with the defendant

limited the Sixth Amendment right it recognized in *Padilla*—“that counsel must inform her client whether his plea carries a risk of deportation”—to the penalty of deportation. *See* 559 U.S. at 374. Accordingly, defense counsel’s failure to advise her client of other potential collateral consequences of conviction is not a ground for a later ineffective assistance claim.

²¹⁴ *See, e.g.*, Roberts, *Why Misdemeanors Matter*, *supra* note __; Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WILLIAM & MARY L. REV. 461, 468-75 (2007). Of course, stifling defense caseloads are not unique to misdemeanor attorneys. *See* Roberts, *Ignorance*, *supra* note __, at 146-47 (describing “crushing caseload conditions” facing felony defense attorneys); Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004). That said, “individuals facing misdemeanor charges are more likely to suffer the consequences of the workload strain.” Roberts, *Why Misdemeanors Matter*, *supra* note __, at 294.

²¹⁵ *See, e.g.*, Roberts, *Why Misdemeanors Matter*, *supra* note __, at 295; Hashimoto, *supra* note __, at 487 n.122, 504 n.180.

²¹⁶ *See, e.g.*, Natapoff, *Misdemeanors*, *supra* note __, at 1342-43; NACDL, *Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts* at 21 (2009).

²¹⁷ NACDL, *Minor Crimes*, *supra* note __, at 21.

²¹⁸ *See id.* at 20-31.

²¹⁹ Most misdemeanor defendants are indigent. *See* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1034 (2006) (“Poor people account for more than 80% of individuals prosecuted.”).

²²⁰ Roberts, *Why Misdemeanors Matter*, *supra* note __, at 326-27 & n.214. Court appointed attorneys are typically paid on a per-case basis. Cade, *supra* note __, at 1788.

²²¹ *See* 725 Ill. Comp. Stat. Ann. 5/113-3.1(b). Curiously, the same statute provides that court-appointed counsel may receive up to “\$2500 for a defendant who is appealing a conviction of any class offense.” *Id.* In other words, counsel is entitled to five times as much funding appealing a misdemeanor conviction as he is trying to avoid that conviction in the first place.

to discuss any number of pertinent issues (including potential consequences of conviction).²²²

This is particularly significant given that misdemeanor attorneys typically receive much less “free” (or “low cost”) discovery than their felony counterparts.²²³ As a result, misdemeanor defense counsel must rely even more on the fruits of their own investigation in order to assess the strength of the government’s case. But, for the reasons noted, misdemeanor defense attorneys will often be the ones least able to perform that critical task

Some misdemeanor defendants lack access to counsel altogether.²²⁴ An indigent defendant charged with a misdemeanor has a constitutional right to government-provided counsel only if he is actually “sentenced to a term of imprisonment.”²²⁵ Nearly half of the states have exceeded that federal floor and provide counsel to an indigent defendant if he is charged with a misdemeanor that merely authorizes incarceration. But a significant number of states still limit the right to counsel for at least some misdemeanor offenses to those instances where imprisonment is actually imposed.²²⁶ As with other constitutional safeguards, an offense’s potential collateral consequences are generally considered irrelevant when determining whether the defendant has a right to counsel.²²⁷

²²² Roberts, *Why Misdemeanors Matter*, *supra* note __, at 317-18 (“Misdemeanor attorneys across the country handle caseloads that make almost any investigation difficult.”); Bibas, *Plea Bargaining*, *supra* note __, at 2479-80.

²²³ See *supra* notes __ and accompanying text.

²²⁴ There also is “compelling evidence that indigent defendants, petty offenders in particular, often do not get counsel even when they are legally entitled to it.” Natapoff, *Misdemeanors*, *supra* note __, at 1340-43 (collecting and summarizing various studies)

²²⁵ *Scott v. Illinois*, 440 U.S. 367, 374 (1979). In *Alabama v. Shelton*, 535 U.S. 654 (2002), the Supreme Court clarified that a suspended prison sentence also may not be imposed on a misdemeanor defendant unless he was represented by counsel. See *id.* at 662. An indigent defendant charged with a felony, however, has an absolute right to government-provided counsel. See *Gideon v. Wainwright*, 372 U.S. 335 (1963). This is true regardless of whether any prison time is actually imposed on the defendant. See *Nichols v. United States*, 511 U.S. 738, 743 n.9 (1994).

²²⁶ See 3 Wayne R. LaFave et al., *CRIM. PROCEDURE* § 11.2(a) at n.30 (3d ed. 2014); *Shelton*, 535 U.S. at 669 n.8.

²²⁷ As a matter of federal constitutional law, courts have uniformly concluded that an offense’s potential collateral consequences have no bearing on whether an indigent defendant is entitled to counsel. See, e.g., *Clapman*, *supra* note __, at 603. As a matter of state law, a handful of jurisdictions have indicated that an offense’s collateral consequences may be relevant to defining the scope of the right. See 3 Wayne R. LaFave et al., *CRIM. PROCEDURE* § 11.2(a) at n.34 (3d ed. 2014). But those jurisdictions are few in number and, generally speaking, appear to consider an offense’s collateral consequences as merely one factor among many when deciding whether the right to state-provided counsel applies in a given case.

C. Misdemeanor Prosecutors

Strategic undercharging can also affect which line prosecutor is responsible for handling the case.²²⁸ This is important because misdemeanor prosecutors can differ in meaningful ways from felony prosecutors. Misdemeanor prosecutors are frequently the most junior and least experienced attorneys in the office.²²⁹ Given their lack of seniority, misdemeanor prosecutors often need supervisory approval for any number of case-altering decisions.²³⁰ Unsurprisingly, junior prosecutors tend to be the “most deferential to supervisory authority and are therefore least likely to buck [office] policy.”²³¹ As a result, misdemeanor prosecutors may be less likely to second-guess the initial charging decisions that were made by more senior prosecutors in the office.²³²

Misdemeanor prosecutors also tend to carry caseloads that far outpace their felony colleagues.²³³ For example, one leading study reports that misdemeanor prosecutors in many of the country’s most populous districts are responsible for hundreds of cases at any given time.²³⁴ “In Tarrant County, Texas, home of Fort Worth,” for example, “misdemeanor prosecutors juggle between 1200 and 1500 matters apiece.”²³⁵

Given such caseloads, a prosecutor’s capacity to scrutinize the merits of a particular case will typically be quite limited. As one prosecutor I interviewed put it: “The amount of attention you can give to a misdemeanor is a fraction of the attention you can give a felony. There is rarely an opportunity to reevaluate the case after the initial charging decision and determine whether different charges are more appropriate.”²³⁶ This is particularly significant since cases charged as misdemeanors are not

²²⁸ This is particularly true in large prosecutor’s offices that have dedicated misdemeanor units. *See supra* note __.

²²⁹ *See, e.g.,* Lee, *supra* note __, at 596.

²³⁰ Cade, *supra* note __, at 1783 (“New prosecutors, cutting their teeth on misdemeanor cases, may need permission from supervisors to deviate significantly from the original charge.”); Bowers, *Punishing*, *supra* note __, at 1128 (“line prosecutors often must obtain supervisory approval before dismissing cases”).

²³¹ Bowers, *Legal Guilt*, *supra* note __, at 1703-04.

²³² *See supra* notes __ and accompanying text.

²³³ *See generally* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 N.W. U. L. REV. 261 (2011).

²³⁴ *See id.* at 267-73 & tbl. 1 (giving examples from most of the country’s largest cities, including Los Angeles, Chicago, Manhattan, Brooklyn, Miami, Philadelphia, and Dallas); *see also* Kohler-Hausmann, *Managerial Justice*, *supra* note __, at 664 n.150 (observing that, in New York City, Assistant District Attorneys often carry upwards of 200 open misdemeanor cases at any given time).

²³⁵ Gershowitz & Killinger, *supra* note __, at 272. For a synopsis of potential harms caused by excessive prosecutorial caseloads generally, *see id.* at 279-96.

²³⁶ Telephone Interview with Individual K, Current Prosecutor (July 8, 2015).

subjected to an independent, initial screening mechanism, such as a grand jury or a preliminary hearing.²³⁷

Finally, new prosecutors tend to be “systematically harsher” than their more senior colleagues.²³⁸ Among other things, this means they are less likely to bargain away potential penalties on equitable grounds alone.²³⁹ “Inexperienced prosecutors” are also more likely to “press for overly broad categories in their sentencing recommendations, when more individualized judgments could produce more proportional and economical sentencing.”²⁴⁰

IV. TAKING SERIOUS MISDEMEANORS SERIOUSLY

In many respects, misdemeanors and felonies are processed in two different worlds: different judges, different attorneys, different docket pressures, and different procedures. This Part focuses on that last difference—the procedural disparity between misdemeanors and felonies.²⁴¹ For reasons explained earlier, that disparity is an integral component of strategic undercharging.

The procedural gap between misdemeanors and felonies has long rested on two grounds: (1) heightened procedures are warranted only for offenses of a sufficient severity;²⁴² and (2) the sole metric for determining an offense’s relative severity is the potential term of imprisonment it

²³⁷ See *supra* notes __; Telephone Interview with Individual K, Current Prosecutor (July 8, 2015) (explaining that “misdemeanors are unloved from the beginning”).

²³⁸ Bibas, *Plea Bargaining*, *supra* note __, at 2475; see also Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 190 (2007) (in the words of one former prosecutor: “As a baby DA, I thought all criminals needed to be punished to the fullest extent of the law . . .”).

²³⁹ As Ronald Wright and Kay Levine document in their recent study about the effect experience has on prosecutors over time, “[e]ntry-level and junior prosecutors [are] more likely than their experienced colleagues to say that it is important to stick with the most serious charges during plea negotiations.” Wright & Levine, *supra* note __, at 1087-88.

²⁴⁰ *Id.* at 1069.

²⁴¹ Even when the procedural safeguards afforded misdemeanor defendants are similar to those provided felony defendants, the misdemeanor version usually comes in watered-down form. For example, while most misdemeanor defendants have a right to government-provided counsel, the amount of funding provided to that counsel will pale in comparison to what an attorney would receive if the case were a felony. See *supra* notes __. Similarly, a misdemeanor defendant afforded the right to demand a jury trial will typically only be entitled to a jury of a smaller size than a felony defendant (e.g., 6 jurors instead of 12). See *supra* notes __.

²⁴² As Alexandra Natapoff summarized this state of affairs, “[i]f the United States Supreme Court can be said to have a misdemeanor theory, it is that lesser punishments should trigger reduced procedural entitlements.” Natapoff, *Misdemeanors*, *supra* note __, at 1350.

authorizes.²⁴³ This Part challenges the continued wisdom of the second ground, and claims that collateral consequences also should be considered when determining an offense's relative severity. Under that approach, misdemeanor offenses carrying certain collateral consequences would trigger the same bundle of entitlements typically afforded felony defendants. This would better honor an important principle underlying the criminal justice system: serious sanctions require serious procedures.

A. Reconsidering Relative Severity

While potential imprisonment remains a useful proxy for offense severity, the misdemeanor-felony line should no longer serve as the sole litmus test.²⁴⁴ Instead, an offense's potential collateral consequences should also be factored into the calculus.

The current prison-centric benchmarks for determining relative severity were designed at a time when the overwhelming majority of collateral consequences—and especially those generally considered most severe—were limited to felony convictions. As explained earlier, that is no longer the case.²⁴⁵ Now that many important collateral consequences are triggered by misdemeanors, defining severity solely in terms of potential prison time fails to capture the full picture of an offense's potential sanctions—and, therefore, fails to capture the full picture of an offense's relative severity.²⁴⁶

This is true regardless of whether one views severity from the perspective of the legislature that enacted the offense or the defendant charged with the offense. Consider the following (and fairly common) example. A jurisdiction creates an offense for misdemeanor sexual abuse and caps potential imprisonment at twelve months or less. In addition, the legislature requires a lengthy period of sex offender registration upon conviction.²⁴⁷ It would be mistaken to conclude that the legislature did not view misdemeanor sexual abuse as a serious offense simply because it

²⁴³ See *supra* notes ___. The lone exception is the constitutional right to counsel, which uses both a potential imprisonment and actual imprisonment metric for purposes of determining relative severity. See *supra* notes ___.

²⁴⁴ For a thoughtful and thought-provoking take on the difficulties of drawing lines when it comes to the issue of relative crime severity, see Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957 (2004).

²⁴⁵ See *supra* notes __ and accompanying text.

²⁴⁶ When collateral consequences were effectively limited to felony offenses, little was lost when severity was understood exclusively as a function of potential prison time. This is because a conclusion about an offense's severity would have been the same regardless of whether collateral consequences were considered (since those consequences were confined to offenses already considered serious).

²⁴⁷ See *supra* notes __ and accompanying text. In some jurisdictions, like New York, a defendant convicted of certain misdemeanor sex offenses face only a maximum of three months in jail but will be required to register as a sex offender for a minimum of 15 years. See *supra* note ___.

declined to authorize a higher potential term of imprisonment.²⁴⁸ Rather, the legislature employed an alternative and additional penalty in the form of sex offender registration.²⁴⁹

The same can be said when viewing matters from the perspective of the defendant. It is far from clear, for example, whether a typical defendant would consider a modest amount of additional prison time to be a more or less severe penalty than being required to register as a sex offender for over a decade. Indeed, there is evidence that at least some defendants are willing to risk additional time in prison in the hopes of avoiding a severe collateral consequence that is now triggered by a misdemeanor conviction.²⁵⁰

Accounting for an offense's potential collateral consequences would reflect the increasingly central role such consequences currently play in our criminal justice system. The collateral consequences imposed on a defendant are often the most significant penalties that result from a criminal conviction.²⁵¹ The procedures aimed at ensuring accurate and fair criminal adjudications should, simply put, reflect this new normal.

One potential objection to considering collateral consequences when determining relative severity is that it would create difficult line-drawing problems about which consequences should be taken into account—and which ones should qualify as sufficiently severe. If nothing else, the misdemeanor-felony line provides a clear point of demarcation. Injecting collateral consequences into the mix would—even if only temporarily—

²⁴⁸ See *Welsh v. Wisconsin*, 466 U.S. 740, 762-63 (1984) (White, J., dissenting) (“Although the seriousness of the prescribed [penal] sanctions is a valuable objective indication of the general normative judgment of the seriousness of the offense, other evidence”—such as an offense's collateral consequences—“is available and should not be ignored.”); Schroeder, *supra* note __, at 516 (“any collateral consequence to an offender that might result from a conviction for a particular offense is arguably relevant in assessing the seriousness of the offense”).

²⁴⁹ At first blush, a legislature's decision to impose simultaneously a lengthy period of sex offender registration for a conviction yet cap potential imprisonment at twelve, six, or even three months might make little sense. If the offense warrants a lengthy period of sex offender registration, why would it not also warrant at least the possibility of substantial jail time? The most likely answer is that legislatures wanted to expand a prosecutor's menu of charging options, thereby making it easier for prosecutors to successfully impose sex offender registration requirements on more offenders. The menu analogy is, of course, from Professor Stuntz. See Stuntz, *Plea Bargaining*, *supra* note __, at 2549.

²⁵⁰ See, e.g., *Kaiser v. State*, 641 N.W.2d 900 (Minn. 2002) (defendant seeking to withdraw guilty plea to misdemeanor sex offense on the grounds that counsel failed to inform him of sex offender registration requirement). See also, e.g., *State v. Ortiz*, 163 44 A.3d 425 (N.H. 2012) (defendant seeking to withdraw guilty plea to misdemeanor shoplifting on the grounds that court failed to inform her of deportation consequences); *Sames v. State*, 805 N.W.2d 565 (Minn. Ct. App. 2011) (defendant seeking to withdraw guilty plea to misdemeanor domestic assault on the grounds that counsel failed to inform him of firearm prohibition).

²⁵¹ See *supra* notes __ and accompanying text.

muddy that clean dividing line.²⁵² Among other things, courts and legislatures tasked with determining relative severity would have to resolve at least three questions when setting the parameters for the universe of relevant collateral consequences.²⁵³

The first is whether to consider collateral consequences beyond those imposed by the prosecuting jurisdiction. If a conviction in state court also would trigger federal collateral consequences, should those federal consequences be factored in the severity analysis? The answer to this question likely depends on how one resolves a more fundamental issue about relative offense severity: should relative severity be viewed from the perspective of the defendant or from the perspective of the prosecuting jurisdiction (that is, its legislature). If the former, then collateral consequences imposed by other sovereigns should be relevant to the severity analysis. If the latter, then the possibility of another jurisdiction's collateral consequences being imposed on the defendant is largely irrelevant, since it fails to reflect the views of the prosecuting jurisdiction.²⁵⁴

The second question is whether to consider collateral consequences that are not uniformly applied across all defendants. Some collateral consequences, including firearm prohibitions and sex offender registration, apply to all defendants convicted of a triggering offense. But some do not. Consider a federal misdemeanor drug offense where a conviction would render a non-citizen deportable. The sanction of deportation applies only to non-citizen defendants. Should the possibility of deportation be considered relevant for purposes of relative offense severity, even though that consequence would threaten only some defendants charged with the pertinent offense? As with the previous question, the answer to this one likely depends on whether relative severity should be viewed from the perspective of the defendant or that of the prosecuting jurisdiction.

The third question is whether to consider collateral consequences that afford the pertinent decision-maker some degree of discretion about imposing them, or limit consideration to those consequences imposed automatically upon conviction.²⁵⁵ Under the current approach, relative

²⁵² This concern echoes one aspect of the familiar debate involving rules versus standards. *See generally* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *DUKE L.J.* 557 (1992).

²⁵³ I assume for present purposes that courts and legislatures would consider only those consequences imposed by law—that is, those consequences that arise by some form of state action, not private conduct. *See supra* note ___ (discussing distinction between consequences imposed by law and those by private action).

²⁵⁴ This has been the approach adopted by the Supreme Court in the context of a constitutional right to a jury trial: only those “additional statutory penalties” adopted by the legislature that enacted the offense are relevant. *See Blanton*, 489 U.S. at 543-44, 545 n.11.

²⁵⁵ *See supra* note ___ (discussing distinction between collateral sanctions and discretionary disqualifications). For an interesting discussion about the American Law Institute's recent

severity is determined by looking at potential imprisonment, not the actual amount of incarceration imposed. Courts and legislatures would therefore need to decide whether discretionary consequences are similar to potential incarceration, such that they merit consideration even though the penalty may not ultimately materialize.

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

After determining the universe of relevant collateral consequences, courts and legislatures would also need to decide what consequences qualify as sufficiently severe to trigger the relevant felony procedure. This could be done either by identifying the specific consequences that merit heightened procedures, or on a case-by-case basis using a standard akin to the one employed by the Supreme Court in the jury trial context—that is, whether the additional “penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe” to warrant classifying the offense as a “serious one.”²⁵⁶

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

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

proposal to “fully integrate” collateral consequences into a trial court’s sentencing process, including by permitting trial judges to “grant relief from specific mandatory collateral consequences at and after sentencing,” see Margaret Colgate Love, *Managing Collateral Consequences in the Sentencing Process: The Revised Sentencing Articles of the Model Penal Code*, 2015 WISC. L. REV. 247, 260 (2015).

²⁵⁶ Blanton, 489 U.S. 543-45. See also N.J.S.A. §2B:24-1 (New Jersey statute authorizing counsel for indigent defendants “subjected to a conviction entailing imprisonment in fact or other consequence of magnitude”) (quoting *Rodriguez v. Rosenblatt*, 58 N.J. 281 (1971)) (emphasis added).

B. Implications

Applying felony-level procedures to misdemeanors carrying severe collateral consequences could have several salutary effects on the administration of low-level offenses.²⁵⁷ To begin, it would likely increase the intensity of initial case screening by prosecutors and, in particular, encourage additional consideration about whether to charge an offense that carries a severe collateral consequence—or instead pursue a different charge that does not (or even no charges at all).²⁵⁸ Extra attention given at the screening stage would be a most welcome development in the low-level offense arena, which is more often known for its quick and deferential-to-arrest screening decisions.²⁵⁹

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

The adoption of felony-level procedures for serious misdemeanors would also increase the degree to which prosecutorial charging decisions account for the views of the local community. “[T]he idea that prosecutors should be broadly responsive to the concerns of their community” is one that “runs deep” in American criminal law.²⁶⁰ Indeed, this commitment to

²⁵⁷ Because my focus here is on the relationship between the current regime of collateral consequences and adjudicatory procedures, I do not discuss other potential reforms that also merit serious consideration. For example, I am putting to the side arguments that legislatures should cease attaching significant collateral consequences to misdemeanors or at least should make them comparatively less severe (e.g., misdemeanants are ineligible to possess a firearm for 5 or 10 years rather than for life). Similarly, reforms to how misdemeanor cases triggering severe collateral consequences are assigned in prosecutors' offices or to defense attorneys also deserve more attention than I can give them here.

²⁵⁸ For a persuasive discussion of the benefits of increased screening at the outset of cases, see Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002).

²⁵⁹ See, e.g., Natapoff, *Misdemeanors*, *supra* note __; Bowers, *Legal Guilt*, *supra* note __, at 1715.

²⁶⁰ Richman, *supra* note __, at 960-61.

community oversight is reflected by the fact that 95 percent of all chief prosecutors in the United States are elected.²⁶¹ But “direct elections are not likely to prove an effective means of giving prosecutors guidance as to a community’s enforcement priorities or of holding them accountable for the discretionary decisions they have already made.”²⁶² To the extent prosecutorial elections are contested (which itself is infrequent),²⁶³ they are typically focused on a few high-profile issues—not the “low-visibility enforcement decisions” of the sort at issue here.²⁶⁴

More effective entry points for community influence on prosecutorial charging decisions are instead the petit jury and, where available, the grand jury. As Daniel Richman explains, a prosecutor concerned about conviction rates “must make all her decisions in the shadow of projected jury responses”—that is, at least, when the defendant has a right to demand a jury trial.²⁶⁵ In such circumstances, even “the mere possibility of a jury trial can bring an often overlooked degree of accountability into our system of essentially administrative justice.”²⁶⁶ While this dynamic is “not necessarily the strongest of voices,” the potential reaction of a group of laypersons drawn from the community surely “has a far greater say in how prosecutors deploy their resources than [does] any more direct mechanism of political accountability.”²⁶⁷

The adoption of felony-level procedures for serious misdemeanors could have a related beneficial impact—even if a relatively small one—regarding the community’s perception of the criminal justice system. “Community participation in the administration of the criminal law,” the Supreme Court has observed, is “not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the

²⁶¹ See *supra* note __.

²⁶² Richman, *supra* note __, at 963.

²⁶³ See *id.*

²⁶⁴ *Id.* at 963-65 (“Perhaps electoral or appointive politics will ensure that the community’s preferences will at least be considered on some broad issues of the guns vs. butter variety But the bulk of the discretionary decisions that prosecutors make turn not on such broad matters of policy but on the individual circumstances of putative defendants, alleged victims, and other such case-specific factors.”). Richman echoes the observations made by earlier scholars. See, e.g., KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969); ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* (1930); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37 (1983).

²⁶⁵ Richman, *supra* note __, at 973. Recall that a key motivation for charging a borderline case as a misdemeanor is to avoid the possibility of a jury altogether. This is especially likely in jurisdictions where prosecutors perceive the potential jury pool to be comparatively hostile to the contemplated prosecution. See *supra* notes __ and accompanying text.

²⁶⁶ Richman, *supra* note __, at 975.

²⁶⁷ *Id.* at 974.

criminal justice system.”²⁶⁸ While felony defendants receive a jurisdiction’s highest forms of due process, misdemeanants typically receive something that charitably could be called due process “light.”²⁶⁹ Treating misdemeanor cases that carry grave penalties more like felonies and less like traffic infractions could make the process seem more legitimate and fair, thereby having positive effects on public confidence in the criminal justice system.

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

I do not mean to suggest that the extension of felony procedures to misdemeanors triggering severe collateral consequences would be all roses. Because the efficiency gains associated with charging a misdemeanor would largely be eliminated, more borderline cases would likely be charged as felonies in my proposed world. Defendants would thus be exposed to further and harsher penalties, including the threat of increased incarceration and a slate of collateral consequences that may not have been associated with the misdemeanor offense (such as disenfranchisement). The imposition of such additional penalties could have negative effects on the defendant, his family, and society at large.

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

²⁶⁸ Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

²⁶⁹ To be sure, providing a defendant with a jurisdiction’s highest forms of due process is not a failsafe against non-meritorious prosecutions or erroneous convictions. See, e.g., BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011). The point is simply that whatever one thinks of the process afforded felony defendants, misdemeanor defendants typically receive something much less. See, e.g., Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1093 (2013) (“[T]here is little reason to have confidence in the outcome of convictions secured in our lower criminal courts . . .”).

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

CONCLUSION

This Article explored the impact collateral consequences have on prosecutors and, in particular, their initial charging decisions. It explained why the attachment of severe collateral consequences to misdemeanor offenses is likely to have a gravitational pull on prosecutors, incentivizing them to charge more borderline cases as misdemeanors rather than felonies. This is because a misdemeanor triggering a severe collateral consequence offers prosecutors the ability to impose significant penalties at a fraction of the cost. Examining the effect collateral consequences have on prosecutorial decision-making also revealed an important and previously overlooked charging tactic—strategic undercharging. Finally, this Article explained why courts and legislatures should look beyond potential imprisonment when determining relative offense severity, and therefore the procedures afforded criminal defendants.

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