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Should Victims' Views Influence Prosecutors' Decisions?

Bruce A. Green[†] *& Brandon P. Ruben*[††]

INTRODUCTION

When prosecutors make discretionary decisions in criminal cases, how should they take account of individual victims' views of the fair and just outcome?[1] No doubt, many crime victims have views, including about whether the person who harmed them should be prosecuted, diverted from the criminal process, or entirely left alone.[2] But little is written about whether, in making key decisions about the disposition of a case, prosecutors do or should consider victims' perspectives.[3] The American Bar Association's (ABA) prosecution function standards list "the views . . . of the victim or complainant" among

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1 For an exploration of the problematic nature of "victim" as a term, and concept, at the pre-adjudication stage, when an accused is presumptively innocent, see generally Anna Roberts, *Victims, Right?*, 42 CARDOZO L. REV. 1449 (2021). For purposes of this article, which focuses on how prosecutors interact with putative crime victims (not all of whom are complainants), we use the term "victims" to refer to individuals whom the prosecutor would regard, and interact with, as a victim.

2 *See, e.g.*, Rachel J. Wechsler, *Deliberating at a Crossroads: Sex Trafficking Victims' Decisions About Participating in the Criminal Justice Process*, 43 FORDHAM INT'L L.J. 1033, 1086–87 (2020) (concluding that "trafficking victims [in the Netherlands] often engage in a complex balancing of multiple factors when deciding whether or not to press charges against their traffickers, which supports the notion that, rather than 'passive objects . . . incapable of making reasoned judgments,' trafficking victims are deliberative, rational, and agentic individuals" (second alteration in original)).

3 Among the most significant normative discussions on this subject is a recent one. *See generally* Kay Levine, *Victims' Rights in the Diversion Landscape*, 74 SMU L. Rev. 501 (2021) (arguing that prosecutors should give limited significance to victims' input regarding offenders' eligibility for diversion programs and the necessity of restitution).

the "factors which the prosecutor may properly consider in exercising discretion to initiate, decline, or dismiss a criminal charge,"[4] but the standards do not require prosecutors to consider victims' views nor do they indicate how much weight they may or should afford those views.

A recent high-profile case invited consideration of these questions. In May 2020, in the so-called "Central Park birdwatching incident," Amy Cooper, a white woman, telephoned for emergency assistance, falsely claiming that she was threatened by an "African American" man while she was walking her dog in the Ramble, a wooded area of Central Park.[5] Two months later, the Manhattan District Attorney's Office charged her with a misdemeanor,[6] even though Christian Cooper, the birdwatcher (and Harvard-educated biomedical editor[7]) who was the victim of the false report, explained online in *The Washington Post* why he did not want her to be prosecuted.[8] Mr. Cooper acknowledged "that it is important to uphold the principle of law, and that those who try to turn racism to their advantage by filing false claims against a person of color should be held accountable."[9] But he believed that "[f]ocusing on charging Amy Cooper lets white people off the hook from" the need to "fix policing so that scenarios such as this are replaced by a criminal justice system that is truly just and equitable to black people."[10] He also observed that punishments should be "commensurate with the

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[4] Fourth Edition of *Criminal Justice Standards for the Prosecution Function*, AM. BAR ASS'N (2017) [hereinafter ABA *Criminal Justice Standards: Prosecution*], https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ (last visited May 18, 2022) (Standard 3-4.3 Minimum Requirements for Filing and Maintaining Criminal Charges); *see also* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 63 (1982), http://www.ojp.gov/ovc/publications/presdntstskforcrprt/87299.pdf [https://perma.cc/576Y-UQZT] (recommending that prosecutors "bring to the attention of the court the views of victims of violent crime on bail decisions, continuances, plea bargains, dismissals, sentencing, and restitution").

[5] Christian Cooper, Opinion, *Christian Cooper: Why I Have Chosen Not to Aid the Investigation of Amy Cooper*, WASH. POST (July 14, 2020, 1:09 PM), https://www.washingtonpost.com/opinions/christian-cooper-why-i-am-declining-to-be-involved-in-amy-coopers-prosecution/2020/07/14/1ba3a920-c5d4-11ea-b037-f9711f89ee46_story.html [https://perma.cc/X37A-9ABD].

[6] Amy Cooper was charged with falsely reporting an incident in the third degree, in violation of N.Y. Penal Law Section 240.50, a class A misdemeanor punishable by up to one year of jail. Michael Brice-Saddler, *White Woman Who Called Police on Black Birdwatcher in New York Is Charged with False Reporting*, WASH. POST (July 6, 2020), https://www.washingtonpost.com/nation/2020/07/06/amy-cooper-charged-false-report/ [https://perma.cc/Z4LE-EQEC]; N.Y. PENAL LAW § 240.50 (McKinney 2021).

[7] Royce Dunmore, *Christian Cooper: Everything to Know About Man Who Exposed Central Park 'Karen,'* NEWSONE (May 26, 2020), https://newsone.com/3948383/christian-cooper-everything-to-know-exposed-central-park-karen/ [https://perma.cc/TWL6-7KVY].

[8] Cooper, *supra* note 5.

[9] *Id.*

[10] *Id.*

wrongdoing," and "[c]onsidering that Amy Cooper has already lost her job and her reputation, it's hard to see what is to be gained by a criminal charge, aside from the upholding of principle."[11]

Although the prosecution could have proceeded without Mr. Cooper's voluntary participation, the prosecutors eventually dropped the charges on the condition that Ms. Cooper participate in a therapeutic program that included education about racial biases.[12] In the interim, the question of whether Mr. Cooper's preferences should be honored was eclipsed in public discussion of the case by the issues of racial justice that Mr. Cooper raised.[13] Afterwards, the prosecutors neither explained their decision nor acknowledged whether they gave weight to Mr. Cooper's views. Consequently, the events did nothing to advance public understanding about whether victims' preferences matter. The Manhattan prosecutors, in apparently deferring to Mr. Cooper without acknowledging having done so, left the impression that they were themselves uncertain or ambivalent about whether victims should have a say in how criminal cases are resolved.

This article seeks to promote a conversation about how prosecutors, particularly in misdemeanor cases with identifiable victims, should take account of what victims want, including what victims regard as the just result. We focus on misdemeanor charges because the vast majority of criminal prosecutions in this country involve misdemeanors,[14]and there is growing national momentum to rethink approaches to misdemeanor justice.[15] Misdemeanor cases often involve identifiable

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[11] *Id.*

[12] Jonah E. Bromwich, *Amy Cooper, Who Falsely Accused Black Bird-Watcher, Has Charge Dismissed*, N.Y. TIMES (Feb. 16, 2021), https://www.nytimes.com/2021/02/16/nyregion/amy-cooper-charges-dismissed.html [https://perma.cc/TC45-RFQC].

[13] *See, e.g.*, *Charge in Central Park Birdwatcher Incident Dropped After Woman Gets Racial Counseling*, L.A. Times (Feb. 16, 2021), https://www.latimes.com/world-nation/story/2021-02-16/case-dropped-after-woman-in-racist-nyc-run-in-gets-therapy (last visited Apr. 16, 2022) (discussing Cooper case but framing result in terms of restorative justice and racial equity as opposed to Cooper's desire for nonprosecution).

[14] Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 734, 746–47 (2018) (estimating that 13.2 million misdemeanor cases are filed annually).

[15] *See generally* Amanda Agan et al., *Prosecuting Low Level Crimes Makes Us Less Safe*, WASH. POST (Apr. 6, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/2021/04/06/misdemeanor-prosecution-future-crime/ [https://perma.cc/5RW2-BRFY] (discussing findings from recent study that found "[p]eople who are *not* prosecuted for misdemeanors are much less likely to find themselves in a courtroom again within two years. Entanglement with the legal system itself seems to be a risk factor for future criminal prosecution."); ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018) (arguing that New York City's era of mass misdemeanor arrests has turned courts into managers of social control); ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE

individual victims, and prosecutors often make charging and plea-bargaining decisions in misdemeanor cases on an ad hoc basis.[16] Therefore, victims' views, if given weight, could tip the balance. Part I discusses the potential significance of victims' views and the dearth of scholarly knowledge about whether and how prosecutors actually take account of them. Then, Part II describes how Maryland prosecutors address victims' preferences in misdemeanor cases, drawing from the recent experience of coauthor Brandon Ruben, a public defender in Prince George's County, Maryland. Finally, Part III argues that, at least in misdemeanor cases with identifiable victims, victims' informed, reasoned preferences for alternatives to prosecution should generally be honored. This Part identifies some of this argument's practical implications.

I. BACKGROUND: THE POTENTIAL SIGNIFICANCE OF VICTIMS' INPUT

Over the past half century, advocates have achieved significant criminal justice reforms in the name of victims' rights.[17] Some advances expand social services for crime victims or reduce unnecessary invasions of their privacy and other burdens as criminal prosecutions progress.[18] More controversially, advocates for victims have promoted aggressive prosecutions and harsh punishment,[19] which critics contend is misdirected because many victims (and particularly those who do not fit the image of the "perfect victim") are not retributivists

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MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018) (examining the "misdemeanor machine" and how it punishes innocent people).

[16] *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 22–25 (2007) (discussing the charging process).

[17] We say "in the name of" cognizant that reformers often are not themselves speaking as crime victims, that actual victims' voices are often left out of the conversation, and that it is often contestable whether reformers are acting in victims' best interests. We say this also cognizant that no one could speak for all victims because those who might be labeled victims is a vast group comprised of individuals who are different in many ways and who have different wants and interests. *See, e.g.*, Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 775 (2007) ("The victims' rights movement has thus created narratives illustrating prototypical victims and defendants . . . . [I]t is about powerful privileged groups using stereotypes to affect policy in a way that expressly decreases the rights of the worst-off and legitimizes, rather than challenges, subordinating institutions.").

[18] *See, e.g.*, Crime Victims' Rights Act, 18 U.S.C. § 3771(a) (listing the rights of crime victims); Victims' Rights and Restitution Act, 34 U.S.C. § 20141 (enumerating services federal agencies are required to provide federal crime victims).

[19] *See, e.g.*, Gruber, *supra* note 17, at 750 ("Rather than securing victim autonomy without qualification, many victims' rights reforms simply seek to position the victim in the legal system in a way that inexorably leads to more liability and punishment for the defendant."); Lynne N. Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937, 1020 (1985) ("The cooptation of victim's concerns by crime control proponents has created a new mythology of victimization that fails to hear those concerns.").

and instead prefer, and would benefit from, alternatives to incarcerating offenders.[20]

Among the victims' rights reforms are laws expanding victims' participation in criminal cases by giving them access to information and opportunities to weigh in. In several jurisdictions, victims have a right to meet with prosecutors before certain critical prosecutorial measures are taken.[21] Victims may object to plea bargains before the court accepts them and speak at the sentencing hearing or submit a written "victim impact statement" before the sentence is imposed.[22] But laws giving victims a voice, or allowing them to participate in the prosecutorial process, do not guarantee them influence in punishment.[23] Much attention has been paid, nationally and internationally, to the importance of allowing victims a chance to tell their stories to prosecutors and judges.[24]

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[20] *See, e.g.*, I. India Thusi, *The Feminist Script for Punishment*, 134 HARV. L. REV. 2449, 2464 (2021) (reviewing AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION (2020)); Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 293 (2020) (exploring restorative justice as an alternative for victims of sexual assault). There is a growing recognition that racial inequities in the criminal process extend to how legal institutions treat "ideal" victims—meaning white, middle-class victims—differently and more favorably than Black and brown victims. For a recent discussion of how inequalities extend to media coverage as well, see generally Itay Ravid, *Inconspicuous Victims*, 25 LEWIS & CLARK L. REV. 529 (2021).

[21] Off. for Victims of Crime, Tech. Training & Tech. Assistance Ctr., *About Victims' Rights*, VICTIMLAW, https://www.victimlaw.org/victimlaw/pages/victimsRight.jsp [https://perma.cc/32D6-4ABY]; *see also* Paul G. Cassell et al., *Circumventing the Crime Victims' Rights Act: A Critical Analysis of the Eleventh Circuit's Decision Upholding Jeffrey Epstein's Secret Non-Prosecution Agreement*, 2021 MICH. ST. L. REV. 211 (analyzing federal law and arguing that it should be interpreted or amended to give victims the right to meet with prosecutors before prosecutors file charges or enter into nonprosecution agreements with alleged offenders); Zulkifl M. Zargar, *Secret Faits Accomplis: Declination Decisions, Nonprosecution Agreements, and the Crime Victims' Right to Confer*, 89 FORDHAM L. REV. 343, 357–72 (2020) (discussing the right for victims to confer with prosecutors granted under state laws).

[22] *See* Off. for Victims of Crime, *supra* note 21. These laws are not uncontroversial, but, in general, the criticism is that they are unfair to the accused, not that they disserve victims. *See, e.g.*, *Justice for Whom?: The Dangers of the Growing Victims' Rights Movement*, HARV. C.R.-C.L. L. REV. (Nov. 27, 2018), https://harvardcrcl.org/justice-for-whom-the-dangers-of-the-growing-victims-rights-movement/ [https://perma.cc/R43E-6RKD] ("[T]he equivalence between defendants' rights and victims' rights . . . . sets up a false dichotomy that threatens to undermine the defenses a defendant has in the face of state power.").

[23] *See, e.g.*, Dana Pugach & Michael Tamir, *Nudging the Criminal Justice System into Listening to Crime Victims in Plea Agreements*, 28 HASTINGS WOMEN'S L.J. 45, 45 (2017) (noting "[v]ictims' limited ability to compel public prosecution or to influence the terms of plea bargains").

[24] With respect to opportunities to make in-court statements regarding sentencing, see generally Jamie R. Abrams & Dr. Amanda Potts, *The Language of Harm: What the Nassar Victim Impact Statements Reveal About Abuse and Accountability*, 82 U. PITT. L. REV. 71 (2020); and Erin Sheley, *Victim Impact Statements and Corporate Sex Crimes*, 73 OKLA. L. REV. 209 (2020). With respect to opportunities to victims' input into prosecutors' diversion decisions, see Miriam Krinsky & Liz Komar, *"Victims' Rights" and Diversion: Furthering the Interests of Crime Survivors and the Community*, 74 SMU L. REV. 527, 547–50 (2021); and Kay L. Levine, *Victims' Rights in the Diversion Landscape*, 74 SMU L. REV. 501, 516–21 (2021).

The procedural laws, however, give no direction to prosecutors and judges about whether, when, and how to take victims' views into account. Prosecutors in particular have discretion whether to consider individual victims' input rather than relying on assumptions and generalizations about victims' wants and needs or altogether ignoring victims.[25]

Some of what victims can convey should obviously matter to prosecutors. Prosecutors should regard victims, as potential witnesses, to be an important source of facts about the alleged crime and its impact on the victim. Prosecutors might also be expected to consider how victims believe a prosecution will affect them, since prosecutors should want to avoid retraumatizing or revictimizing victims.[26] It is less obvious, however, that prosecutors would care about victims' views or preferences regarding the just outcome, such as those views expressed by Christian Cooper, other than when a victim's views affect the victim's willingness to testify or other behavior as it relates to a given prosecution.

Victims' views of criminal justice can affect victims' behavior in various respects. Specifically, these views may influence victims' cooperativeness.[27] In Amy Cooper's case, for example, Christian Cooper's opposition to criminal prosecution may have tipped the balance, not because prosecutors agreed with or valued his views, but because his unwillingness to meet before trial to go over his testimony might have made a successful prosecution more difficult. Victims' views may also influence their willingness to cooperate with alternatives to prosecution. For example, victims' ideas of a just outcome may influence whether they will participate in a restorative justice process.[28] In high-

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[25] *See* Abraham S. Goldstein, *The Victim and Prosecutorial Discretion: The Federal Victim and Witness Protection Act of 1982*, 47 LAW & CONTEMP. PROBS. 225, 233 (1984) ("Although the Act and the guidelines contemplate that the victim's views will be considered by the prosecutor in exercising his discretion, it does not follow that the prosecutor must accept those views."); *see also supra* note 4 and accompanying text.

[26] *See* I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV 1561, 1592 (2020); *see also* Lynne Henderson, *Revisiting Victims' Rights*, 1999 UTAH L. REV. 383, 391 (observing that advocates of a victims' rights amendment take the view that victims should have a right not to be retraumatized, or victimized, by the government in the criminal process).

[27] Prosecutors do not invariably defer to uncooperative victims. Rachel Wechsler has addressed prosecutors' use of coercive mechanisms to compel uncooperative victims to testify in prosecutions of gender-based violence. She argues, "[d]rawing on moral philosophy and liberal legal theory," that these practices "instrumentalize, dehumanize, and deny dignity to victims," harming them as well as offenders and communities. Rachel J. Wechsler, *Victims as Instruments*, 97 WASH. L. REV. (forthcoming 2022).

[28] Restorative justice has no fixed meaning but is typically used to describe processes that involve the offender and the victim, and often members of the community, in mediated conversations with the aim of achieving accountability, reparation, and rehabilitation. *See generally* Thalia Gonzalez, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147, 1160 (2020) ("[T]here is no universal form, practice, or process of restorative

profile cases in which victims publicly express their views, prosecutors may be sensitive to how the public or media will respond. Continuing the prosecution of Amy Cooper, for example, would have invited criticism that a white district attorney had ignored the views of the Black racial profiling victim.[29]

Because prosecutors have virtually untrammeled discretion regarding whether or not to pursue criminal charges,[30] they can respond to victims' views in a range of ways. On one end of the spectrum, prosecutors might consider victims' views of justice to be irrelevant and disregard them entirely, believing that views such as those of Christian Cooper have no bearing on the exercise of prosecutorial discretion no matter how thoughtfully expressed or deeply held.[31] For example, prosecutors' categorical charging and plea-bargaining policies conventionally leave no room for victims' ideas of justice. This is

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justice across the country."). The contemporary push for restorative justice processes, especially in the context of the progressive prosecution movement, both brings the question of victims' preferences to the fore and exposes the theoretical difficulty. Restorative justice has been promoted as one among various avenues to divert offenders from the conventional criminal process where prosecution is usually followed by punishment. Restorative justice processes are intended, in significant measure (although not exclusively), for victims' benefit, *see* Bruce A. Green & Lara Bazelon, *Restorative Justice from Prosecutors' Perspective*, 88 FORDHAM L. REV. 2287, 2289–90 (2020), and, by their nature restorative justice programs depend on victims' voluntary, informed participation. *See* Lynn S. Branham, *"Stealing Conflicts" No More?: The Gaps and Antirestorative Elements in States' Restorative Justice Laws*, 64 ST. LOUIS U. L.J. 145, 149–51 (2020). Although progressive prosecutors' support for restorative justice processes may have various motivations, including a desire to reduce mass incarceration and overcriminalization through alternatives to incarceration, one motivation may be concern either for victims' well-being or for their desires.

[29] Likewise, in the case of George Floyd, a Black man killed by a white police officer in 2020, prosecutors acted consistently with Mr. Floyd's family's adamant wish to see the officer prosecuted and punished as harshly as possible. *See* Philonise Floyd, Opinion, *Philonise Floyd: For My Brother George Floyd, This Is What Justice Feels Like*, WASH. POST (Apr. 21, 2021, 11:33 AM), https://www.washingtonpost.com/opinions/2021/04/21/philonise-floyd-chauvin-verdict-justice/ [https://perma.cc/HQ8D-VC83].

[30] DAVIS, *supra* note 16, at 15–17, 194; Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 589, 597 (2019) ("Both the range of prosecutors' discretionary decisions and the breadth of their discretion in making those decisions are vast.").

[31] *See, e.g.*, Stacy Caplow, *What If There Is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 CLINICAL L. REV. 1, 5 (1998) ("While many prosecutors are willing to engage with victims during the case preparation, few defer to the victim in critical decision making where there are disagreements about the direction of the prosecution. Even when the prosecutor's choices reflect the victims' goals, this coincidence is usually fortuitous rather than the product of deference."). In capital cases, for example, it has been observed that prosecutors seek the death penalty when the victims' survivors favor that result but also when the survivors do not, and that this is an example of prosecutors ignoring victims' preferences except when they happen to coincide with those of the prosecutor. *See* Wayne A. Logan, *Declaring Life at the Crossroads of Death: Victims' Anti-Death Penalty Views and Prosecutors' Charging Decisions*, 18 CRIM. JUST. ETHICS 41, 44–45 (1999). Viewed from the outside, however, it may not be possible to say conclusively whether, in cases where prosecutors are on the fence, survivors' preferences push prosecutors in one direction or the other.

true, for example, of "no drop" policies in domestic violence (DV) cases which call for prosecuting offenders even when the victims oppose.[32] But it is equally true of progressive prosecutors' policies calling for declining to prosecute certain categories of cases.[33] Even in making ad hoc decisions about charging and plea bargaining, prosecutors may disregard victims' views entirely on the theory that prosecutors are elected to implement their own views of justice in a consistent way,[34] and that in a system of public prosecution, victims' views should not matter.[35]

On the other end of the spectrum, prosecutors making discretionary decisions might give victims' preferences significant weight on the ground that the principal purpose of criminal law should be to vindicate victims' interests.[36] On this theory, victims would generally be entitled to have cases prosecuted if they wish, and if they do not, there often would be no adequate justification to use the state's coercive and punitive powers.[37] Reminding us that private prosecutions were once the norm, Bennett Capers recently advocated a return to victim-driven criminal justice.[38] Although no contemporary prosecutor treats victims exactly like clients, letting them dictate how prosecutors make discretionary decisions in all cases,[39]

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[32] *See* Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Law Policy*, 2004 WIS. L. REV. 1657, 1672 n.76 (2004) ("The point of no-drop policies is that dismissal of cases due to victim's nonparticipation is not the norm, and prosecutors must evaluate the viability of each case independent of a victim's involvement.").

[33] *See, e.g.*, Rachael Rollins, *Charges to Be Declined*, RACHAEL ROLLINS FOR SUFFOLK DA, https://rollins4da.com/policy/charges-to-be-declined/ [https://perma.cc/G2PG-9BB4] (district attorney candidates proposal for misdemeanors her office would decline to prosecute by default); *see also* Paul Schwartzman, *In Crime Battered Baltimore, a Halt to Some Drug and Prostitutions Prosecutions Is Causing Fresh Anxiety*, WASH. POST (Apr. 10, 2021, 2:23 PM), https://www.washingtonpost.com/local/md-politics/baltimore-crime-mosby-misdemeanors/2021/04/10/730a679c-9650-11eb-962b-78c1d8228819_story.html [https://perma.cc/4ASX-M4EL] (business owner discussing his unease with Marilyn Mosby's policy of not prosecuting conduct such as urinating on his office building or jiggling car doors in his parking lot). *See generally* W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173 (2021) (examining categorical refusal to enforce certain state laws by local elected prosecutors).

[34] *Cf.* David E. Aaronson, *New Rights and Remedies: The Federal Crime Victims' Rights Act of 2004*, 28 PACE L. REV. 623, 673–74 (2008) ("[E]qual treatment of defendants stands against victim participation at virtually every stage of the criminal process.").

[35] *Cf.* Danielle Levine, Comment, *Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution*, 104 NW. U. L. REV. 335, 336 (2010) (arguing that in a system of public prosecution, victims' rights impinge on prosecutorial discretion).

[36] *Cf.* Jack Boeglin & Zachary Shapiro, *A Theory of Differential Punishment*, 70 VAND. L. REV. 1499 (2017) (arguing that laws providing for different punishments based on results, such as whether a shooting resulted in death rather than injury, can be explained only by theories of punishment focusing on victims' interests); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1696 (1992) ("[R]etribution is . . . a form of compensation to the victim.").

[37] *See* Capers, *supra* note 26, at 1574.

[38] *See id.* at 1586–1609.

[39] *Cf.* Green, *supra* note 30, at 596 ("Crime victims may express their preferences and may even have a legal right to weigh in, but they are not clients."). It

prosecutors would be well within their discretion to presumptively honor victims' reasoned preferences.

Alternatively, prosecutors may give weight to victims' views in some cases but not in others, or give victims' views varying amounts of weight.[40] Particularly in misdemeanor and low-level felony cases that largely escape public scrutiny, prosecutors might weigh victims' views and preferences together with other considerations, including the nature of the offense and the offender's prior conduct, so that victims' views occasionally tip the balance. Or prosecutors might give weight only to victims' views that appear to be well-informed and well-reasoned or otherwise deserving from prosecutors' perspective.

There is no professional consensus on how prosecutors should take account of victims' views,[41] and public accounts of criminal cases are not particularly illuminating about whether victims influence prosecutors' decisions. Some accounts indicate that prosecutors' charging or plea-bargaining decisions were aligned with victims' preferences but do not explain how prosecutors arrived at their decisions. Thus, these accounts do not indicate whether prosecutors deferred to victims' preferences, persuaded victims to support their decisions, or coincidentally alighted on decisions with which victims concurred.[42] Other accounts indicate when victims opposed prosecutors' decisions, conveying that these prosecutors do not invariably honor victims' preferences. These accounts do not,

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would arguably be unethical under present-day understandings for a prosecutor to do so. *See In re* Flatt-Moore, 959 N.E.2d 241, 245 (Ind. 2012).

[40] *See, e.g.*, Jeffrey K. Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Factor Client/Attorney Relationships*, 48 S. TEX. L. REV. 695, 710 (2007) (maintaining that prosecutors decide how much weight to give to victims' preferences).

[41] *See, e.g.*, John W. Stickels et al., *Elected Texas District and County Attorneys' Perceptions of Crime Victim Involvement in Criminal Prosecutions*, 14 TEX. WESLEYAN L. REV. 1, 18 (2007) (discussing survey of Texas prosecutors that found a significant number gave significant weight to victims' preferences about charging and plea bargaining). The significance of victims' preferences was raised in the race for Manhattan district attorney around the question of how to handle cases where two parties initially filed assault complaints against each other and then sought to dismiss the complaints. Some candidates for the democratic nomination argued for deferring to the complainants' wishes to allow them "to move on with their lives," while others argued that doing so could leave uncertainty about "who was the true victim" and allow "cycles of abuse [to] continue." Jonah E. Bromwich, *Farhadian Weinstein Is a Lightning Rod in Manhattan D.A. Race's Lone Debate*, N.Y. TIMES (Nov. 2, 2021), https://www.nytimes.com/2021/06/17/nyregion/manhattan-da-farhadian-weinstein-bragg.html?auth=login-email&login=email [https://perma.cc/Z5UF-PM69].

[42] *See, e.g.*, Colin Kalmbacher, *'He Put Me on a Washing Machine and Pleasured Himself While Molesting Me': Retired Army General Demoted After Conviction for Sexually Assaulting His Daughter Starting When She Was 3*, MSN NEWS (June 8, 2021), https://www.msn.com/en-us/news/crime/he-put-me-on-a-washing-machine-and-pleasured-himself-while-molesting-me-retired-army-general-demoted-after-conviction-for-sexually-assaulting-his-daughter-starting-when-she-was-3/ar-AAKQ1U6 [https://perma.cc/9JP9-HSHF] (according to her lawyer, a woman whose father sexually assaulted for years, beginning at age three, was said to support a guilty plea to one count of sexual assault "because at the end of the day, the truth was more important than the punishment for her").

however, indicate whether the prosecutors entirely ignored victims' preferences, or took account of them but determined that they were outweighed by other considerations.[43]

There is not much contemporary empirical work on prosecutorial discretion, since prosecutors are generally reluctant to open their internal processes to scrutiny,[44] and there is even less work on victims' roles in prosecutorial decision-making.[45] But the prevailing assumption is that many prosecutors disregard victims' views[46] or honor them only when they coincide with prosecutors' own retributive preferences.[47] The reasons may include that prosecutors have greater confidence in and fidelity to their own views,[48] that prosecutors lack sufficient time to elicit victims' views,[49] and that deference to victims' wishes may invite coercion by offenders.[50] Some of the writings suggest that prosecutors regard victims' views as fluid and malleable, and use their

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[43] For example, in 2019, an Ohio lawyer brought litigation against a prosecutor who, in her view, had offered an excessively lenient plea deal to her alleged rapist. *See* Dan Horn, *'I'm Being Revictimized': Deters Accused of Mishandling Rape Case*, CIN. ENQUIRER (Sept. 19, 2019), https://www.cincinnati.com/restricted/?return=https%3A%2F%2Fwww.cincinnati.com%2Fstory%2Fnews%2F2019%2F09%2F15%2Fcincinnati-lawyer-joe-deters-and-mike-gmoser-mishandled-her-rape-case%2F2313853001%2F [https://perma.cc/3UYC-SNS6]; Dan Horn, *'Conflict of Interest' Pulls Prosecutor off Rape Case; Attorney General's Office Takes over After Kinsley Complaint*, CIN. ENQUIRER (Oct. 2, 2019), https://www.cincinnati.com/story/news/2019/09/30/cincinnati-lawyer-complaint-her-rape-case-ousts-prosecutors/3824581002/ [https://perma.cc/3M5Y-TZ86]. New Orleans prosecutors defended a lawsuit brought by domestic violence victims who were served with fake subpoenas and, in some cases, imprisoned for refusing to cooperate with prosecutions of their abusers. *See* Singleton v. Cannizzaro, 956 F.3d 774, 777–78 (5th Cir. 2020).

[44] On prosecutors' ordinary lack of transparency, and a new initiative to make the reasons for plea-bargaining decisions public, see BRANDON L. GARRETT ET AL., OPEN PROSECUTION (2021). For a review of theoretical and empirical research on prosecutors' exercise of discretion in selecting criminal charges, see Matt Barno & Mona Lynch, *Selecting Charges*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 35 (Ronald F. Wright et al. eds., 2021). For a review of empirical literature on plea bargaining, see Brian D. Johnson & Raquel Hernandez, *Prosecutors and Plea Bargaining*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION, *supra*, at 75.

[45] For a review of social science research on victims and prosecutors, see Amanda Konradi & Tirza Jo Ochrach-Konradi, *Victims and Prosecutors*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION, *supra* note 44, at 373.

[46] *Cf.* Wechsler, *supra* note 2, at 1080–82 (finding that law enforcement authorities in the Netherlands sometimes coerced reluctant victims to press charges even though domestic law allowed trafficking victims to decline to do so).

[47] *See, e.g.*, Konradi & Ochrach-Konradi, *supra* note 45, at 381 (citing study finding that "[w]hen victims' views about plea bargains and sentences differed from their own, prosecutors . . . said they would do what they thought was best for the case"); *cf.* Hadar Dancig-Rosenberg & Dana Pugach, *Pain, Love, and Voice: The Role of Domestic Violence Victims in Sentencing*, 18 MICH. J. GENDER & L. 423, 426 (2012) ("Traditionally, the victim's point of view is regarded only in the context of pushing for severity in sentencing.").

[48] *Cf.* Laurie S. Kohn et al., *The Victim-Informed Prosecution Project: A Quasi-Experimental Test of a Collaborative Model of Cases of Intimate Partner Violence*, 15 VIOLENCE AGAINST WOMEN 1227, 1228 (2009) (noting that the strategies that prosecutors and victims want to employ to end domestic violence often differ).

[49] *See id.* at 1228 (noting that "prosecutors' offices are notoriously overburdened").

[50] *See id.* at 1230 (noting that batterers may coerce domestic violence victims to drop charges).

interactions with victims as an opportunity to bring victims around to their views.[51] Prosecutors' websites and other public pronouncements may convey concern for victims and victims' interests but do not offer much detail about the significance of victims' preferences.[52]

Incorporating victims' views into discretionary decision-making would have implications not only for prosecutors' internal or subjective processes, but also for how prosecutors interact with victims; for example, whether and how they solicit victims' views. Prosecutors' practice of honoring, or giving weight to, victims' preferences could also have implications for other actors. Defense lawyers would have a motivation, if not an obligation, to communicate with victims about their potential testimony[53] and their preferences,[54] and then to invoke victims' helpful preferences in negotiating a plea or other disposition with prosecutors or with the court directly. Currently, defense lawyers in death penalty cases seek to communicate with victims' families about whether they would favor a life sentence over a death sentence,[55] but it is not clear that defense lawyers perceive it useful to do so in criminal cases generally.[56] If victims' views mattered to prosecutors, victims would have a stronger

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[51] *See, e.g.*, Konradi & Ochrach-Konradi, *supra* note 45, at 381 (citing studies finding that "[p]rosecutors actively worked to influence what victims thought and felt to produce courtroom behavior that would reinforce their message to the judge and jury").

[52] *See, e.g.*, SUFFOLK CNTY. DIST. ATT'Y, THE RACHAEL ROLLINS POLICY MEMO 23 (2019), https://static1.squarespace.com/static/5c671e8e2727be4ad82ff1e9/t/5d44a5f79807850001acc3d9/1564780028241/The+Rachael+Rollins+Policy+Memo..pdf [https://perma.cc/V3XK-TSZF] ("Survivor input is one of many critical factors to be considered as we seek an appropriate, proportional outcome in every case."); *Victims' Rights—Assisting Victims & Witnesses*, PRINCE GEORGE'S CNTY. STATE'S ATT'YS OFF., https://www.princegeorgescountymd.gov/1235/Victims-Rights—-Assisting-Victims-Witne [https://perma.cc/G69N-QTKL]. *But see Victim Services*, S.F. DIST. ATT'Y, https://www.sfdistrictattorney.org/victim-services/2/ [https://perma.cc/2Y6J-DGLL] (offering more detailed view of the role of victims before, during, and after a criminal prosecution).

[53] *See* Fourth Edition of *Criminal Justice Standards for the Defense Function*, AM. BAR ASS'N [hereinafter ABA *Criminal Justice Standards: Defense*], https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition [https://perma.cc/VQ7J-JKXN] (Standard 4-4.3(c); "Defense counsel or counsel's agents should seek to interview all witnesses, including seeking to interview the victim or victims . . . .").

[54] *See* Brandon P. Ruben, Opinion, *Post-pandemic, The Criminal Justice Class Can Choose Not to Return to Business as Usual*, WASH. POST (June 19, 2020, 7:00 AM), https://www.washingtonpost.com/opinions/local-opinions/post-pandemic-the-criminal-justice-class-can-choose-not-to-return-to-business-as-usual/2020/06/18/76d7c068-acb8-11ea-a9d9-a81c1a491c52_story.html [https://perma.cc/269U-6REN].

[55] *See* David McCord & Mark W. Bennett, *The Proposed Capital Penalty Phase Rules of Evidence*, 36 CARDOZO L. REV. 417, 453 (2014) ("The defense will often wish to offer the opinion of the defendant's family members or friends that the defendant should not receive a death sentence. Some jurisdictions prohibit such testimony, and some permit it." (citing People v. Blacksher, 259 P.3d 370, 428 (Cal. 2011); State v. Manning, 885 So. 2d 1044, 1098–99 (La. 2004))).

[56] *See* Ruben, *supra* note 54.

argument that they should be afforded state-funded counsel to ensure that their views were well-advised and well-reasoned.[57]

II. VICTIMS' ROLE IN MISDEMEANOR PROSECUTIONS: A MARYLAND PUBLIC DEFENDER'S EXPERIENCE

Unlike the aforementioned prosecution of Amy Cooper for falsely accusing Christian Cooper of threatening her in Central Park,[58] the typical prosecution does not make the front page of *The New York Times* or involve an Ivy League educated victim apparently well-versed in contemporary criticism of the criminal legal system. Contrary to what many might believe based on highly publicized cases or sensational media representations (like *Law and Order: Special Victims Unit*), the typical prosecution is an unceremonious proceeding in a local courtroom where an inexperienced and overworked prosecutor brings misdemeanor charges.[59] For these proceedings, prosecutors' preparation ranges from speaking a week or a few days in advance with state witnesses (i.e., police officers, victims, and third parties) to simply reading the statement of charges minutes before, or even during, trial. In this ultra-high-volume, low-profile world, prosecutors have virtually unfettered discretion, limited time and attention to devote to each matter, no scrutiny or pressure from the public or the media, and limited oversight from busy supervisors. With respect to the consideration of victims' views, this dynamic produces a process that is inconsistent at best and that most often appears entirely random.

What follows is a description of how prosecutors in one jurisdiction regard victims' views at different stages of misdemeanor cases with identifiable victims. These cases typically involve charges such as theft, assault, malicious destruction of property, trespass, burglary (i.e., unauthorized entry into a dwelling), driving under the influence that involves harm to another person or property, or unauthorized use of a motor vehicle. The examples woven throughout are from misdemeanor court cases in Prince George's County, Maryland, from September 2019 through the time of this writing. The observations are synthesized from coauthor Ruben's

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[57] *See generally* Kohn et al., *supra* note 48 (discussing the Victim-Informed Prosecution Project).

[58] *See supra* text accompanying notes 5–12.

[59] *See* KOHLER-HAUSMANN, *supra* note 15, at 109–24 (discussing resource constraints and unmanageably high caseloads in "misdemeanorland"); Stevenson & Mayson, *supra* note 14, at 768 (summarizing scholarly characterizations of the misdemeanor system including, *inter alia*, "that [it] . . . delivers 'assembly-line justice'"); NATAPOFF, *supra* note 15, at 3 (noting how the large volume of petty offenses results in "speedy dispositions"). Based on coauthor Ruben's experience, in Maryland, an individual prosecutor is routinely responsible for twenty or more cases misdemeanor cases in a day.

personal experience as a public defender, informal discussions with local prosecutors, confidential conversations with victims and defendants, and anecdotal evidence. Our descriptions are generalized to protect client confidentiality.

As an initial matter, some jurisdictional context may be useful. First, in Maryland, there is no statute affording rights to victims in misdemeanor cases. Under Article 47 of the Maryland Constitution, victims are guaranteed only the right to "be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process."[60] Moreover, in addition to at least ten other states,[61] private citizens in Maryland can initiate criminal charges by presenting a handwritten affidavit called a Citizen Complaint to a county commissioner (i.e., a municipal judicial officer).[62] Finally, we note that in misdemeanor cases in Maryland, defendants have the right to a bench trial[63] and, if they lose, a right to a de novo appeal for a jury trial.[64] Functionally, this provides defendants little incentive to accept plea offers in misdemeanor cases. Most cases, therefore, proceed to trial unless the prosecutor agrees to a resolution that does not involve a criminal conviction.

The first procedural stage where prosecutors might evaluate victims' views is at pretrial detention hearings, colloquially called bail reviews. In Prince George's County, one

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[60] MD. CONST. art. 47(a). Subsection b applies only to felony matters. It provides crime victims the right to be informed about the rights established in Article 47 and, "if practicable, to be notified of, to attend, and to be heard at a criminal justice proceeding." *Id.* at art. 47(b). In other words, in Maryland, victims in misdemeanor cases do not enjoy a right to notice, attendance, or participation in a prosecution.

[61] *See* MD. CODE ANN. CTS. & JUD. PROC. § 2-607(c)(6)(i) (West, Westlaw through Joint Resolution 1 from the 2022 Reg. Sess.); N.C. GEN. STAT. ANN. § 15A-304(b)(3) (West, Westlaw through S.L. 2021-162 of the 2021 Reg. Sess.); S.C. CODE ANN. § 22-5-115 (West, Westlaw through 2022 Act No. 125); VA. CODE ANN. § 19.2-72 (West, Westlaw through the 2022 Reg. Sess.); GA. CODE ANN. § 17-4-40 (West, Westlaw through Act 586 of the 2022 Reg. Sess.); 234 PA. CODE § 506 (West, Westlaw through Pa. Bulletin, vol. 52, no.12, dated Mar. 19, 2022); OHIO REV. CODE ANN. § 2935.09(D) (West, Westlaw through file 86 of the 134th Gen. Assemb. (2021–2022)); IDAHO CODE ANN. § 19-501 (West, Westlaw through ch. 185 of the Second Reg. Sess. of the 66th Idaho Leg.). *See generally* State v. Martineau, 808 A.2d 51 (2002) (establishing that certain minor offenses may be initiated and prosecuted by private citizens in New Hampshire); Douglas E. Beloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U. L. REV. 1135 (2007) (noting Texas law establishing right for crime victims to seek indictment with grand jury).

[62] Said differently, in Maryland and other states, a private citizen can file charges without any police involvement, and thus, there exists a system somewhat akin to the historical institution of private prosecutions to which Bennett Capers draws our attention. *See* Capers, *supra* note 26, at 1573–81. As we will discuss, however, it is not a purely private system; crucially, the state still retains control of these civilian complaint prosecutions once charges are filed.

[63] *See* MD. R. 4-302(e)(2).

[64] *See* MD. R. 7-102.

prosecutor handles almost all of the county's bail review hearings.[65] Before COVID-19 court closures, victims were allowed into the courtroom during bail reviews. But the time and location of the hearings made it impracticable for most victims to attend, and few did. As COVID-19 spurred the court to transition to remote bail proceedings, however, it became easier for victims to attend, and more did.[66]

At pretrial detention hearings, the court might learn of victims' views in one of three ways: (1) the prosecutor reads a proprosecution victim statement into the record; (2) a state agency called Pretrial Release Services submits a document indicating whether a victim is in fear for her life (without indicating the source of this information); or (3) defense counsel elicits victim testimony, or relays a victim's statement, that is helpful to the defendant.

For obvious ethical reasons, defense attorneys never introduce victims' statements that harm their clients. Conversely, at bail hearings, the prosecutor almost never introduces a victim's defendant-friendly, or potentially exculpatory, statement. Moreover, when defense attorneys introduce a victim's statements or elicit testimony that recants the allegations or tends to exculpate the defendant, the prosecutor almost never gives any weight to the statement or testimony in the prosecution's pretrial detention recommendation to the judge. This is especially true in cases of alleged DV.

It is not obvious why prosecutors at bail review hearings generally refuse to introduce or endorse victims' statements and testimony that are favorable to, or tend to exculpate, the defendant. Perhaps prosecutors believe that in an adversary process, they should leave that job to the defense. If so, that conception seems contrary to the professional norm that prosecutors should "seek justice."[67] Prosecutors may also uncritically accept the folk wisdom that, especially in DV cases, victims' recantations are typically

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[65] As Courtwatch PG (a grassroots court accountability organization), in conjunction with the Howard University School of Law Movement Lawyering Clinic, recently found, this structure is problematic because, among other reasons, having the same, single prosecutor conduct all the bail hearings imbues the process with a particularly jaded, assembly-line like quality. *See* Katie Mettler, *One Jailed, These Women Now Hold Courts Accountable—with Help from Students, Retirees, and Fiona Apple*, WASH. POST (Apr. 9, 2021, 6:00 AM), https://www.washingtonpost.com/local/public-safety/courtwatch-prince-georges/2021/04/08/dc63e064-2e96-11eb-bae0-50bb17126614_story.html [https://perma.cc/38MF-RCDG].

[66] Notably, the transition to remote hearings has also allowed advocacy groups like Courtwatch PG to much more easily observe and report on the proceedings. *See Campaign*, COURTWATCH PG, https://courtwatchpg.com/campaigns [https://perma.cc/H3BT-KZNQ].

[67] *See* MODEL RULES OF PRO. CONDUCT, r. 3.8 cmt. 1 (AM. BAR ASS'N 2021) ("A prosecutor has a responsibility of a minister of justice and not simply that of an advocate."). *See generally* Bruce A. Green, Why Should Prosecutors Seek Justice?, 26 FORDHAM URB. L.J. 626 (1999) (examining rationales for prosecutors' obligation to seek justice).

false and the product of fear or coercion.[68] Either way, prosecutors' indifference to victims' views may lead to unjust results. For example, if a victim testifies at a bail hearing that she is unafraid of the defendant, but the prosecutor (without the benefit of investigation) nevertheless argues for pretrial detention, the court will routinely detain the defendant on the ground that the defendant is a danger to that very victim. And when the victim at the bail review hearing says she will not cooperate with the prosecution, the prosecutor handling the bail review hearing routinely fails to convey this to the trial prosecutor. The result is that defendants may be incarcerated for months before the trial date, when the case is summarily dismissed because the state lacks an essential witness. This occurs even in cases initiated by civilian complaint, where there is no evidence aside from the victim-complainant's handwritten affidavit. During their pretrial detention, these defendants sometimes lose their homes, employment, and ability to care for vulnerable loved ones.

Victims' views may also come into play in the months leading up to the scheduled trial date. Often, because misdemeanor prosecutors have excessive caseloads, lack experience, or do not take misdemeanor cases seriously,[69] they wait until the eve of trial to investigate or forgo investigating entirely—again, contrary to professional norms.[70] Defense lawyers ordinarily attempt to let the trial prosecutor know well before the trial date that the victim wishes to recant her allegations or otherwise does not wish to proceed, but prosecutors rarely dismiss the case at this stage, and least of all in DV cases. Although prosecutors do not appear to solicit victims' views, they sometimes consent to transfer a pretrial detainee directly to an in-patient rehabilitation facility if the defense lawyer lets the prosecutor know that the victim prefers that the defendant receive treatment instead of incarceration. Even then, prosecutors generally refuse to dismiss the case.[71]

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[68] *See e.g.*, *Domestic Violence: Reasons Why Battered Victims Stay with Their Batterers*, L.A. POLICE DEP'T, https://lapdonline.org/get_informed/content_basic_view/8877 [https://perma.cc/LM2N-L8BN].

[69] *See also* KOHLER-HAUSMANN, *supra* note 15, at 120 (noting a prosecution office's push to get newer prosecutors "to start thinking about misdemeanors a lot more seriously").

[70] *See* ABA *Criminal Justice Standards: Prosecution*, *supra* note 4 (Standard 3-1.9(a); "The prosecutor should act with diligence and promptness to investigate, litigate, and dispose of criminal charges . . . .").

[71] In one example, at the request of the victim expressed through the defense attorney to the prosecutor, a defendant was released to an in-patient program and successfully completed a six-month course of rehabilitation. A year later, however, over the victim's objection, the prosecutor still refused to dismiss the matter. Worse still, the pending case—which the prosecutor could not prove without the victim's cooperation—was an aggravating factor in a separate proceeding for the defendant.

When private citizens initiate criminal charges via civilian complaint, the prosecutors' office is more likely to accede to victims' preferences. The office has a stated policy of screening cases and dismissing those where the complainant misses an appointment,[72] presumably because a failure to appear expresses the complainant's indifference to the prosecution. But misdemeanor prosecutions initiated by civilian complainants are routinely brought to trial without pre-screening, perhaps because prosecutors in the county regard the screening process as an unnecessary burden. Other than in DV cases, if the victim conveys that she wants to dismiss the case or seek only restitution, prosecutors often dismiss the case or accept a resolution that avoids a trial or conviction.[73] Prosecutors honor victims' preferences less often when police officers initiate charges. In these cases, the prosecutors' office does not appear to have a policy or procedure for ascertaining and taking account of victims' preferences, perhaps because prosecutors feel compelled to defer to the judgments of the police.[74]

Prosecutors have another opportunity to take account of victims' views and preferences at the trial date itself. Maryland prosecutors might resolve the case in various ways aside from prosecuting it or dismissing it outright, and, at least in theory, victims' preferences might be relevant. Prosecutors can refer a case to drug court or mental health court. Alternatively, they may place a case on a "stet" (or, inactive) docket,[75] which is usually done to give a defendant an opportunity to comply with some type of condition, such as community service or anger management, before the prosecutor ultimately dismisses the case. In addition, the Maryland Courts' website endorses community conferencing and restorative justice programs,[76] although there is not yet a practice of referring cases to such programs, at least in Prince George's County.

Other than in DV cases, which we address separately below, the prosecutors' office responds in any of various ways when the

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[72] Prince George's County State's Attorney's Office, *Citizen Complaints*, PRINCE GEORGE CNTY., MD., https://www.princegeorgescountymd.gov/1261/Citizen-Complaints [https://perma.cc/6XSH-Q7EY].

[73] Prosecutors may be more willing to give victim views dispositive weight in matters initiated by civilian complaint because, as no agent of the state is involved (except for the commissioner that approves the victim's affidavit), they view these charges as more akin to a private prosecution. This is not necessarily a sound distinction, however, because often times in misdemeanor court, an application for a statement of charges that a police officer files is little more than rank hearsay relaying the officer's version of an alleged victim's statements.

[74] Indeed, it is not uncommon for police witnesses to express anger in open court if a prosecutor decides not to proceed on a matter which they have investigated and for which they have authored an application for a statement of charges.

[75] MD. R. 4-248.

[76] *Community Conferencing and Restorative Programs in Maryland*, MD. CTS. (June 25, 2021), https://www.courts.state.md.us/sites/default/files/import/macro/pdfs/communityconferencingrestorativeprogramsmd.pdf [https://perma.cc/X6JE-NF59].

victim apparently does not want the case to be prosecuted. If the victim is an essential witness but is absent from court and has been unreachable, the prosecutor may dismiss the case rather than asking the court to continue the case to a future date when the victim may become available. Prosecutors often attempt to proceed in the victim's absence, however, when they believe they can win a conviction with testimony from police officers and other evidence. That is, even if it is assumed the victim is uninterested in pursuing the prosecution, the prosecutor will sometimes go forward. In these cases, judges often informally pressure prosecutors to drop the case by asking questions to the effect of "are you *sure* you can prove this case without the victim?" or "how about, because the victim is not here, placing this case on the inactive docket?" In this way, judges signal skepticism about the adequacy of the prosecution's proof or about whether it is an appropriate use of prosecutorial and judicial resources to conduct a misdemeanor trial in which the victim evidently has no interest. A misdemeanor docket may have as many as thirty cases scheduled in an afternoon, and if one goes to trial, the others must be rescheduled, which is especially burdensome given the enormous COVID-19-induced backlogs.

Alternatively, the victim may appear at the trial date but not understand what is occurring and express no preferences. Prosecutors rarely inform these victims of the range of possible resolutions. Prosecutors also attempt to shield victims from defense attorneys who want to inform them of the alternatives by interrupting defense attorneys and sternly emphasizing to victims that they are not obligated to speak with defense attorneys, often with an implication that they should *not* speak with defense attorneys.[77] When victims appear in court, they have almost never been counseled about the range of disposition options that are available, and prosecutors almost always attempt to leverage this information asymmetry to persuade victims to proceed with a trial.[78]

Here again, if judges perceive, either independently or at defense counsel's urging, that the victim would be satisfied with an alternative to a criminal conviction, judges often pressure the prosecutor to honor the victim's preference. For example, when the defense attorney represents that the victim does not wish to proceed

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[77] Inexperienced prosecutors sometimes suggest or outright state that it is inappropriate for defense counsel to speak with victims, even if victims have shown no indication that they are unwilling to speak with a defense attorney.

[78] Reasons for this attitude may vary. One reason is the culture of the prosecutor's office examined herein. In this office, for example, there is a visible, public chart that lauds the "trial dog of the month," i.e., the assistant prosecutor who takes the most cases to trial in a given month. A second related reason is that many misdemeanor prosecutors, who are generally young and inexperienced, view one of their goals in the misdemeanor unit as to "gain trial experience."

to trial, judges sometimes call the victim up to the bench, describe potential resolutions aside from a trial, and ask the victims which would satisfy them. If a victim indicates that she would be satisfied with a dismissal, or with the judge placing the case on the inactive docket with conditions, the judge typically encourages the prosecutor to take that approach. Wholly apart from a judge's interest in conserving resources, they may see no good reason to prosecute misdemeanor cases involving conflicts between individuals when the victims themselves have no interest in, or even disfavor, criminal punishment.[79]

Sometimes victims appear on the scheduled trial date and state explicitly that they do not want to move forward with charges. Their reasons are not always clear. The victim, having called the police or filed a civilian complaint, may still seek assistance but may believe that a misdemeanor prosecution is excessive and may do more harm than good. Most victims in misdemeanor cases have a level of concern for the offenders, whether that is because the offenders are family members, friends, or community members, or because the victim feels a level of compassion for the accused as a fellow human being.

Prosecutors sometimes respond to victims' preferences by deferring or dismissing charges rather than bringing them to trial. If the charge involves a property crime, prosecutors are often willing to put the case on the inactive docket with the condition that the defendant pay restitution. Likewise, if the charge involves nonintimate partners arguing verbally or lightly physically, the prosecutor will often agree to dismiss the case or place it on the inactive docket if the parties agree to stay away from one another.

If the alleged misdemeanor is more serious, however, trial prosecutors often proceed against the victim's wishes. Prosecutors have different views of what "more serious" means. One prosecutor's test is whether the case involves blood or bruising. Another ignored a victim's wish not to see the defendant incarcerated, because the prosecutor characterized the offense as a "potential rape," even though the defendant was not charged with a sex offense. Where defense counsel indicates that prosecutors have either misunderstood or misrepresented the victim's preferences to resolve the case without a trial, judges often address prosecutors in the courtroom but off the record in an effort to clarify the victim's preferences and encourage a noncarceral resolution, where appropriate.

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[79] Put differently, whether consciously or not, judges in misdemeanor matters may view the "conflicts as property" of the parties, as Nils Christie famously described it. *See* Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 7 (1977).

Even in misdemeanor court, prosecutors view DV as sui generis. In this Maryland prosecutor's office, as in many across the nation, there is a separate unit dedicated exclusively to DV misdemeanor cases. That is because, even when classified as a misdemeanor, prosecutors' offices see DV as a particularly serious crime and perceive that its victims are especially vulnerable.[80] Consequently, DV victims are treated differently from others.

Even when the DV prosecution is predicated solely on a handwritten civilian complaint, the DV prosecutor almost always recommends pretrial detention, which the court almost always orders. This is true even where the victim says that her prior allegations were false or not completely true, that she wants the defendant to be released, and that she is not in fear of the defendant. In the investigation phase leading to trial, prosecutors typically continue to ignore victims' recantations and desires to dismiss the charges, even if it seems inevitable that the charges will ultimately be dismissed because the victim is uncooperative.

Prosecutors sometimes compel misdemeanor DV victims to come to court against their will. This occurs when victims say they do not wish to come to court for reasons ranging from: their allegations were false, they want to seek a private resolution of the matter, or they will be retraumatized by coming back into contact with the defendant. Often, DV victims ask defense lawyers whether they must come to court. To compel the victim's appearance, a Maryland prosecutor must arrange to serve the victim with a subpoena—a mailed summons is not sufficient.[81] But when defense lawyers inform victims of this law, prosecutors often accuse them of unethical behavior. Some prosecutors have victims personally served and threaten their arrest (body attachment[82]) if they do not show up at trial.

Ultimately, this Maryland prosecutor's office is probably typical in its failure to articulate or implement office-wide policies about whether and how to account for misdemeanor victims' preferences. Prosecutors make decisions on an ad hoc basis in wildly different ways. Those who take account of victims' views do not explain why—whether out of respect for victims, to curry favor

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[80] Indeed, one prosecutor stated that in DV cases, she perceived herself as "a zealous advocate for the victims and the community" in addition to a minister of justice. *See also* Leigh Goodmark, *The Impact of Prosecutorial Misconduct, Overreach, and Misuse of Discretion on Gender Violence Victims*, 123 DICK. L. REV. 627, 634–35 (2019) (describing various motivations of prosecutors in gender violence cases).

[81] *See* MD. R. 4-266.

[82] MD. R. 1-202(c) ("'Body attachment' means a written order issued by a court directing a sheriff or peace officer to take custody of and bring before the court (1) a witness who fails to comply with a subpoena, (2) a material witness in a criminal action, or (3) a party in a civil action who fails to comply with an order of court.").

with judges, or to lighten their own caseloads. In DV cases, which are treated as a unique category, prosecutors are affirmatively hostile to victims' preferences on the assumption that the cases are more serious, and that DV victims are especially vulnerable and incapable of assessing what is in their own best interest.

III. WHY VICTIMS' PREFERENCES FOR LENIENCY SHOULD MATTER IN MISDEMEANOR CASES AND SOME PRACTICAL IMPLICATIONS

There are reasons why, even in the most serious felony cases, prosecutors should consult with victims, as victims' rights laws require in some jurisdictions, and why prosecutors should then take account of victims' views and preferences about how the matter should be handled. But our focus here is on misdemeanor cases, which comprise the majority of criminal cases. Section III.A sets out our argument that, particularly in misdemeanor cases, prosecutors should ordinarily honor victims' informed, reasoned, and uncoerced preferences for alternatives to prosecution. We argue in Section III.B that honoring victims' preferences for noncarceral resolutions is consistent with the paramount principle that prosecutors serve the public interest, not exclusively the interests of the victim or other individuals. And in Section III.C, we address some of the practical implications of our argument. Our ultimate objective is to encourage public, professional, and academic discussion of an important question of prosecutorial discretion that has not been adequately considered in the professional literature, whether by prosecutors and other practitioners or by academics.

A. The Significance of Victims' Views in Misdemeanor Cases

Some may think it a foregone conclusion that victims' views in misdemeanor cases should not matter. Some may believe that misdemeanors should not be prosecuted at all.[83] Conversely, others may believe that all readily provable criminal offenses should be prosecuted.[84] Both views, however, are out of the mainstream. Although a handful of prosecutors have categorically declined to prosecute certain offenses,[85] none has

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[83] *See, e.g.*, Vida Johnson et al., Opinion, *Misdemeanor Court Has Been Closed for a Year. Keep It that Way.*, WASH. POST (Mar. 4, 2021, 10:41 AM), https://www.washingtonpost.com/opinions/2021/03/04/misdemeanor-court-has-been-closed-year-keep-it-that-way/ [https://perma.cc/M5R4-JVXU].

[84] Tom Cotton, *Our Under-Incarceration Problem*, NAT'L REV. (Aug. 11, 2021, 10:49 AM), https://www.nationalreview.com/2021/08/our-under-incarceration-problem/ (last visited May 18, 2022).

[85] *See* articles cited *supra* note 33.

declined to prosecute all or most misdemeanors. And we know of no US prosecutor who is committed to prosecuting every offender when there is enough evidence to do so successfully. In this country, legislatures overcriminalize with the expectation that prosecutors will make choices about which guilty, convictable individuals to prosecute.[86] Prosecutorial discretion is a traditional feature of public prosecution: Prosecutors have traditionally had authority to decline to prosecute, or to dismiss prosecutions of, readily provable cases.[87] In recent years, courts and legislatures have created alternatives to incarceration precisely so that cases can be diverted out of the criminal process where courts or prosecutors consider it appropriate and alleged offenders consent.[88] The hard question is how prosecutors should exercise their discretion.

Our argument is that mainstream prosecutors, in the conventional exercise of charging discretion, should solicit and take account of victims' views. Especially in misdemeanor cases with identifiable victims, prosecutors who would otherwise pursue criminal charges should generally honor a victim's reasoned preference for an alternative to prosecution, including by declining or dismissing charges. In some felony cases, such as arson, murder, and child sexual abuse cases where a competent adult offender is provably guilty, the case will obviously be prosecuted regardless of victims' contrary preferences. In cases of such serious wrongdoing, prosecution serves the paramount public interest in incapacitating the dangerous offender to ensure public safety, in general and specific deterrence, and in retribution.[89] But the justifications for disregarding victims' preferences for alternatives to prosecution are rarely compelling in misdemeanor cases, which is our focus

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[86] *See* Green, *supra* note 30, at 599.

[87] Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1249–50 (2020). For a critique of the drug court movement, see generally Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595 (2016).

[88] *See, e.g.*, Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717, 727 (2008) (describing the primary goal of drug treatment courts as "finding solutions that will be 'mutually beneficial to the defendant, the larger community, and . . . [the] victims'" (alterations in original) (quoting William H. Simon, *Criminal Defenders and Community Justice: the Drug Court Example*, 40 AM. CRIM. L. REV. 1595, 1596 (2003))).

[89] The list of serious felonies, in which prosecutors might decline to honor a victim's reasoned preference to drop the charges, is obviously longer. And in some types of cases, prosecutors might also doubt the victim's ability to formulate a reasoned view. Sexual assaults of children are an obvious example. That said, the prosecutor should still take account of how the prosecution will affect the victim. The implications for the victim's well-being should influence prosecutors' plea-bargaining decisions and decisions whether to call the victim as a witness, for example. If testifying will harm the victim, as may be particularly likely in a case with a child victim, or in a sexual assault case, that is a weighty consideration independent of the victim's preference.

here, and these justifications may be less compelling in lower-level felony cases as well.[90]

Most obviously, prosecutors should weed out both misdemeanor and felony cases when victims' input raises doubts about the alleged offender's guilt or undermines the ability to secure a conviction. These are ethical imperatives that most US prosecutors would publicly acknowledge, regardless of whether prosecutors adhere to them in practice.[91] We assume that in Prince George's County, when prosecutors dismiss some cases in which victims recant or are uncooperative, they do so based on these principles.

More controversially, we think that when victims express an informed, reasoned, and uncoerced preference to drop a misdemeanor case or to seek a noncarceral alternative, such as restorative justice, restitution, or drug treatment for the misdemeanor offender, prosecutors should ordinarily honor that preference rather than initiating or pursuing a prosecution. For example, in Amy Cooper's case,[92] though an atypical one, the prosecutor's office should have simply acknowledged that, regardless of whether it might otherwise have gone forward on the misdemeanor charge, it was deferring to Christian Cooper's well-reasoned, well-motivated preference that charges be dropped.

For those who identify philosophically with the progressive prosecutor movement,[93] the reasons might be less nuanced:

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[90] *See generally* Bazelon & Green, *supra* note 20, at 293 (advocating restorative justice as an alternative to prosecution in certain sexual assault cases). Even in more serious cases, prosecutors should elicit and consider victims' preferences, at least with respect to sentencing, and perhaps even with respect to charging decisions (especially if a prosecutor is considering charges that carry mandatory minimum sentences). In 2019, for example, a Manhattan district attorney heavily solicited victim input in a murder case. While the victim's preferences as to a just outcome did not impact the decision to prosecute, they ultimately led to the offender engaging in a restorative justice process with the victim's family, being allowed to plead guilty to manslaughter rather than being prosecuted for murder, and receiving a relatively lenient sentence. *See* Margaret Hetherman, *Manhattan DA's First Restorative Justice Sentencing Helps Victim's Family Find Peace*, GOTHAMIST (Dec. 9, 2019, 2:59 PM), https://gothamist.com/news/manhattan-das-first-restorative-justice-sentencing-helps-victims-family-find-peace [https://perma.cc/TCY9-MVY6].

[91] ABA *Criminal Justice Standards: Prosecution*, *supra* note 4 (Standard 3-4.3(a); "A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.").

[92] *See supra* text accompanying notes 5–12.

[93] Although recently elected reform-minded prosecutors have been identified as "progressive prosecutors," in contrast to traditional "tough-on-crime" prosecutors, it has been noted that there is no fixed definition. *See* Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1417–18 (2021) (arguing that "'progressive prosecutor' means many different things to many different people"). Among the policies that progressive prosecutors have in common, however, are "declining low-level charges" and "increasing the use of diversion programs" with an eye toward "end[ing] mass incarceration" and "restor[ing] fairness to the criminal system." Darcy Covert, *Transforming the Progressive Prosecutor*

victims' preferences for leniency or an alternative resolution (such as restitution or restorative justice) should be honored because the American criminal legal system is too vast, too punitive, and often ineffective,[94] and misdemeanor prosecutions are largely to blame.[95] Honoring victims' preferences to resolve misdemeanor cases outside the traditional carceral process will promote efficiency, humanity, and effectiveness in our criminal legal system.

But that said, we think that, at least in misdemeanor cases, even mainstream or traditional prosecutors who might otherwise be inclined toward a more punitive approach should give significant weight, and ordinarily honor, victims' reasoned preferences for a noncarceral disposition. This is true for a combination of reasons.

First, in misdemeanor cases, it is unnecessary to prosecute all or most provable cases to achieve the ordinary ends of criminal justice. For example, there is no evidence that a greater level of general deterrence will be achieved if a higher percentage of misdemeanor cases is prosecuted.[96] Less expensive and less punitive alternatives to incarceration should generally be favored because the state should use the least amount of coercion

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Movement, 2021 WIS. L. REV. 187, 188–92; *see also* Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 746–47 (2020) (discussing "progressive prosecutors' controversial policies to refrain from prosecuting certain low-level offenses and to divert certain offenders, particularly non-violent offenders, out of the conventional criminal process and into rehabilitative services"). For positive accounts of the movement, see generally EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019); Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707 (2020); Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1 (2019); David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647 (2017); and Abbe Smith, *The Prosecutors I Like: A Very Short Essay*, 16 OHIO ST. J. CRIM. L. 411 (2019). For a view that the reforms do not go far enough, see Covert, *supra*.

[94] *See, e.g.*, Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (2021), https://www.prisonpolicy.org/global/2021.html [https://perma.cc/3FLY-2PQ3] (demonstrating that twenty-four states in the United States, viewed independently, "would have the highest incarceration rate in the world"); *see also* Brandon P. Ruben, *Police Accountability Reform is Insufficient. To Save Lives, Money, and Time, States Must Diversify Public Safety Services*, BROOKINGS (Dec. 10, 2020), https://www.brookings.edu/blog/how-we-rise/2020/12/10/police-accountability-reform-is-insufficient-to-save-lives-money-and-time-states-must-diversify-public-safety-services/ [https://perma.cc/X62M-RR42] (arguing that, especially in misdemeanor cases, the process of policing, arrest, prosecution, and incarceration "is inhumane, inefficient, and ineffective").

[95] *See* KOHLER-HAUSMANN, *supra* note 15, at 1–22; *see also* Stevenson & Mayson, *supra* note 14, at 735–36; NATAPOFF, *supra* note 15, at 1313. *But see* JOHN PFAFF, LOCKED IN (2017) (arguing that long sentences for violent crime have been the driver of mass incarceration, as distinct from mass criminalization).

[96] In fact, one recent study found that not prosecuting misdemeanors leads to reductions in recidivism. *See* Agan et al., *supra* note 15.

necessary. In the misdemeanor context, alternatives are often available to protect the victim and the public generally, and to deter the offender from future wrongdoing. And to the extent that prosecutions express the public's condemnation of wrongful conduct, the point is amply made by the vast volume of misdemeanor prosecutions that will undoubtedly remain.

Second, in these cases, although the public has many interests which are likely to point in different directions, a significant public interest is to vindicate the victim's interests. The law assumes that victims' ordinary interest is in retribution or restitution and therefore weighs in favor of prosecution.[97] But those ordinary assumptions may be wrong in individual cases, if not in general. When the victim is not interested in a prosecution, the public interest in prosecuting becomes less compelling as compared with interests that point toward a noncarceral resolution.

Third, to the extent that varied public interests are at stake, victims will often have expertise in identifying and assessing some of those interests—and possibly greater expertise than the prosecutors. That is because victims will often be more knowledgeable about how various resolutions will affect them, the offender, and the community, to which prosecutors are often a stranger. Prosecutors often make decisions based on folk wisdom, stereotypes, or generalities.[98] Victims often can express preferences based on more specific information and experience.

Fourth, a significant public interest at stake in cases involving individual victims is in the victims' wellbeing. Wholly apart from victims' ordinarily greater ability to judge how a prosecution will affect their own psychological or physical wellbeing, the decision whether to honor victims' preferences, whatever those preferences may be, has implications for their wellbeing. Victims' sense of autonomy, agency, and dignity is typically eroded by the offense against their person or property, and having their

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[97] *See* Kennedy v. Louisiana, 554 U.S. 407, 442 (2008) (discussing retribution as an objective of criminal law and noting that "the goal of retribution, which reflects society's and the victim's interests [is] in seeing that the offender is repaid for the hurt he caused"); *see also supra* note 36 and accompanying text.

[98] *See, e.g.*, Olwyn Conway, *Are There Stories Prosecutors Shouldn't Tell?: The Duty to Avoid Racialized Trial Narratives*, 98 DENV. L. REV. 457 (2021) (discussing the role of racial stereotypes in prosecutors' trial narratives); Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 889 (noting that in making discretionary decisions in a drug courier case against an immigrant woman, the prosecutor may inappropriately rely on "stereotypical assumptions . . . either that women in drug operations play a minor role or are exploited or coerced into participation or that immigrant drug couriers are somehow more blameworthy than drug couriers who are U.S. citizens"); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012) (discussing the influence of racial stereotyping on various prosecutorial discretionary decisions).

preferences rejected replicates this assault in a manner that victims may even experience as revictimization.[99] Conversely, respecting victims' informed wishes, whatever they are, is more likely to be restorative.

Fifth, giving victims greater influence may encourage other victims to report crimes. At present, most crimes involving individual victims are substantially underreported.[100] That is a problem, because it denies the prosecution any opportunity to vindicate the relevant public interests. The reasons why many victims do not report undoubtedly vary. But one likely reason is victims' awareness that once the crime is reported, the case is out of their hands.[101] If prosecutors were to adopt, implement, and publicize policies that give substantial weight to victims' preferences, victims would presumably be more willing to come forward.

B. Respecting Victims' Preference for Leniency Serves the Public Interest

We recognize a significant counterargument—namely, that prosecutors are elected or appointed to serve the public interest, not to represent victims as clients,[102] and that serving the public interest generally calls for exercising discretion in consistent, principled ways.[103] While we generally accept this principle, however, it does not follow that victims' views should be minimized or ignored.

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[99] *See* Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. CRIM. L. 67, 70–71 (2015); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1865 (1996). A survey of current and former prosecutors, and others who interact with crime victims suggested, however, that prosecutors are unlikely to acknowledge that victims may feel revictimized by prosecutors, even when prosecutors compel them to participate in criminal proceedings. *See* Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 415 (2001).

[100] *See* Bazelon & Green, *supra* note 20, at 309 n.72 (noting that "[m]any crimes go unreported, including almost half of the crimes of gun violence and more than half of property crimes," and that "[r]ape and sexual assault are among the most under-reported crimes").

[101] *Cf.* Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Law Policy*, 2004 WIS. L. REV. 1657, 1681 ("No-drop prosecutions may have the unintended consequence of discouraging victims from reporting domestic violence incidents . . . .").

[102] *See* ABA *Criminal Justice Standards: Prosecution*, *supra* note 4 (Standard 3-1.3; "The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim.").

[103] *See* Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 589, 604 (2019) (discussing "the understanding that prosecutors should not use their power arbitrarily and, therefore, similarly situated people should be treated in roughly comparable ways").

First, from prosecutors' perspectives, prosecutors serve the public interest in various ways by taking victims' preferences, insights, and interests into account.[104] We assume that is the premise of laws requiring prosecutors to meet with victims before making certain key decisions.[105] The public interest in exercising informed discretion is enhanced by considering victims' insights. The public interest in protecting and promoting victims' wellbeing is advanced by respecting victims' reasoned preferences and is undermined by ignoring their preferences. The broader public interest in effective law enforcement is promoted by reducing a substantial disincentive to victims' reporting crimes. Therefore, honoring victims' preferences does not abdicate the prosecutor's responsibility to serve the public, and to not treat the victim as a client. Rather, exercising prosecutorial discretion in favor of victims' informed, reasoned preferences serves the underlying public interests to a significant degree.

Second, the disparities that result when offenders in different cases are treated differently because of the victims' disparate preferences do not offend the general principle that similarly situated defendants should be treated in similar ways. If victims have different preferences, then the offenders' situations differ in a relevant way. Sometimes the victims' different reactions will reflect differences in the offenders' level of moral culpability or amenability to rehabilitation. But even if the victims differ only in their criminal justice philosophies or their willingness to forgive, the differences are legitimate, not arbitrary, as the implementation of restorative justice programs reflects. It is not uncommon for prosecutors' decisions to differ based on considerations unrelated to offenders' moral culpability—for example, based on whether a victim of violence dies or survives, on the cost of a prosecution, or on whether the defendant who is willing to be cooperative has useful information. What victims want is another relevant consideration.

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[104] *See, e.g.*, Kirsch, *supra* note 99, at 413–15 (reporting surveyed prosecutors' interest in accounting for the needs and circumstances of individual victims on a case-by-case basis).

[105] Others may disagree, however, viewing this simply as a chance for victims to be informed or for them to engage in self-expression while prosecutors express interest. *See, e.g.*, Hon. Geoffrey Flatman & Dr. Mirko Bagaric, *The Victim and the Prosecutor: The Relevance of Victims in Prosecution Decision Making*, 6 DEAKIN L. REV. 238, 252 (2001) ("The prosecutorial obligation towards victims is best discharged by providing them with thorough information about the criminal trial process at the earliest possible stage of the proceedings."); William T. Pizzi, *Victims' Rights: Rethinking Our "Adversary System,"* 1999 UTAH L. REV. 349, 353 ("[E]ven if it is a rare case in which the victim's opposition to a plea agreement is likely to alter the proposed plea bargain, it is still very important that the victim be heard.").

This is not to say that victims' preferences should be reflexively honored regardless of their motivations or reasons. If victims' views are misinformed because they do not know the available alternatives to prosecution, or because they misunderstand the trial process, then incorporating their preferences may be misaligned. Honoring their views might promote their sense of agency, but it would be better promoted by providing relevant information and then eliciting better informed views. If victims' views are influenced by fear or outside pressure, it might be preferable to seek honestly to assuage their fears or, if possible, to enhance their autonomy by protecting them so that they can express unpressured views. If the reasons for victims' preferences are socially repugnant, the public interest might be best served by rejecting them. For example, if a shopkeeper's preferences about which shoplifters to prosecute are based on racial distinctions or other illegitimately discriminatory criteria, prosecutors should not honor those preferences.

Nor is this to say that special weight should be ascribed to victims' preferences that offenders be prosecuted and incarcerated. The criminal process is already weighted toward prosecution. The assumption built into the process is that victims want, and will be best served by, prosecutions and retributive punishment.[106] Many prosecutors proceed from that assumption as well.[107] If anything, prosecutors should check their ordinary impulse to use victims' preferences to bolster their own retributive impulses,[108] because otherwise the risk is that prosecutors will pressure victims to come around to prosecutors' views, misinform them, or misconstrue or ignore their legitimate preferences. Giving weight to victims' preference for prosecution would essentially entail double- or triple-counting. The state's use of its coercive power should be limited to cases where there is no feasible alternative. When prosecutors are otherwise convinced that a prosecution is unwarranted, they should not be

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[106] *Cf.* Henderson, *supra* note 19, at 994 ("Recent victim's rights proposals appear to be driven . . . by the retaliatory view of retribution . . . . The victim who participates in sentencing might further the ends of the retribution-as-vengeance theory by providing specific and graphic information about the crime—information that will provoke outrage.").

[107] *Cf.* Flatman & Bagaric, *supra* note 105, at 239 ("[V]ictims are—with the exception of accused—the most important stakeholders in the criminal justice process. The crime often has stripped them of much that is meaningful in their lives and they, understandably, feel that a grave injustice has been perpetrated on them. Hence they often have very strong and forceful views on broad matters relating to the progress of the criminal proceedings.").

[108] *Cf.* Susan Bandes, *Victim Standing*, 1999 UTAH L. REV. 331, 338 (1999) (noting the assumption that, in death penalty cases, prosecutors ignore victims' preferences that do not advance prosecutors' retributive agendas).

deterred by victims' retributive preferences, because these would have been assumed in the first place.

Finally, prosecutors should not use victims' desire for alternatives to prosecution, such as that the offender undergo treatment, as a justification for "net widening" or for initiating a prosecution or threatening to seek incarceration to pressure an alleged offender to accept an alternative, less punitive, outcome. There is a risk, to be avoided, that prosecutors may employ excessive power even when they implement victims' preferences for nonpunitive outcomes, because prosecutors' offices may view the threat of prosecution as the appropriate means toward nonpunitive ends. One example is how prosecutors' offices deal with "bad check" cases.[109] If not for some victims' contrary preferences, many prosecutors' offices would not prosecute consumers who deliberately wrote checks against insufficient funds. Prosecutors would view this as a problem for which debt collectors should seek civil remedies. To serve debt collectors, however, many prosecutors' offices adopted the practice of threatening to prosecute debtors who bounced checks if they do not make restitution and take classes in managing their finances. No doubt, prosecutors' motivation is not only to accommodate victims' preferences but also to receive a promised share of debtors' tuition payments. The result has been to expand the number of individuals subject to prosecutorial power; further, in some cases, prosecutors presumably initiate criminal charges against debtors who resist debt collectors' demands, to give veracity to their threats. Like most exercises of prosecutorial discretion, similar uses of prosecutorial power also occur on an ad hoc, unpublicized basis when prosecutors threaten or initiate prosecutions of offenders to pressure them to accept a noncarceral outcome that prosecutors consider more measured.[110]

C. Implications of Victims' Preference for Noncarceral Alternatives

Given our view that prosecutors who are otherwise inclined to prosecute misdemeanor cases should generally honor victims' informed preferences for noncarceral resolutions, it follows that prosecutors should ascertain victims' views after ensuring that victims are adequately informed about the

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[109] See Green & Roiphe, *supra* note 93, at 590–95, 623–25, from which the following description is taken.

[110] For discussions of the danger that diversion programs will result in "net-widening," see Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Reform*, 79 MINN. L. REV. 965, 1095–96 (1995).

criminal process and available alternatives.[111] It makes no sense for prosecutors to keep victims in the dark and then, when victims express preferences for a disposition not involving a criminal conviction, dismiss the victims' preferences as uninformed or mistaken.[112]

Obviously, we regard the Prince George's County prosecutors' approach as deficient in many respects. That office makes little effort to inform victims of alternative dispositions and often impedes defense lawyers' efforts to do so. Rather than endeavoring to ascertain victims' genuine preferences, the office relies on assumptions that may or may not be correct—for example, that complainants' failure to meet with the prosecutors or to appear in court when the trial is scheduled means that they no longer favor a prosecution, when it could mean so many other things. And, of course, the office routinely rejects victims' apparent preferences in favor of the apparent preferences of the police (while capitulating to the apparent preferences of trial judges).

If prosecutors' offices accept our argument that, rather than prosecuting and seeking to punish offenders in misdemeanor cases, they should strongly consider and generally honor victims' informed preferences for a noncarceral disposition, then it follows that these offices should develop and implement processes to ascertain victims' views and to ensure that their views are informed by an understanding of the criminal process and the alternatives it presents. Further, prosecutors should elicit victims' views early in the process and, if the process continues, at subsequent stages, rather than waiting until the scheduled trial date. Continuing prosecutions unnecessarily serves no good purpose—not for victims whose views are initially disregarded; not for defendants who may be unnecessarily jailed, put to needless anxiety, and delayed in gaining access to rehabilitative alternatives; and not for the public and public institutions that are put to unnecessary expense.

Prosecutors who interact with victims at the pretrial stage, to make an independent judgment about the defendant's guilt and the strength of the evidence, could assume the additional responsibility for ascertaining what victims want. Alternatively, given prosecutors' extremely high caseloads, it might be inefficient for each individual prosecutor to educate and solicit the views of

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[111] *See* Hao Quang Nguyen, *Progressive Prosecution: It's Here, But Now What?*, 46 MITCHELL HAMLINE L. REV. 325, 332–33 (2020) (asserting that to exercise charging discretion fairly and appropriately, a prosecutor must ascertain information from the victim).

[112] *But cf.* Leo Zaibert, *The Ideal Victim*, 28 PACE L. REV. 885, 887 (2008) ("The main shortcoming of affording any role, let alone a very important one, to victims' desires, is, quite simply, that sometimes victims are mistaken (i.e., sometimes what they desire is unfair).").

the victims in their cases, beginning at the bail hearing, which can take place just hours after an arrest. It may be preferable to assign this responsibility to staff, who need not be lawyers, and whose principal job would be to inform victims throughout the process about all the available options. Although interviewing and preparing victims to testify is a job for lawyers, it is not unusual for prosecutors' offices to assign substantial responsibility for communicating with victims to nonlawyer staff.

In misdemeanor DV cases in particular, prosecutors should devote special attention to informing victims of the range of options and soliciting their views. As discussed, prosecutors are often affirmatively hostile to victims' preferences in misdemeanor DV cases.[113] This hostility often reflects the assumptions that DV cases are especially serious and that DV victims are too vulnerable to form independent, reasoned views.[114] The first assumption is questionable because misdemeanor cases, by nature, are defined as less serious within the context of the criminal legal system. Moreover, we are unaware of any compelling empirical support for the notion that DV victims are generally incapable of making rational decisions because they are under the abusers' thrall.[115]

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[113] *See supra* note 80 and accompanying text.

[114] *See supra* note 80 and accompanying text.

[115] *Cf.* Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much Is Too Much?*, 22 BERKELEY J. GENDER L. & JUST. 2, 14–25 (2007) (describing various pressures to which DV victims may be subject and explaining that these pressures vary in degree in kinds). Notably, lawyers for women who are victims of domestic violence generally assume that their clients are capable of making adequately reasoned decisions regarding the representation. *See, e.g.*, Camille Carey & Robert A. Solomon, *Impossible Choices: Balancing Safety and Security in Domestic Violence Representation*, 21 CLINICAL L. REV. 201, 252 (2014) (trusting client's ability and judgment to that her husband should not be incarcerated for domestic violence).

That said, we recognize that domestic violence cases present particular complexities, including the possibility that others pressure DV victims not to cooperate with the prosecution. We take the view that prosecutors should generally honor victims' informed, reasoned preferences in misdemeanor cases when they are *uncoerced* because we recognize that victims, and particularly DV victims, may express a preference to dismiss charges under pressure from the offender, family members or others. But our point is that since not all DV cases are alike, prosecutors should get to know the particular victim's circumstances, not rely on assumptions. Additionally, we call for giving weight to victims' *reasoned* preferences. A victim's unwillingness to cooperate with the prosecution, although influenced by trauma or misperceived self-interest, is not necessarily unreasoned. Simply deferring to the victim's preference is preferable to putting the victim in a position where she perceives that the only way to avoid a prosecution is to recant truthful testimony. *Cf.* Njeri Mathis Rutledge, *Turning a Blind Eye: Perjury in Domestic Violence Cases*, 39 N.M. L. REV. 149, 165–73 (2009) (explaining that DV victims may be motivated by trauma or self-interest to recant truthful accusations).

Finally, we propose that prosecutors should *generally*, but not invariably, honor victims' reasoned, informed, and uncoerced preferences because we recognize that, even in misdemeanor cases, countervailing law enforcement interests will sometimes call for bringing a misdemeanor case to trial against the victim's wishes. This may be true, for example, in some misdemeanor DV assault cases, particularly if the case can be tried without the victim's testimony, if the charged conduct appears to be part of a pattern of escalating violence. Even if the assault does not constitute a felony, the

Worse, this assumption threatens to replicate the type of misogyny that DV prosecution ostensibly stands against. In any event, if misdemeanor DV cases are as serious and sensitive as prosecutors suggest, then it makes sense to take special care in educating misdemeanor DV victims about their full range of options and soliciting their wants and needs (even if that includes resolving the matter in a noncarceral fashion).

Ultimately, in all misdemeanor matters, prosecutors' offices should actively solicit victims' views of the just outcome after explaining how the case may be resolved other than by trial or plea agreement. This should first occur as early as possible, and ideally before a pretrial detention hearing, to promote what might be-called "front end justice," that is, dispositions early in a case to avert later injustices. Prosecutors who undertake this responsibility should present information objectively, suppressing the possible urge to pressure victims. When victims express an informed preference for an alternative to prosecution, and the office agrees that the alternative would adequately serve the public interest, the office should promote that alternative, whether that involves dismissing charges outright, offering to do so if the offender makes restitution, or conditioning an eventual dismissal on treatment or community services.

There should be a strong preference for ascertaining victims' actual views, and adequate resources should be dedicated to this task, rather than relying on assumptions and inferences. That said, when prosecutors cannot locate the victim, or when the victim will not communicate with them, prosecutors have various options. It is reasonable to dismiss cases (without prejudice to later reinstitute them) on the assumption that the victim is uninterested in seeing the prosecution continue. If this becomes office policy, there is no reason to distinguish between cases initiated by civilian complaints and those initiated by the police. If the case reaches the trial date, prosecutors should again attempt to elicit victims' informed views, recognizing that initial retributive impulses may have faded. When victims are

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prosecutor may conclude that a prosecution is necessary to avoid emboldening violent behavior and sending a signal that the state is indifferent to the problem. These decisions, if made conscientiously, based on complete information, on a case-by-case basis, are difficult, and victims' genuine preferences for leniency should not invariably be dispositive. For examples of the significant body of literature on prosecutors' exercise of discretion in DV cases, see Jane W. Ellis, *Prosecutorial Discretion to Charge in Cases of Spousal Assault: A Dialogue*, 75 J. CRIM L. & CRIMINOLOGY 56 (1984); and Leonore M.J. Simon, *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases*, 1 PSYCHOL. PUB. POL'Y & L. 43, 67–73 (1995). However, the influence of victims' preferences on prosecutors' discretionary decision-making in DV cases is a subject particularly deserving of deeper thought. The authors thank Maeve Kendall, an Alaska prosecutor, for emphasizing this need in response to an earlier draft.

indifferent or reasonably prefer an alternative, there is ordinarily no compelling reason to pursue trial and carceral punishment rather than to seek out a resolution that does not involve a criminal conviction.

If prosecutors' offices cannot dedicate adequate resources to educating victims and eliciting their views, then public defenders' offices should attempt to ascertain victims' preferences. Prosecutors should neither discourage victims from communicating with the defense nor be skeptical or dismissive when defense lawyers recount victims' views.[116] It is well recognized that victims (and other witnesses) do not "belong" to the prosecution,[117] and that defense lawyers have professional obligations to investigate and ascertain information needed to represent their clients competently, including by undertaking to speak with putative victims.[118] Prosecutors, as "ministers of justice" responsible for promoting a fair process, should welcome defense lawyers' efforts to fulfill their constitutional and professional role, thereby contributing to a just resolution.

CONCLUSION

There is surprisingly little scholarship on whether or how prosecutors elicit and weigh victims' views in making charging and plea-bargaining decisions, and prosecutors themselves do not publicly discuss how they take account of individual victims' actual views. Victims' rights laws mean to make the criminal process more humane for crime victims, in part by providing them information and a voice in the process, and one might expect that along with information and a voice come influence. However, victims' rights laws do not afford victims influence but leave it to prosecutors whether, as a matter of discretion, to allow victims to have influence over charging and plea-bargaining decisions. The Prince George's County example suggests that prosecutors often ignore victims' views or deal with them haphazardly and inconsistently, with preference

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[116] *See* Derick Dailey & Brandon Ruben, *Garland Alone Cannot Transform Our Criminal Legal System*, LAW360 (Mar. 7, 2021, 8:02 PM), https://www.law360.com/articles/1361570/garland-alone-cannot-transform-our-criminal-legal-system [https://perma.cc/7ZBP-9KBS] (arguing that prosecutors and defense attorneys must work together to shrink the footprint of the American criminal legal system).

[117] *See, e.g.*, United States v. Peter Kiewit Sons' Co., 655 F. Supp. 73, 77–78 (D. Colo. 1986) ("Generally, witnesses do not 'belong' to either side in a criminal case.").

[118] *See, e.g.*, Goodwin v. Balkcom, 684 F.2d 794, 810–13, 817–18 (11th Cir. 1982) (finding defense counsels' general attitude and failure to adequately investigate constituted ineffective assistance and violated defendant's right to counsel); Thomas v. Wyrick, 535 F.2d 407, 413–16 (8th Cir. 1976) (holding defense attorney's failure to interview witnesses breached the duty the attorney owed to his client).

given to views that coincide with prosecutors' own. We aim to encourage increased scholarly attention to this subject from empirical, theoretical, and practical perspectives, as well as deeper consideration by prosecutors themselves.

Our conclusion is that in cases involving individual victims, prosecutors should consider victims' views of how best to serve their own interests and those of their community. This is especially true in misdemeanor cases, where other public interests that prosecutions and punishment might serve are less important than in felony cases. For example, there is rarely a need to pursue a prosecution to incapacitate a dangerous misdemeanant. Many misdemeanor prosecutors may be convinced that they do serve victims' interests. But if so, that belief is less likely to derive from conversations in which prosecutors elicit individual victims' actual, informed views and preferences than from prosecutors' own assumptions about what hypothetical victims want or need. The criminal law assumes that victims want retribution, which means incarcerating offenders, and prosecutors' offices largely accept that premise. The result is to extend the world-historical harshness of the US criminal process even to misdemeanor cases. This is often unjustified, because many victims, if given information and options and freed from pressure and manipulation, would not and do not want retribution. That is, of course, one insight of the restorative justice literature,[119] but it is also true even in jurisdictions where restorative justice is not among the options. Often, on reflection, victims would prefer a nonpunitive outcome, including simply seeing criminal charges declined or dropped. Christian Cooper, with whom we began this article,[120] is an atypical victim in some respects, but there was nothing extraordinary about his reasoned opposition to prosecuting the offender.

We suggest that victims' actual views—not their presumed interests—should carry weight in prosecutors' charging and plea-bargaining decisions, especially in misdemeanor cases, but not toward the end of greater harshness or increased use of state power. There is a broad perception that the American criminal legal system is too vast, too punitive, and plagued by racial disparities, and that misdemeanor

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[119] *See, e.g.*, Lynn S. Bramham, *The Overlooked Victim Right: According Victim-Survivors a Right of Access to Restorative Justice*, 98 DENV. L. REV. F. 1, 18 (2021) ("[T]he supposition that victim-survivors prefer a traditional criminal justice forum is grounded on a one-size-fits-all perception of victim-survivors . . . . [M]any victim-survivors in the United States . . . , when given the opportunity, [have chosen] to participate in a restorative process with the person who harmed them.").

[120] *See supra* text accompanying notes 5–12.

prosecutions are a key contributor.[121] In a misdemeanor process already weighted toward punishment and excessive use of state power, victims' views should serve as a counterweight. When prosecutors would otherwise pursue a misdemeanor prosecution, they should generally defer to victims' informed and reasoned preferences for nonprosecution and noncarceral resolutions. Doing so would make the criminal legal system more humane toward victims as well as more efficient, effective, and humane overall. There is nothing particularly humane or respectful about pressuring victims or ignoring their views. On the contrary, doing so denies them dignity and undermines their autonomy—just the opposite of what victims' rights advocates seek. Whether or not mainstream prosecutors find this argument immediately convincing, it should prompt them to examine their assumptions. Prosecutors should more deeply consider questions of prosecutorial discretion and, particularly, the significance of victims' views, and they should adopt, publicize, publicly justify, and implement internal practices that reflect their offices' conclusions.

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[121] *See, e.g.*, K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285 (2014) (discussing racial disparities and high caseloads stemming from overpolicing minor offenses); Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. REV. 971 (2020) (showing racial disparities in misdemeanor case filing rates); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1314, 1315–17 (2012) ("It has become a truism that the U.S. criminal system is too big. . . . Whatever work the criminal process is supposed to do—deter, rehabilitate, incapacitate, or vindicate—a growing consensus concludes that it cannot do it properly given its current scale.").