# DISMISSALS AS JUSTICE

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ABSTRACT

*More than a third of our states have given judges a little-known power to dismiss prosecutions, not because of legal or factual insufficiency, but for the sake of justice. Whether phrased as dismissals "in furtherance of justice" or dismissals of* de minimis *prosecutions, these exercises of judicial power teach two important lessons.*

*First, judges exercising these dismissals are rebutting the common notion that in the face of over-criminalization and over-incarceration they are powerless to do more than rubber-stamp prosecutorial decision making. In individual cases, they push back against some of the most problematic aspects of our criminal justice system: its size, harshness, and bias.*

*Second, these cases converge on shared principles of justice. These principles conjure a vision of a very different criminal justice system: one in which an alleged criminal act is viewed not in isolation, but within a broader context that includes the apparent motivations for it, the state's role in and response to it, and possible responses other than the criminal law. There is no logical reason to confine these principles to this procedural context, and the Article urges their broader consideration.*

## INTRODUCTION

There is broad agreement among experts about the urgent need to reform our system of over-criminalization and over-incarceration.[1] But these experts have differed as to tactics: should one chip away at the most troubling aspects of the system, or strike at the foundations of the system,[2] aiming for a fundamentally different vision of criminal justice?[3] The recent presidential transition has made these questions more salient and added

1. *See* Letter from Undersigned ALI Members and Advisers to ALI Director, Deputy Director, Project Reporters, Council and Members (Apr. 4, 2016), http://www.prosecutorintegrity.org/wp-content/uploads/2016/05/ALI-Apr.-4-2016-Memorandum.pdf (regarding Preliminary Draft No. 6: Revisions to Sexual Assault Provisions of Model Penal Code) ("[T]here is broad consensus that the States have criminalized too much behavior and have incarcerated too many people.").

2. *See* Joseph Margulies, *War Crimes in a Punitive Age*, VERDICT (May 2, 2016), https://verdict.justia.com/2016/05/02/war-crimes-in-a-punitive-age (stating that the real problem with current criminal justice reform is that it "deliberately does nothing to alter the organizing philosophy that created and sustains the carceral state," and does not change the assumptions currently underlying the carceral state: assumptions "about human nature, individual responsibility, and the relationship between the individual and the state").

3. *See* Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 359 n.29 (2015) ("The abolitionist vision is in tension, of course, with the nearer term calls for indictments and imprisonment of police who have killed Black folks."); Margulies, *supra* note 2 ("People who hope to change things for the better cannot continue to dwell unproductively on particular problems with the criminal justice system, though there are many. Instead, we have to articulate a different philosophy of criminal justice.").

new ones. Can and will the judiciary provide a robust check on executive moves to expand the criminal justice system?[4] And as federal decision makers pursue an aggressive interpretation of "law and order,"[5] will the states be the site of criminal justice reform, or at least resistance?[6]

This Article analyzes an important set of tools available to criminal court judges in more than a third of our states. The case law applying these tools offers examples of judges providing a check on the executive, and, in doing so, simultaneously chipping away at some of the worst excesses of our system and striving toward a vision of a different system. This Article urges that this site of reform and these modes of reform be unearthed and remembered as a new era begins.

Nineteen states have given trial courts the power to dismiss prosecutions for the sake of justice.[7] Whether granting a power to dismiss "in furtherance of justice" or a power to dismiss *de minimis* prosecutions, these statutes allow judges to determine that while a case is permitted in criminal court, it should not be pursued.[8]

These statutes have received surprisingly little attention,[9] even while some of the problems that they can do something about are bemoaned and said to be intractable. Only a handful of scholarly articles have focused on these statutes,[10] and judicial opinions often remark upon the failure of defense attorneys to invoke them.[11] This neglect on the part of scholars and advocates should be remedied for two reasons.

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4. *See* Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 29, 2016, 3:55 AM), https://twitter.com/realdonaldtrump/status/803567993036754944 ("Nobody should be allowed to burn the American flag—if they do, there must be consequences—perhaps loss of citizenship or year in jail!").

5. *See, e.g.*, Memorandum from Attorney General Jeff Sessions to Federal Prosecutors (May 10, 2017), https://www.justice.gov/opa/press-release/file/965896/download ("[I]t is a core principle that prosecutors should charge and pursue the most serious, readily provable offense.").

6. *See* Yamiche Alcindor, *Minorities Worry What a 'Law and Order' Donald Trump Presidency Will Mean*, N.Y. TIMES (Nov. 11, 2016), https://www.nytimes.com/2016/11/12/us/politics/minorities-worry-what-a-law-and-order-donald-trump-presidency-will-mean.html; German Lopez, *The Case for Optimism on Criminal Justice Reform—Even Under President Trump*, VOX (Nov. 10, 2016, 3:00 PM), http://www.vox.com/policy-and-politics/2016/11/10/13580644/president-trump-criminal-justice-2016.

7. *See infra* notes 21, 31 and accompanying text.

8. While this Article uses "statutes" for ease of discussion, five states (Alaska, Arizona, Utah, Vermont, and Washington) include their in furtherance dismissal power solely in court rules that do not require legislative approval. *See* ALASKA R. CRIM. P. 43(c); ARIZ. R. CRIM. P. 16.6(b); UTAH R. CRIM. P. 25(a); VT. R. CRIM. P. 48(b)(2); WASH. SUP. CT. CRIM. R. 8.3(b).

9. *See, e.g.*, M. Beth Henzel, *Defense Categories and the (Category-Defying) De Minimis Defense*, 11 CRIM. L. & PHIL. 545, 545 (2016) ("De minimis defenses are an understudied aspect of law, appearing in legal practice more often than in legal theory but rarely garnering any type of extensive analysis in either."); *see also* Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the "De Minimis" Defense*, 1997 BYU. L. REV. 51, 51 ("Surprisingly, one of the most innovative, interesting, and complex provisions of the Model Penal Code, section 2.12, has attracted little attention, certainly much less than it deserves.").

10. *See infra* note 52.

11. *See infra* note 173.

First, these statutes, and the dismissals that they permit, achieve important ends in individual cases. They offer a way to tackle some of the most prominent flaws within the criminal law: its size, its harshness, and its disparate enforcement.[12] In doing so, they challenge the notion that judges can do little more than rubber-stamp prosecutorial discretion.[13] This tool is certainly not a panacea: for example, courts have invoked the separation of powers as a constraint on the circumstances in which dismissals can be granted;[14] in addition, the success of dismissal motions is dependent on individual judicial preferences, and thus potentially dependent on explicit and implicit bias.[15] Yet, these dismissals offer an escape valve, for some defendants, from the myriad destructive consequences of prosecution and conviction.[16]

Second, these dismissals are important because of the vision that they offer when read as a body of cases. Interpreting multiple statutory provisions, and in multiple states, judges ordering dismissals repeatedly converge on the same principles of justice.[17] If one weaves together these threads, what emerges is something that is urgently needed[18]: a vision of a different criminal justice system. Rather than a decontextualized focus on alleged wrongdoing, this vision involves a more circumspect approach in which one considers various aspects of context: the extent of governmental involvement in the alleged lawbreaking, the availability of responses other than the criminal law, the costs of criminal prosecution and conviction, and the apparent motives behind the defendant's alleged acts.[19] In invoking these principles, judges show us that even in the bleak circumstances of criminal court, vision is possible, and they bolster those scholars who have

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12. *See* Jonathan Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 999, 1000 (2013).

13. *See* Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1243–44 (2011) ("[P]rosecutorial discretion is largely unreviewable and unchecked . . . ."); *id.* at 1268 n.96 (mentioning as potential checks on prosecutorial charging decisions only "grand jury indictment, judicial probable cause determinations, and jury and judicial reasonable doubt findings at trial").

14. *See infra* notes 195–97. For the endurance of these statutes despite potential separation of powers concerns, see, for example, *State v. Sauve*, 666 A.2d 1164, 1167 (Vt. 1995) ("[D]espite the number of jurisdictions with similar longstanding laws, the State has not cited, and we have not found, any case striking down such a law as an unconstitutional violation of the separation-of-powers doctrine."); *id.* (citing People v. Kirby, 460 N.Y.S.2d 572 (1983) for the proposition that a trial court's "inherent authority to terminate prosecution to assure integrity of its judgment is traceable to separation-of-powers principle").

15. *See infra* notes 251–67 (implicit bias); *infra* note 249 (explicit bias).

16. *See, e.g.*, THE COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION (NICCC) [hereinafter "NICCC"], https://niccc.csgjusticecenter.org/ (last visited Oct. 18, 2017) (providing state-by-state list of collateral consequences, including 1,831 in California alone).

17. *See infra* Part IV.A.

18. *See* Margulies, *supra* note 2 (urging "the need to develop a unified, transformative vision of criminal justice").

19. *See infra* Part IV.A.

urged these kinds of approaches but have been unable to point to much real-world support.[20]

Paradoxically, it may be that some of the constraints that limit what can be achieved in individual cases have helped to enable this vision. For it may be that restrictions on this remedy reassure judges that they are operating in a relatively low-stakes context, and thus, that they can make broad declarations without much risk. It may also be that the empathy that is so vulnerable to bias is part of what moves judges to make broad statements about what justice requires. Yet, this Article urges that if these principles resonate in this procedural context, there is no logical reason why they should not be considered in other areas of the criminal justice system, including those where some of the constraints operating in this context do not apply.

Part I will introduce this group of statutes. Part II will describe a first set of reasons why they deserve more attention, giving examples of their use in individual cases to tackle some of the most pressing concerns about the criminal justice system. Part III will note constraints that limit this remedy, in ways that limit defendant protections throughout the criminal justice system, such as judicial narrowing of the remedy, and the human variability of the decision maker. Part IV will describe the second set of contributions that this body of law offers: the principles of justice on which judges rely in ordering dismissals, and the composite vision that these principles create. There is no logical reason to confine these principles to this specific procedural context, and their broader consideration may help stop the struggle for defendant protections from becoming an entirely reactive one.

## I. THE STATUTES

This Part will describe first the group of statutes permitting in furtherance of justice dismissals and then the group of statutes permitting *de minimis* dismissals, before explaining the commonalities between the two. It will end by describing the variety of approaches taken by jurisdictions that reject this type of statute.

### *A. Dismissals in Furtherance of Justice*

Fifteen states and Puerto Rico have enacted statutes that give the courts power to dismiss a prosecution in furtherance of justice.[21] New York is

20. *See infra* note 299. I am grateful to Justin Murray for the reminder that scholars are far from the only visionaries in this area, and that many non-scholarly visionaries have indeed achieved real-world results.

unique in having two statutes—one allowing dismissals of misdemeanors,[22] and one allowing dismissals of felonies[23]—and in including in each a detailed list of grounds for dismissal. In New York, a prosecution may be dismissed in furtherance of justice when:

> such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such [indictment] or count would constitute or result in injustice. In determining whether such compelling factor, consideration, or circumstance exists, the court must, to the extent applicable, examine and consider, individually and collectively, the following:
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> (a) the seriousness and circumstances of the offense;
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> (b) the extent of harm caused by the offense;
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> (c) the evidence of guilt, whether admissible or inadmissible at trial;
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> (d) the history, character and condition of the defendant;
>
> (e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;
>
> (f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
>
> (g) the impact of a dismissal on the safety or welfare of the community;
>
> (h) the impact of a dismissal upon the confidence of the public in the criminal justice system;
>
> (i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;
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> (j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.[24]

New York is important not only because of its unique statutory provisions, but also because it was the first state to enact legislation giving this kind of

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21. MINN. STAT. ANN. § 631.21 (West 2009); MONT. CODE ANN. § 46-13-401(1) (West 2015); N.Y. CRIM. PROC. LAW § 170.40 (McKinney 2007); N.Y. CRIM. PROC. LAW § 210.40 (McKinney 2007); OKLA. STAT. ANN. tit. 22, § 815 (2003); OR. REV. STAT. § 135.755 (2003); ALASKA R. CRIM. P. 43(c); ARIZ. R. CRIM. P. 16.6(b); CAL. PENAL CODE § 1385(a) (2011); CONN. GEN. STAT. §§ 54–56 (2009); IDAHO CODE § 19-3504 (2017); IDAHO CRIM. R. 48(a)(2); IOWA R. CRIM. P. 2.33(1); OHIO R. CRIM. P. 48(b); UTAH R. CRIM. P. 25(a); VT. R. CRIM. P. 48(b)(2); WASH. R. CRIM. P. 8.3; *see also* P.R. R. CRIM. P. 247(b).

22. N.Y. CRIM. PROC. LAW § 170.40 (McKinney 2007).

23. N.Y. CRIM. PROC. LAW § 210.40 (McKinney 2007).

24. *Id.*; N.Y. CRIM. PROC. LAW § 170.40 (McKinney 2007).

power to judges.[25] Since the common law, prosecutors had possessed the ability to dismiss cases through their *nolle prosequi* power.[26] While this was originally a power vested solely in prosecutors,[27] in 1828 New York took a first step toward limiting prosecutorial power in this regard, by making the power one that was subject to court approval.[28] New York went further in 1881, passing dual provisions on the issue: the first removed the *nolle prosequi* power from the prosecutor, and the second put it "where it should alone rest, in the hands of the court."[29] The legislature thus corrected a situation that it had found nonsensical: one in which the prosecutor had more power than the judge, who was "unable, no matter how unjust may be the continuance of the indictment against the defendant, to relieve him from that injustice, until the district attorney chooses to consent that it do so."[30]

### *B.* De Minimis *Dismissals*

In 1962, the drafters of the Model Penal Code (MPC) created the first *de minimis* statute: MPC Rule 2.12. Subsequently, four states (Hawaii, Maine, New Jersey, and Pennsylvania) and Guam enacted statutes based on MPC 2.12.[31] This kind of statute is therefore more recent than the first in furtherance statutes, but again has ancient roots.[32] It rests on the common

25. *See* John F. Wirenius, *A Model of Discretion: New York's "Interests of Justice" Dismissal Statute*, 58 ALB. L. REV. 175, 178 (1994).

26. "Nolle prosequi is a formal entry on the record by the prosecuting officer by which he declares that he will not prosecute the case further, either as to some of the counts of the indictment, or as to part of a divisible count, or as to some of the persons accused, or altogether." *Nolle Prosequi*, BLACK'S LAW DICTIONARY (9th ed. 2009). "[T]he writ of *nolle prosequi* did not extend plenary power to prosecutors to dismiss in furtherance of justice, as the New York statute permits. Rather, the 'Attorney-General's power was used for two quite different purposes: to dispose of technically imperfect proceedings instituted by the Crown; and to put a stop to oppressive, but technically impeccable, proceedings instituted by private prosecutors.'" Wirenius, *supra* note 25, at 178 (internal quotation marks omitted).

27. Nancy A. Wanderer & Catherine R. Connors, *Culture and Crime:* Kargar *and the Existing Framework for a Cultural Defense*, 47 BUFF. L. REV. 829, 846 (1999) (citing Commonwealth v. Kindness, 371 A.2d 1346, 1349 (Pa. Commw. Ct. 1977)).

28. Wirenius, *supra* note 25, at 178.

29. COMM'RS ON PRACTICE AND PLEADING, REPORT ON THE CODE OF CRIMINAL PROCEDURE OF THE STATE OF NEW YORK 343 (1850), https://ia800202.us.archive.org/13/items/codecriminalpro00pleagoog/codecriminalpro00pleagoog.pdf.

30. *Id.*

31. *See* HAW. REV. STAT. § 702-236 (2016); ME. REV. STAT. ANN. tit. 17-A, § 12 (2006); N.J. STAT ANN. § 2C: 2-11 (2011); 18 PA. CONST. STAT. ANN. § 312 (2015); 9 GUAM CODE ANN. 7.67 (1980). Importantly, Hawaii, Maine, and New Jersey departed from the MPC's "shall dismiss" in favor of "may dismiss." *See* HAW. REV. STAT. § 702-236 ("court may dismiss"); ME. REV. STAT. ANN. tit. 17-A, § 12 ("court may dismiss"); N.J. STAT ANN. § 2C: 2-11 ("judge may dismiss").

32. *See* HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 258 (1966) ("The maxim had its original application in Roman law . . . .").

law principle *de minimis non curat lex* ("The law does not concern itself with trifles.").[33]

The MPC provision contains three separate grounds for dismissal (the second of which is divided into two alternative bases). Its text is as follows:

> The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:
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> (1) was within a customary license or tolerance, neither expressly negatived by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense; or
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> (2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
>
> (3) presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.[34]

The drafters of the MPC have provided some insight into the thinking behind Rule 2.12. When the draft was introduced, Reporter Herbert Wechsler noted that judges have a "kind of unarticulated authority to mitigate the general provisions of the criminal law to prevent absurd applications" and expressed a desire to bring it to the surface.[35] A subsequent MPC Comment elaborated,[36] stating that "Section 2.12 authorizes courts to exercise a power inherent in other agencies of criminal justice to ignore merely technical violations of law."[37] The drafters viewed a judicial "[a]meliorative power" as essential, since "if every law were rigorously enforced as 'precisely and narrowly laid down,' the criminal law would be 'ordered but intolerable.'"[38] They were careful to state that they did not reject the notion that prosecutors have a "parallel power" to dismiss, but that they did reject the notion that it was *only* the prosecutor who could exercise such a power, "as though he somehow had a patent upon wise decision in such matters."[39] Once a criminal case has begun, "it

33. *De Minimis Non Curat Lex*, BLACK'S LAW DICTIONARY (9th ed. 2009).

34. MODEL PENAL CODE § 2.12 (AM. LAW INST. 1985).

35. Discussion of the Model Penal Code, 39 A.L.I. PROC. 61, 105 (1962).

36. MODEL PENAL CODE § 2.12 explanatory note (AM. LAW INST. 1985).

37. *Id.*

38. MODEL PENAL CODE AND COMMENTARIES § 2.12 cmt. 2, at 403 (AM. LAW INST. 1985) (quoting Jerome Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133, 153 (1953)).

39. *Id.* at 402 n.9.

is very much the court's business to see that a just disposition, which in appropriate cases may include a dismissal of the prosecution, is reached."[40]

### *C. Commonalities*

No state has both a *de minimis* and an in furtherance of justice statute: rather, these are alternative ways of serving a similar function. At their core, these statutes are not about the legal or factual merits of a prosecution,[41] or about guilt or innocence,[42] but are about a determination that while the case is permitted in criminal court, it should not be pursued.[43] Put differently, "[b]oth mechanisms are designed to act as safety valves with which to evade strict application of the law when factors not normally considered in the criminal judicial process appear relevant in individual situations."[44] One sees the interplay between the two sets of statutes in the fact that the MPC's commentary refers to the "in furtherance of justice" statutes,[45] while the factors contained within the most detailed in furtherance statute—that of New York—"resembl[e] the judicial interpretation of the *de minimis* statute in other states."[46] While one might assume from their name that *de minimis* dismissals are limited to "minor" alleged offenses, none of the *de minimis* statutes exclude any particular type of charge from their coverage.[47]

A second shared feature is that these statutes generally require that the reasons for dismissal be put on the record.[48] This requirement, which was

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40. *Id.*

41. *See* State v. Zarrilli, 523 A.2d 284, 286 (N.J. Super. Ct. Law Div. 1987) (stating that in determining whether to dismiss, "it must be assumed that the conduct charged actually occurred"); Joseph W. Bellacosa, *Practice Commentary*, *in* N.Y. CRIM. PROC. LAW § 210.40 (McKinney 1982).

42. *See* People v. Joseph P., 433 N.Y.S.2d 335 (N.Y. Just. Ct. 1980).

43. *See* People v. Curtis, 784 N.Y.S.2d 922 (Table) (N.Y. Crim. Ct. 2003).

44. Wanderer & Connors, *supra* note 27, at 845.

45. *See* MODEL PENAL CODE AND COMMENTARIES § 2.12 cmt. 3, at 404 (AM. LAW INST. 1985) (citing in furtherance statutes to support the notion that various states have left "[a]melioration of the letter of the law" to "existing statutes and practices").

46. Wesley MacNeil Oliver & Rishi Batra, *Standards of Legitimacy in Criminal Negotiations*, 20 HARV. NEGOT. L. REV. 61, 86 (2015).

47. *See Zarrilli*, 523 A.2d at 287 ("The *de minimis* statute applies to *all* prohibited conduct."); Martin H. Belsky, Joseph Dougherty & Steven H. Goldblatt, *Three Prosecutors Look at the New Pennsylvania Crimes Code*, 12 DUQ. L. REV. 793, 807 (1974) (noting that "[de minimis] Section 312 gives the judiciary power to dismiss any prosecution at any stage or for any crime."); *see also* State v. Fitzpatrick, 772 A.2d 1093, 1096 (Vt. 2001) (suggesting that "serious" charges do not preclude an in furtherance dismissal).

48. *See* Valena E. Beety, *Judicial Dismissal in the Interest of Justice*, 80 MO. L. REV. 629, 656 (2015) ("All the noted [in furtherance] states, except Vermont, require the court to state its reasons on the record for dismissal. In Vermont, the court must only do so if the prosecution objects to the dismissal."); Oliver & Batra, *supra* note 46, at 83 ("Unlike prosecutors, . . . judges dismissing cases under *de minimis* statutes must provide reasons for their actions and their decisions are often made public.").

imposed as a check on arbitrariness,[49] has led to a large body of case law, in which an array of justifications for dismissal is recorded.[50]

In addition to commonalities in function and procedure, these two sets of statutes have something else in common: neglect by both scholars and advocates.[51] While each of the two groups has received some scholarly attention, it is slight, and only a handful of pieces have discussed the two groups of statutes together.[52]

### *D. What Other Jurisdictions Do*

Two-thirds of our states lack these statutes, and the federal system has also rejected them. The Federal Rules Committee proposed adding an in furtherance of justice provision to the Federal Rules of Criminal Procedure[53]—one that would have been available, for example, in *de minimis* prosecutions[54]—but it was rejected,[55] and federal courts attempting to invoke such a concept have been reversed.[56]

Where no statute exists, two possibilities remain for judges who feel moved by concerns similar to those embodied within the statutes. First, the case law in several states mentions an inherent judicial power to dismiss

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49. *See, e.g.*, People v. Belge, 359 N.E.2d 377, 378 (N.Y. 1976).

50. *See* People v. Superior Court, 917 P.2d 628, 647–48 (Cal. 1996).

51. *See, e.g.*, Melissa Beth Valentine, *Defense Categories and the (Category-Defying) De Minimis Defense*, 11 CRIM. L. & PHIL. 545, 545 (2016) ("De minimis defenses are an understudied aspect of law, appearing in legal practice more often than in legal theory but rarely garnering any type of extensive analysis in either.").

52. *See* Beety, *supra* note 48; Elaine M. Chiu, *Culture as Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317 (2006); Oliver & Batra, *supra* note 46; Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393 (1988); Wanderer & Connors, *supra* note 27.

53. 48 F.R.D. 553, 640 (Preliminary Draft of Proposed Amendments to the Rules of Criminal Procedure 1970). The provision would have been Federal Rule of Criminal Procedure 48(b)(2), and its addition would have meant a subsection (b) phrased as follows (the italics indicate new language):

> (b) . . . the court may dismiss the indictment, information or complaint:
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> (*1*) *if* there is unnecessary delay in presenting the charge to a grand jury or in filing any information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial.
>
> (*2*) *if, for any other reason, it concludes that such dismissal will serve the ends of justice and the effective administration of the court's business.*

*Id.*

54. *Id.*

55. *See* AMERICAN BAR ASSOCIATION, REPORT OF THE SPECIAL COMMITTEE ON FEDERAL RULES OF PROCEDURE, 52 F.R.D. 87 (1971).

56. *See, e.g.*, United States v. Broward, 594 F.2d 345, 351 (2d Cir. 1979); United States v. Lamb, 294 F. Supp. 419, 420 (E.D. Tenn. 1968) ("[The *de minimis*] doctrine applies to questions of minimal damage and transactions between one person and another, not to transactions between a person and the sovereign.").

prosecutions in certain circumstances.[57] This is a circumscribed power,[58] however, and one that most states reject.[59] Second, judges may act *sub rosa*, perhaps masking their reasons behind findings of fact.[60] It was a desire to bring this sort of dismissal out into the open that motivated the drafters of the MPC and jurisdictions that followed them.[61]

Not all those whose jurisdictions lack such statutes are happy about that fact. At least one federal judge has expressed a desire that the federal judiciary be given the power to dismiss in furtherance of justice.[62] And in a recent District of Columbia case, one concurring judge wished that the court were able to dismiss on grounds that the prosecution was *de minimis*.[63] Give us what Hawaii and New Jersey have, he urged the legislature, as he was forced to go along with the affirmation of a conviction for snatching at a cell phone at the end of a long hot day at the Department of Motor Vehicles.[64] "De minimis non curat lex" read the heading of his opinion,[65] but his call to reclaim this principle went unheeded.

## II. THE POWER OF INDIVIDUAL CASES

The first reason why these statutes deserve more attention is that the cases interpreting them offer ways, in individual instances, of pushing back against some of the aspects of our criminal justice system that provoke the strongest critiques: its size, its harshness, and its bias. In doing so, they

57. *See, e.g.*, People v. Thomas, 54 Cal. Rptr. 409, 414 (Cal. Dist. Ct. App. 1966); People v. Lenz, 703 N.E.2d 971, 972 (Ill. App. Ct. 1998); State v. Boehmer, 203 P.3d 1274 (Kan. Ct. App. 2009); State v. Odom, 993 So.2d 663 (La. Ct. App. 2008); Commonwealth v. Thurston, 642 N.E.2d 1024 (Mass. 1994); State v. Witt, 572 S.W.2d 913, 917 (Tenn. 1978).

58. *See* State v. Shelton, 802 S.W.2d 80 (Tex. Ct. App. 1990), *vacated*, 830 S.W.2d 605 (Tex. Crim. App. 1992).

59. *See* People v. Stewart, 217 N.W.2d 894, 897 (Mich. Ct. App. 1974). In most states that lack this kind of statute, the general approach is to reject the concept of an inherent authority to dismiss. *See, e.g.*, *id.*

60. *See* Kent Greenawalt, *Conflicts of Law and Morality—Institutions of Amelioration*, 67 VA. L. REV. 177, 230 (1981) ("In jury trials, [judges] can direct jurors to acquit when evidence clearly supports a finding of guilt; when trial is before the bench, they can acquit though persuaded of legal guilt.").

61. *See* N.J. STAT. ANN. § 2C:2-11 cmt. (West 2011); 9 GUAM CODE ANN. § 7.67 cmt. (2017).

62. *See* Frederic Block, *Reflections on Guns and Jury Nullification—and Judicial Nullification*, CHAMPION, July 2009, at 17 ("[S]hould not federal law recognize, as New York State does, that in a worthy exceptional case, 'the letter of the law gracefully and charitably [should] succumb to the spirit of justice'?") (second alteration in original) (quoting People v. Rickert, 58 N.Y.2d 122, 126 (N.Y. 1983).

63. Watson v. United States, 979 A.2d 1254, 1268 (D.C. 2009).

64. *See id.* ("[I]n my view, the adoption of the relevant provisions of the MPC (or of the Hawaii and New Jersey variations of the MPC) would promote justice by protecting citizens from significant burdens attendant upon a criminal conviction when they have committed, at most, trifling and essentially harmless violations of the law.").

65. *Id.* at 1258.

unsettle the notion that judges are unable or unwilling to do more in relation to these kinds of problems, and in relation to prosecutorial predominance, than apply a rubber-stamp. This Part will offer examples of the exercise of this power under each of these three (necessarily overlapping) headings, before pulling together the ways in which these examples challenge conventional wisdom about state court power.

### *A. Size*

In individual cases, judges who dismiss are tackling some of the ways in which the criminal justice system can be said to be too big. As this Part will explain, they are separating the concepts of justice and prosecution, they are responding to over-expenditure of resources, and they are offering an "escape valve" from our criminal justice machinery when so many others are blocked.

First, these cases (and the statutes) are teasing apart the concepts of prosecution and justice, often fused in the public's mind.[66] When justice comes to seem synonymous with prosecution, there is little hope of reducing the amount of prosecution. These cases chip away in individual instances at the notion of synonymy. They remind the prosecution and the public that we have in many instances lost track of the common law notion that "de minimis non curat lex."[67] The criminal law does currently concern itself with trifles,[68] and judicial action may be necessary in response. Thus, a New Jersey court dismissed a prosecution for alleged theft of three pieces of bubble gum, pointing out that "[i]n the milieu of bubble gum pilferage the only cases more trivial are those involving two pieces or one."[69] Another dismissed the theft prosecution of a man who, after commencing lunch at the unlimited Cornucopia Buffet at the Garden State's Golden Nugget casino, had allegedly taken five pieces of fruit back to his room to eat.[70] Beyond the realm of "trifles," these cases endorse a notion that a true justice system is a system that holds back from prosecution in some of the

66. *See* Joseph Margulies, *Finding Justice in Baltimore*, VERDICT, (June 27, 2016) https://verdict.justia.com/2016/06/27/finding-justice-baltimore ("In the carceral state, we have developed such a crabbed view of justice that we imagine it as nothing more than a criminal conviction. . . . I hope we want accountability for what happened, and change to ensure it never happens again. Why should we think a criminal prosecution is the only—or even the best—way to achieve these goals?").

67. *See* Oliver & Batra, *supra* note 46, at 85 (suggesting that the *de minimis* provision was designed to "provide a public forum to publicly discuss the appropriate exercise of discretion by prosecutors when they consider declining a particular case").

68. *See, e.g.*, Alex Koma, *Milk Theft Charges on Hold—For Now*, INSIDENOVA (Dec. 6, 2016), http://www.insidenova.com/headlines/charges-dropped-in-milk-theft-case/article_c3481d0c-bc26-11e6-b096-3fe9f68f7349.html (describing charges against a teenager alleged to have stolen a carton of milk).

69. State v. Smith, 480 A.2d 236, 240 (N.J. Super. Ct. Law Div. 1984).

70. State v. Nevens, 485 A.2d 345 (N.J. Super. Ct. Law Div. 1984).

circumstances in which it could be carried out, and indeed that a strong society is one in which restraint is shown.[71] Thus, for example, courts have used their dismissal powers where they found that prosecution was targeted at mental illness,[72] drug addiction,[73] or poverty,[74] rather than wrongdoing.

Second, in these cases, courts are doing something to address the resources that they see being devoted to an overly large system of criminal prosecution. They point to over-crowded dockets,[75] and try to identify and remediate some of the harms that result: harms to the possibility of individualized justice,[76] to the prosecution of other cases (potential or actual),[77] to the speedy trial rights of defendants,[78] and to civil justice.[79]

This concern about resources includes an explicit focus on money. Courts allude to the money being spent on prosecution, and the ways in which it could be better used, whether on other prosecutions, other

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71. *See* People v. Gragert, 765 N.Y.S.2d 471, 476 (N.Y. Crim. Ct. 2003) ("[C]ertainly our society is strong enough to recognize the mitigating circumstances present here and forego the prosecution of this young woman.").

72. People v. Coleman, 466 N.Y.S.2d 620, 623 (N.Y. Dist. Ct. 1983) (dismissing charge relating to alleged receipt of Valium prescription from two doctors simultaneously, and noting that "[t]he defendant was a psychotic at the moment the alleged crime was perpetrated").

73. *See* People v. A.T., 589 N.Y.S.2d 980, 983 (N.Y. Crim. Ct. 1992) (dismissing charge of possession of a hypodermic needle against "a defendant who is his own victim of a life of drug addiction, which has left him permanently disabled and chronically ill").

74. *See* People v. Cunningham, 431 N.Y.S.2d 785, 787 (N.Y. Crim. Ct. 1980).

75. State v. Kinchen, 707 A.2d 1255, 1258 (Conn. 1998).

76. *See* People v. Jones, 484 N.Y.S.2d 415, 423 (N.Y. Crim. Ct. 1984) (dismissing where "the People are persisting in the prosecution of these cases solely for the vindication of principle as opposed to each case's individual merits"); People v. Boyer, 430 N.Y.S.2d 936, 949 n.18 (Syr. City Ct. 1981) (dismissing where the prosecution's "blanket policy of insisting on full payment of Family Court arrears, in addition to a plea of guilty to the charge, fails to recognize that every case must be dealt with on an individual basis"), *rev'd*, 459 N.Y.S.2d 344 (1981).

77. *See Kinchen*, 707 A.2d at 1258 (quoting judge as saying that "[y]ou know, we have a lot of serious cases on the jury [list]. We have a burglary [case] right behind this. We have six cases [for which] subpoenas are out behind this case, and in twenty-six years I have never tried a trespassing case to the jury. . . . Now we have a situation here where clerks are being let go, we have backlogs, and quite frankly, I would be embarrassed to put this [case] before a jury who has taken their time off from work."); State v. Smith, 480 A.2d 236, 239 (N.J. Super. Ct. Law Div. 1984) (dismissing indictment alleging theft of three pieces of bubble gum, and stating that "[d]eterrence . . . cannot itself justify making a sacrificial lamb of the most minor of offenders. This is especially so when there are others available for prosecution whose offenses are not trivial"); People v. Arroyo, 815 N.Y.S.2d 922, 924 (N.Y. Crim. Ct. 2006) ("The police should concentrate their noble efforts on behalf of the city on countering real crimes committed every day. They do not need to manipulate a situation where temptation may overcome even people who would normally never think of committing a crime."); People. v. James, 415 N.Y.S.2d 342, 347 (N.Y. Crim. Ct. 1979) ("At a time of public outcry about the inability of our system of justice to deal effectively with violent crime, we are still wasting valuable court time and taxpayer funds on a victimless crime [prostitution], the existence of which as a fact of human nature was recognized without particular disapproval as far back as Genesis 38:15.").

78. *See* State v. Fitzpatrick, 772 A.2d 1093, 1099 (Vt. 2001) (docket congestion "may affect the ability of the trial court to provide a speedy trial to the defendant before it and to other defendants").

79. *See* State v. Sulgrove, 578 P.2d 74, 75 (Wash. Ct. App. 1978) (judge dismissed, noting that prosecutor's "unpreparedness" had an adverse effect on civil matters in a court whose docket was "congested by criminal cases").

governmental functions, or however the taxpayer would like to use it.[80] Something has gone wrong, for example, when thousands of dollars are spent prosecuting a 20-year-old for an alleged sip of beer.[81] Where a woman was tried for prostitution after being arrested by an undercover agent who had feigned an interest in sex, a Minnesotan judge—of the view that "[n]othing happened here except a little pathetic slice of life from the streets of Minneapolis"—noted the costs of a trial, and of an appeal litigated by two tax-funded attorneys.[82] He then fantasized about how the money might otherwise have been used: "If this case never happened and half the money spent went back to the taxpayers, they would be happy. If the other half of the money went to appellant for as many months at a technical school or a local college that the money would cover, she would be better off."[83]

Third, these courts are providing an escape valve, or safety valve,[84] in what can appear to be a pipeline straight from arrest to conviction[85]: a way to "open the door of the courtroom,"[86] and try to "save the single individual before [the court]" from pre-adjudication and post-conviction harm.[87] In doing so, they are acting in accord with a common theme in discussions of the architecture of the American criminal justice system: that there should be means of escape for reasons other than legal or factual insufficiency.[88] They are doing so at a time when this particular means of escape may be particularly urgent, because of the mass funneling of cases into the criminal

80. People v. Joseph P., 433 N.Y.S.2d 335, 340 (N.Y. Just. Ct. 1980) (dismissing charge relating to alleged consensual sex act in public bathroom, where conviction "would appear to involve an unwarranted expenditure of the public's time, effort and resources and a judgment of conviction would serve no useful purpose"); *Boyer*, 430 N.Y.S.2d at 948 n.15 (dismissing charges of failure to pay child support where "as a result of these prosecutions, the taxpayers are bearing the additional costs of representing at least three defendants and extensively utilizing the court process").

81. *In re* Shorto, 14 Pa. D. & C.3d 222, 227 (Pa. Ct. Com. Pl. 1980) ("A sip (or sips) of beer by a person 77 days short of his or her 21st birthday is *NOT* such socially prohibited conduct that thousands of taxpayers' dollars are to be used to prosecute the sippee [sic] and the licensee upon whose premises the sipping took place.").

82. State v. Thoreson, No. A06-454, 2007 WL 1053205, at *10 (Minn. Ct. App. Apr. 10, 2007).

83. *Id.*

84. *See* State v. Goodwin, 129 A.3d 316, 323 (N.J. 2016) ("The de minimis provision acts as a safety valve, permitting dismissal of a charge that is too trivial to warrant prosecution."); Wanderer & Connors, *supra* note 27, at 844 ("[S]tatutes and rules similar to the *de minimis* statute [i.e., in furtherance statutes] . . . also create a safety valve to offload otherwise criminal conduct from prosecution when the individual circumstances warrant.").

85. For fact that arrests and guilty pleas share the same factual requirement—probable cause—see David L. Shapiro, *Should a Guilty Plea Have Preclusive Effect?*, 70 IOWA L. REV. 27, 42–44 (1984).

86. People v. Shanis, 374 N.Y.S.2d 912, 915 (N.Y. Sup. Ct. 1975).

87. People v. James, 415 N.Y.S.2d 342, 346 (N.Y. Crim. Ct. 1979).

88. *See* Andrea Roth, *Trial by Machine*, 104 GEO. L.J. 1245, 1285 (2016) ("The American criminal justice system is designed with safety valves in mind . . . ."); MODEL PENAL CODE § 2.12 cmt. 1, at 400 (AM. LAW INST. 1985) ("The power that this section confers upon the courts is commonly exercised by other agencies in the criminal justice system . . . .").

justice system,[89] because the consequences are so numerous and profound,[90] and because so many of the escape valves envisioned by criminal justice system theorists are blocked.[91] Police are supposed to act as an escape valve, with discretion to refrain from an arrest; yet, incentives to arrest frequently make that a nugatory power.[92] Prosecutors can decline to charge, and can move to dismiss after charges have been filed,[93] but incentives and adversarial culture frequently block this power also.[94] Grand jurors have the power to vote against an indictment even if they believe probable cause to have been established,[95] but they endorse prosecutorial requests in the vast majority of cases.[96] Jurors have the ability to vote not guilty even if they believe guilt to have been proven beyond a reasonable

89. *See, e.g.*, People v. LaFont, 978 N.Y.S.2d 832 (N.Y. Crim. Ct. 2014) (dismissal of case against woman alleged to have intervened when police tried to handcuff her husband (who had just had heart surgery) after she called 911 to request an ambulance for him); Matthew Epperson, *Where Police Violence Encounters Mental Illness*, N.Y. TIMES (Jan. 13, 2016), https://www.nytimes.com/2016/01/13/opinion/where-police-violence-encounters-mental-illness.html?_r=0.

90. *See* NICCC, *supra* note 16.

91. *See* Kent Greenawalt, *The Cultural Defense: Reflections in Light of the Model Penal Code and the Religious Freedom Restoration Act*, 6 OHIO ST. J. CRIM. L. 299, 306–07 (2008).

92. *See* K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 293 (2014) ("The pressure on police to exercise discretion to make arrests for minor offenses, such as enjoying a beer on one's own stoop on a summer evening, has significantly increased the number of individuals in the lower criminal courts that the public might deem to be normatively innocent."); *id.* at 318 n.181 (discussing pressures on police to meet quotas).

93. *See* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 128 (2004) ("Police have wide latitude in deciding whether to arrest an individual and file charges. Likewise, prosecutors can choose whether to accept police officers' recommendations and pursue those charges. Particularly for lower-level crimes, police may not arrest and prosecutors may decline to charge or may divert cases for alternative resolution after charging.").

94. *See* Howell, *supra* note 92, at 301 ("For the most part, assistant district attorneys prosecute minor victimless crimes, not because they want to, but because they are assigned to do so early in their careers and feel that they must do so to advance their careers."); *id.* at 312–13 ("[T]he one decision that prosecutors are typically required to document is the decision to dismiss. It is far easier to bring charges in all cases than to engage in individualized assessment or risk alienating police."); Wirenius, *supra* note 25, at 176 n.6 (calling this an "illusory" shield because of prosecutorial "siege mentality," and stating that "[t]he adversary system leads inexorably to prosecutors who identify justice as a 'win' for their side"); Jessica Lussenhop, *Could 'Actual Innocence' Save the Broken US Justice System?*, BBC NEWS (Apr. 21, 2016), http://www.bbc.com/news/world-us-canada-35971935 ("[B]ecause of some of the professional incentives to get convictions and maintain convictions, and political incentives to be tough on crime, the justice role takes a back seat to the advocacy role.").

95. *See* Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 705 (2008).

96. *See* Andrew D. Leipold, *Prosecutorial Charging Practices and Grand Jury Screening*, *in* GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY (Roger A. Fairfax, Jr. ed., 2010) ("[I]t is hard to find support . . . for a claim that grand juries currently serve as a meaningful check on prosecutorial charging decisions"); Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 50 n.220 (2002) (estimating that only eight percent of felony cases presented to New York grand juries result in dismissals or reductions).

doubt—to nullify, in other words[97]—but almost without exception governmental authorities refrain from telling them about this power[98] and take active steps to prevent them from learning of it through other means.[99] In any event, the percentage of cases in which a jury makes the final decision is a small one.[100] Even within that small percentage of cases, the frequent silencing of criminal defendants at trial may leave jurors with little motivation to offer an escape.[101]

A variety of potential "safety valves" exist after conviction—the judge's ability to demonstrate "leniency" at sentencing, an appellate court's ability to reduce a sentence,[102] the ability of the parole board to permit release, pardons, and other acts of "clemency." All such safety valves are unable to address the harms that accumulated until the moment of relief, many are infrequently awarded,[103] and in the case of sentencing, even the most "lenient" judge may be constrained by mandatory sentencing

97. *See, e.g.*, Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

98. *See* Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 598 (2017) ("[A]lthough jurors have the legal ability to nullify, courtroom actors cannot inform them of this ability.").

99. *See, e.g.*, Noelle Phillips, *Denver Activists File Federal Lawsuit Over Jury Nullification Arrests*, DENVER POST (Aug. 17, 2015, 7:42 AM), http://www.denverpost.com/2015/08/17/denver-activists-file-federal-lawsuit-over-jury-nullification-arrests/. Note that the factors that appear to persuade jurors to nullify are similar to those highlighted in this article as important to judges ordering dismissals. *See* Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 301–02 (1996) ("[J]uries sometimes acquit against the evidence when the harm caused by the defendant is *de minimis*, when the victim's conduct contributed to the harm, when jurors believe the defendant already has suffered enough, and when the government appears to have acted improperly.").

100. *See* Howell, *supra* note 92, at 319 (stating that in New York City, there is one trial for every 570 non-felony cases, and one jury trial for every 1800 non-felony arrests); Roth, *supra* note 88, at 1287 (noting that "the shift toward streamlining through low-level proxy offenses that do not trigger the right to a jury trial has rendered less frequent the exercise of equitable and merciful discretion by fact finders").

101. *See* Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 858 (2016) (describing one cause of such silencing: prior conviction impeachment); Brief of Appellee at 46, *United States v. Taylor*, 196 F.3d 1263 (11th Cir. 1999) No. 98-4141, 1999 WL 33643277, at *46 (arguing that the defendant's testimony was important to his nullification defense, and thus that prior conviction impeachment was appropriately permitted); *see also* Roth, *supra* note 88, at 1287 ("[T]he shift [away from nullification in cases involving authoritative proof] is worth noting so that we do not close other safety valves assuming that nullification will safeguard equity and mercy in an era of increasingly authoritative proof.").

102. *See* Wirenius, *supra* note 25, at 214.

103. *See* Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1333 (2008) (grants of clemency rare); Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169 (2010); *Scope of Appellate Review of Sentences in Capital Cases*, 108 U. PA. L. REV. 434, 435–36 (1960) (appellate sentence reductions rare); *cf.* Michael Tonry, *From Policing to Parole*, *in* 46 CRIME AND JUSTICE: A REVIEW OF RESEARCH (Michael Tonry ed., 2017) ("In the 1980s and 1990s, [parole] boards became overly cautious and risk averse, and they became a major contributor to the rapid increase in the number of prisoners.").

regimes[104] and is generally unable to avert a huge array of crippling post-conviction consequences.[105]

### *B. Harshness*

In individual cases, judges who dismiss are often pushing back at some of the aspects of the criminal justice system that contribute to its harshness[106]: over-charging,[107] excessive sentences,[108] pre-adjudication hardships,[109] and collateral consequences.[110]

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104. *See* People v. Vecchio, 526 N.Y.S.2d 698, 699 (N.Y. Sup Ct. 1987) ("Traditionally, under our system of justice, a sentencing court, following any guilty plea or conviction, has a substantial degree of latitude in determining the severity or leniency of a sentence. This discretionary latitude, however, under mandatory sentencing scheme, limited or gravely restricted by legislation which imposes non-flexible minimums, as to a particular offense, does not enable a sentencing court to find 'mitigating circumstances' based upon the characteristics of the crime and/or the criminal.").

105. See Judge Gleeson's efforts to buck this trend through his grant of a federal certificate of rehabilitation in *Doe v. United States*, 168 F. Supp. 3d 427 (E.D.N.Y. 2016), and his order (subsequently reversed) that a conviction be expunged. Doe v. United States, 110 F. Supp. 3d 448 (E.D.N.Y. 2015); see also *State v. Kargar*, 679 A.2d 81 (Me. 1996), in which an Afghani refugee was convicted of gross sexual assault for kissing his baby son's penis, a conviction subsequently overturned as being the product of a *de minimis* prosecution. At sentencing, "[a]lthough the court responded to this call for leniency by imposing an entirely suspended sentence, the two convictions expose[d] Kargar to severe consequences independent of any period of incarceration, including his required registration as a sex offender . . . and the possibility of deportation . . . ." *Id.* at 85; *see also* Sajid A. Khan, *Op-Ed: In Defense of Brock Turner's 'Lenient' Sentence*, SAN JOSE INSIDE (June 24, 2016) http://www.sanjoseinside.com/2016/06/24/op-ed-in-defense-of-brock-turners-lenient-sentence/ (describing what Brock Turner faced even with a sentence widely described as "lenient").

106. *See* Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 113 (2007) ("American punishment has become degrading, indecent, and undeservedly harsher despite a Constitution designed to protect people from infliction of excessive punishment.").

107. *See* State v. Pacquing, 297 P.3d 188, 194 (Haw. 2013) (quoting trial court dismissing felony charge involving alleged presentation of false identification to a police officer, and voicing concern "that [Pacquing] has been over-charged and his misdemeanor conduct was pigeon-holed into a felony statute. . . . [Pacquing's] conduct was meant to be prohibited by [misdemeanor offense] Unsworn Falsification to Authorities" (citation omitted) (first and second alterations in original)).

108. *See* State v. Viernes, 988 P.2d 195, 197 (Haw. 1999) (upholding dismissal that had been based on a finding "that a conviction for possession of this amount of methamphetamine [less than one hundredth of a gram], which would mandate a felony conviction and a mandatory five-year term of incarceration with a mandatory thirty days incarceration before being eligible for parole, result[s] in an unduly harsh conviction").

109. *See* People v. Wingard, 306 N.E.2d 402, 404 (N.Y. 1973) (upholding misdemeanor charge where "any further proceedings would necessitate additional expense and would force the defendants to lose more time from work or school").

110. State v. Ramirez, No. CRIM.A. CR-04-213, 2005 WL 3678032, at *6 (Me. Super. Ct. Nov. 9, 2005) (dismissing charge alleging that a mother kissed her baby son's penis, in part because "even with a suspended jail sentence, the defendant would be subject to sex offender registration and to potential deportation"); People v. Stewart, 656 N.Y.S.2d 210, 214 (N.Y. App. Div. 1997) (trial judge based dismissal of contempt charge against defense attorney Lynne Stewart in part on "the catastrophic collateral effect of disbarment" that the authorized sentence would have had); Commonwealth v. Przybyla, 722 A.2d 183, 185 (Pa. Super. Ct. 1998) (trial judge stated that he was aware of the seriousness of the problems associated with teenage sexual behavior, but that he could not "conceive

The action in response to collateral consequences is particularly significant, because of the common conception that collateral consequences are a "hidden" after-effect of the formal processes of adjudication and sentencing, disregarded even when a sentence is being meted out.[111] In these cases, at least some of the collateral consequences are not hidden—even before the point of sentencing. They come to light, and they persuade judges to dismiss. And in the language used by the courts, we see understanding of the unshakeable and destructive nature of these consequences, which can represent a "blot,"[112] a taint,[113] a "constant companion for . . . life,"[114] a specter,[115] and a "scarlet letter."[116] The MPC embodies this concern by referring not to whether a conviction is justified, but to whether "the condemnation of conviction" is justified.[117] Case law in states that have adopted this provision echo the theme.[118] In New Jersey,

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the legislature intended to address these problems by imposing felony criminal liability, including Megan's Law sanctions, on one teenager who has consensual sex with another.").

111. *See* JEREMY TRAVIS, INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 16 (2002) (explaining that collateral consequences have been described as "invisible punishments" because they are "imposed by operation of law rather than by decision of the sentencing judge . . . [and] are not considered part of the practice or jurisprudence of sentencing"); Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 359–60 (2004) ("Collateral consequences of street crime punishment are a prime example of costs the criminal justice system now ignores.").

112. *See* People v. Joseph P., 433 N.Y.S.2d 335, 345 (N.Y. Just. Ct. 1980) ("To have [the prints of a first-time arrestee] on file forever, to be hounded in the future on job application, to be questioned and to have a blot on one's record forever, is something unworthy of a democratic society.").

113. *See* People v. Zarrilli, 523 A.2d 284, 288 (N.J. Super. Ct. 1987) ("The benefit of dismissal is not difficult to describe: it consists of the value to society of a citizen who is not tainted with a conviction of criminal or disorderly conduct and the saving of judicial resources resulting from the avoidance of prosecution.").

114. Watson v. United States, 979 A.2d 1254, 1263 (D.C. 2009) ("In general, a conviction of a criminal offense will not only subject a defendant to punishment, but it will become his constant companion for the remainder of his life. It is likely to haunt him whenever he applies for employment, public or private. In many or most cases, it will affect the respect which he is accorded by his fellow-citizens and bring him 'shame before his family, friends and peers.' It will impair his pursuit of happiness contemplated by the drafters of our Declaration of Independence.") (quoting State v. Smith, 480 A.2d 236, 239 (N.J. 1984)).

115. *See id.*

116. *See* Commonwealth v. Pryzbyla, 722 A.2d 183, 185 (Pa. Super. Ct. 1998) (trial court "could not believe that the legislature intended to brand for life with the scarlet letter of a felony sex conviction a teenager who engaged in consensual sex with another sexually experienced teenager under the facts of this case").

117. MODEL PENAL CODE § 2.12 (AM. LAW INST. 1985).

118. *See Zarrilli*, 523 A.2d at 289 (dismissing charge based on alleged sip by a 20-year-old from a cup of beer, stating that "the harm to society caused or threatened by William Zarrilli's conduct was so minimal as not to warrant the condemnation of a conviction"); Commonwealth v. Moll, 543 A.2d 1221, 1226 (Pa. Super. Ct. 1988) (citing § 312 of state criminal code to dismiss criminal mischief prosecution based on alleged cutting of hole in county-installed storm drain pipe, to avoid flood damage to defendant's property, on basis that this act was "too trivial to warrant condemnation of conviction"); Commonwealth v. Kirkwood, 520 A.2d 451, 455 (Pa. Super. Ct. 1987) (finding case alleging injuries sustained on dance floor ripe for *de minimis* dismissal where "Appellant's conduct during the 40-second whirlwind encounter and its lack of resultant bodily harm constitutes an infraction too trivial in nature

for example, "[t]he use of the word condemnation is significant. It means reprobation or censure. The Legislature in recognition of the serious consequences which may attend a conviction has granted this dismissal option to avoid an injustice in a case of technical but trivial guilt."[119]

The action in response to sentencing is also intriguing, since it raises the question of what those judges who have decried the fact that they are "forced" to impose sentences that they view as "unjust and counterproductive" would do if they had the power to dismiss instead.[120] Would they find it better that one (potentially) guilty person be freed than that one unjust and counterproductive punishment be imposed?

### *C. Bias*

Judges applying these statutes sometimes seize the opportunity to push back against aspects of the bias that pervades our criminal justice system.[121] At least one scholar has advocated the use of motions to dismiss in the interests of justice as a way of combating racial discrimination,[122] asserting that it is urgent, through methods such as this, to combat the notion that "our understanding of justice is so meager that it cannot include true racial justice."[123]

In several cases, one sees judges using these dismissals to push back against prosecutorial double standards. Thus, one judge decried the prosecution of defense attorney Lynne Stewart for criminal contempt (as opposed to civil contempt, which would not have jeopardized her law license), stating that "lawyers—and particularly defense lawyers representing a particularly despised clientele—ought not to be singled out by reason of their vocation for disparate prosecutorial treatment."[124]

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to warrant the condemnation of conviction. . . . Appellant should not be stigmatized with a criminal conviction for actions which may be considered, if not customary, at least not wholly extraordinary during a fast dance at a tavern.").

119. *See Smith*, 480 A.2d at 241.

120. *See* People v. Vecchio, 526 N.Y.S.2d 698, 709 (N.Y. Sup. Ct. 1987) (describing the dismissal power as a "safeguard" against the limitation of sentencing discretion); *id.* (granting dismissal to avoid mandatory minimum prison sentence); Jed Rakoff, U.S. District Judge for the Southern District of New York, Address at 2015 Harvard Law School Conference: Mass Incarceration and the "Fourth Principle," *in* BLOOMBERG LAW BUSINESS, https://bol.bna.com/judge-rakoff-speaks-out-at-harvard-conference-full-speech/ (stating that judges are "forced to impose these sentences that many of us feel are unjust and counterproductive").

121. *See* Pomorski, *supra* note 9, at 99 ("[MPC 2.12(2)] can serve as an important check on overbroad discretionary powers of prosecutors, as well as police, who exercise de facto power of decriminalization by a practice of selective enforcement or nonenforcement.").

122. *See* Robin Walker Sterling, *Defense Attorney Resistance*, 99 IOWA L. REV. 2245, 2265 (2014).

123. *Id.* at 2271.

124. People v. Stewart, 656 N.Y.S.2d 210, 236 (N.Y. App. Div. 1997) (adding that "[t]he within motion presents an opportunity for the court not only to avert a tragically unjust outcome but to reaffirm

Another stated that restoration to the calendar of a set of cases because of failure to pay restitution would "create a class of status offenders, i.e., the impoverished."[125] Finally, one Brooklyn court dismissed charges against leaders of religious centers charged with failing to provide proper exit lighting in their buildings.[126] The court noted that "New York City public schools and other public buildings operated by the City (including this courthouse) were not in compliance to the same degree as similar buildings in the private sector,"[127] and that "it is apparent that the Corporation Counsel has taken it upon itself to create a double standard in the enforcement of the Building Code and, indeed, other municipal safety codes."[128]

The courts' attempts to push back against inequality extend beyond purely prosecutorial behavior. In one case, a Minneapolis judge railed against the double standard in prostitution enforcement.[129] In the case before the court, a male officer had posed as a civilian, and arrested the defendant after she acceded to a request to strip naked in his car.[130] The judge commented that "[f]rom time to time, there is a politically-correct uproar urging that 'the johns,' meaning the 'tricks,' be prosecuted also. That means sending female undercover officers into the street as 'decoys.' I have *never* come across any case, in any state, where, after the give and take of the preliminary negotiations, and the passing or attempted passing of the 'buy money,' the female undercover officer ever felt she had to get the man to strip completely naked in front of her before she had enough evidence to make an arrest!"[131]

### *D. Rebutting Common Views of the Judicial Role*

In exercising their dismissal power in response to facets of the criminal justice system's size, harshness, and bias, judges are unsettling some common conceptions about their role within criminal court and their relationships with the prosecution.

Judges are often said to be virtually powerless in the face of prosecutorial power and discretion, unable in the face of phenomena such

its commitment to neutral and independent adjudication and to a balanced adversary process."). The case involved Ms. Stewart's refusal to answer questions regarding retainer information on the basis of attorney–client privilege. *Id.* at 211.

125. People v. Cunningham, 431 N.Y.S.2d 785, 787 (N.Y. Crim. Ct. 1980).

126. People v. Neuberger, 570 N.Y.S.2d 256 (N.Y. Crim. Ct. 1991).

127. *Id.* at 257.

128. *Id.* at 258.

129. State v. Thoreson, No. A06–454, 2007 WL 1053205, at *11 (Minn. Ct. App. June 27, 2007).

130. *Id.*

131. *Id.*

as over-criminalization and over-incarceration to do anything other than perhaps display some "leniency" at sentencing,[132] or perhaps "streamline [court] appearances."[133] Meanwhile, prosecutors are said to be unrestrained,[134] devoid of regulation in terms of charging practices,[135] spending practices,[136] or their interpretation (if any) of their duty to do justice.[137]

What one sees in this case law, however, is the possibility (and sometimes the reality) that judges can play a role that is "bold" and "courageous."[138] These judges have the power to stand firm as gatekeepers of the criminal law,[139] monitoring its use and pushing back against its overuse.[140] In these cases, they stand "between the prosecutor and the

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132. *See* Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 918 (2015) ("If the primary role of juries is to decide contested facts in criminal cases, then the primary role of trial judges in those cases is to determine an appropriate sentence.").

133. *See* Howell, *supra* note 92, at 293 (pointing to ways in which various players in the criminal justice system could "reduce the harms that flow from the massive processing of minor cases through the criminal courts," and prescribing vis-à-vis judges that they "should streamline appearances so that individuals who want to assert their right to trial need not make dozens of unnecessary court appearances").

134. *See id.* at 305 ("The only constraint on prosecutorial discretion is that prosecutors may not exercise their discretion to target individuals based on impermissible criteria such as race."); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1655 (2010) ("[W]hen prosecutors decline or pursue charges for equitable reasons, they exercise their prerogative unchecked."); Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 359–60 (2004) ("[C]ourts and legislatures have steadfastly refused to regulate prosecutorial discretion."); *id.* at 341 ("[P]rosecutors have unregulated discretion.").

135. Brown, *supra* note 134, at 331 (mentioning "the complete lack of judicial scrutiny under which prosecutors work in screening and charging cases"); Joseph Margulies, *The Puzzle of Reform, Part I*, VERDICT (Mar. 21, 2016), https://verdict.justia.com/2016/03/21/the-puzzle-of-reform-part-I.

136. Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1517 (2015) ("Many of the costs of prosecution are currently externalized and, therefore, provide no incentive to cabin those costs.").

137. *See, e.g.*, *Prosecutorial Oversight: A National Dialogue in the Wake of* Connick v. Thompson, INNOCENCE PROJECT (Mar. 29, 2016), http://www.innocenceproject.org/prosecutorial-oversight-national-dialogue-wake-connick-v-thompson/ (highlighting prosecutorial failures and lack of accountability).

138. People v. Joseph P., 433 N.Y.S.2d 335, 338 (N.Y. Just. Ct. 1980) (determinations under New York's in furtherance statute "evoke the true and unfortunately perceived of as old-fashioned, sometimes courageous 'judging'"); People v. Collier, 376 N.Y.S.2d 954, 989 (N.Y. Sup. Ct. 1975) ("A court must intervene boldly when unfairness. . . surfaces in a particular case. The purpose of CPL § 210.40 [and 170.40] is to interpose the court between the prosecution and the accused in an appropriate case. The judiciary must never passively defer to the executive when the rights of the vulnerable are impermissibly threatened. An independent judiciary must never fear the risk of retribution or the dismay of traditionalists when it makes a decision or issues an opinion that it believes is right.").

139. *See* State v. Hoffman, 695 A.2d 236 (N.J. 1997) ("[S]ome people may attempt to use the process as a sword rather than as a shield. The judicial system must once again rely on the trial courts as the gatekeeper."); State v. Cabana, 716 A.2d 576 (N.J. Super. Ct. Law Div. 1997) (stating as to the *de minimis* dismissal power that "[c]ommon sense prevails and this court must be the 'gatekeeper' in that regard").

140. *See* Pomorski, *supra* note 9, at 99 ("Since American law has been notoriously troubled by overcriminalization, the decriminalizing potential of [MPC 2.12(2)] should be put to its fullest use.").

accused,"[141] honoring (and sometimes citing) the legislators' intent that prosecutorial power not be "untrammeled."[142] Indeed, as envisaged by California law, these statutes permit judges to grab the reins, "take[] charge of the prosecution, and act[] for the people."[143]

Through this dismissal power—and the fact that they exercise it[144]—these judges demonstrate that there can be some oversight of the prosecution's use (or disuse) of its duty to do justice.[145] Indeed, some case law goes as far as to say that because of the impossibility of the prosecution's being both a partisan advocate and a neutral arbiter of what is just, it is in effect *only* the judge who can and should exercise that latter role. Thus, in voting to uphold the in furtherance of justice dismissal of a "habitual criminal charge" that would have dictated an elevated sentence, one Washington State Supreme Court Justice said the following:

> [T]he district attorney cannot be regarded as impartial. He is essentially an advocate who, believing in the justice of his cause, is seeking conviction and punishment of the accused. To make him also the court of last resort as to what punishment should be imposed, without any impartial tribunal to review his decision in the matter of sentencing, seems to me to do violence to our concept of constitutional government, and offends our oft repeated and proud boast that we are a government of law and not of men.[146]

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141. *Collier*, 376 N.Y.S.2d at 989.

142. State v. Carroll, 13 Conn. Supp. 112, 112 (Conn. Super. Ct. 1944) ("The purpose of the law and the philosophy back of [Connecticut's statute] was to prevent unchecked power by a prosecuting attorney.").

143. People v. More, 12 P. 631, 632 (Cal. 1887) ("The court, for the purposes of the order of dismissal, takes charge of the prosecution, and acts for the people."); *id.* (adding that as a result the prosecution cannot appeal from such dismissals).

144. This power is analogous to the power of jury nullification to push for change. *See* Paul Butler, *supra* note 97, at 724–25 ("I hope that there are enough of us out there, fed up with prison as the answer to black desperation and white supremacy, to cause retrial after retrial, until, finally, the United States 'retries' its idea of justice.").

145. *See* Wanderer & Connors, *supra* note 27, at 846 (1999) ("The prosecutor is supposed to examine the factors recognized in the *de minimis* and 'interests of justice' statutes and case law."); *id.* ("*De minimis* or 'interests of justice' statutes reflect a legislative will to recognize judicial authority to oversee executive prosecutorial discretion—one example of a checks-and-balances framework with which to achieve ultimate justice.").

146. State v. Starrish, 544 P.2d 1, 9 (Wash. 1975) (Utter, J., dissenting) (alteration in original) (quoting People v. Sidener, 375 P.2d 641, 660 (Cal. 1962)); *see also* Josh Bowers, *supra* note 134, at 1655 ("[S]everal reasons exist to believe that prosecutors are ill-suited to consider the normative merits of potential charges. First, professional prosecutors fail sufficiently to individualize cases, lumping them instead into legal boxes. Second, professional prosecutors prioritize institutional concerns over equitable particulars."); Andrew Inest, *A Theory of De Minimis and a Proposal for Its Application in Copyright*, 21 BERKELEY TECH. L.J. 945, 956 n.63 ("In theory, the state should undertake the same analysis as would a court applying de minimis, and thus not prosecute cases that would qualify for the defense. However, there are a number of reasons why this might not happen, including: (i) the fact that

This same judge was explicit in affirming the judiciary's power to escape from the role of prosecutorial rubber-stamp. Washington's statute "makes the courts something more than the passive instruments of prosecutorial policies."[147] It "ensures that the broad discretion of prosecutors and the rigidity of aggravated sentencing laws will not combine to reduce judges to the status of mere clerks assigned to stamp and file the decisions of other agencies of government."[148]

Trial judges in the state criminal court system are often said to be little more than case processors[149]: workers on an assembly line, or perhaps just the cogs.[150] But in these cases we see judges who not only take responsibility for, and attempt to uphold, their own integrity and that of the criminal justice system,[151] but also attempt to understand how the criminal justice system interacts with other systems and pressures affecting defendants. New York's highest court noted that in dismissing prosecutions for failure to provide child support, the trial court had "[e]mploy[ed] a realism especially suitable in the context of an interest of justice determination":

> [T]hree of the defendants . . . were in such indigent circumstances that whatever opportunity there may have been to treat constructively with their support obligations through the Family Court would have been destroyed by their incarceration. One of these three was a student dependent for his own sustenance on part-time work and grants. The fourth one, Brown, who had suffered a heart attack, had attempted to clear up his support arrears only to be repulsed by the District Attorney's insistence on a finding of guilt.[152]

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prosecutors do not pay litigation costs from their own pockets, (ii) a prosecutor's desire for a law-and-order reputation for use in a later election, and (iii) an honest difference of opinion concerning what qualifies as trifling.").

147. *Starrish*, 544 P.2d at 9 (Utter, J., dissenting).

148. *Id.*

149. *See* Sterling, *supra* note 122, at 2268 ("Particularly in high volume courts, like those that hear misdemeanor and municipal cases, the first goal on the court's agenda is case processing. Efficient disposal of cases is often diametrical to nuanced, individualized examination of each defendant and the full context and circumstances of that defendant's life.").

150. *See* Howell, *supra* note 92, at 290 ("The observation that what happens in the lower criminal courts has little to do with justice is not new.").

151. *See* State v. Thoreson, No. A06–454, 2007 WL 1053205, at *11 (Minn. Ct. App. Apr. 10, 2007) ("Everyone on this case, law enforcement, public defender's office, Hennepin County Attorney's Office, and the judiciary are part of the government. We are all, to some degree, bureaucrats. But we are still allowed to define ourselves."); State v. Sauve, 666 A.2d 1164, 1166 (Vt. 1995) (court dismissed charge of sexual assault of a minor after a mistrial, thanks to its sense that the court is "responsible for the integrity of the process as a whole").

152. People v. Rickert, 446 N.E.2d 419, 422 (N.Y. 1983).

One sees the same emphasis on "realism" in an opinion dismissing a manslaughter charge, where the court quoted with approval another judge, who, in reviewing the case, had stated that to find that the defendant's use of defensive force was excessive would be "applying law in a vacuum,"[153] and that "[s]uch approach is suitable for a laboratory setting but is unsuitable for a world of real people where a person has been goaded beyond endurance and his own safety may have been in jeopardy if this bully had gotten the upper hand."[154]

Part IV will explain that in these nineteen states, and in interpreting numerous statutory provisions, judges frequently converge on these same themes: that justice requires realism and context, or, in the words of Aristotle, quoted in one of these cases, "no[t] this or that detail so much as the whole story."[155] One may wonder what is suitable when "realism" is not,[156] but even if we agree that realism may be "especially suitable" in this procedural realm,[157] these cases should inspire us to consider opportunities to introduce it in other parts of the criminal justice system too. This is in part because of the limitations that this procedural context necessarily involves, a subject to which this Article now turns.

## III. THE LIMITATIONS OF THESE STATUTES

A thorough examination of these statutes must include an appreciation of their limitations. It is an assessment of their limitations that will lead, in Part IV, to a proposal that one seek additional fora in which the principles relied upon in these cases might be applied. The limitations are important for another reason too. They provide a case study of ways in which, throughout the criminal justice system, defense protections tend to become constrained, even in a context (here, potential dismissal of prosecutions) that one might think would be nothing but useful to the defense. Four limitations will be considered: first, the relative powerlessness of the defense as regards this dismissal power; second, the phenomenon of reform in one area leading to problems in another; third, judicial narrowing of this power; and fourth, the risk of bias in the application of these statutes.

153. People v. Shanis, 374 N.Y.S.2d 912, 918 (N.Y. Sup. Ct. 1975).

154. *Id.* at 919.

155. *See id.* at 923 ("Equity bids us be merciful to the weakness of human nature; to think less about the laws than about the man who framed them, and less about what he said than about what he meant; not to consider the actions of the accused so much as his intentions, nor this or that detail so much as the whole story; to ask not what a man is now but what he has always or usually been.").

156. *Rickert*, 446 N.E.2d at 422 (stating that "realism" is "especially suitable" in the context of these dismissal motions).

157. *Id.*

### *A. Relative Powerlessness of the Defense*

The relative powerlessness of the defense in this area is shown by the fact that many states do not have these statutes on the books, and several of those that do have them prohibit defense counsel from invoking them.[158] That California has softened its stance so that defense counsel can "informally suggest" dismissal,[159] while not able explicitly to move for it, may be symbolic of a justice system that masks rot with a facade of adversarialism.[160] Prosecutors can invoke these statutes for reasons that include wanting more time to prosecute,[161] more defendants,[162] more evidence,[163] more charges,[164] or more serious charges.[165] Some courts have pointed to a tension in the idea that prosecutors—the most dominant participants in the system[166]—need yet another tool in order to get enough and sufficiently serious convictions;[167] one court has described as "sleight of hand" the prosecution's use of this statute to dismiss so that it could then refile.[168]

Even where defense counsel is able to invoke these statutes, placing the burden of seeking justice on the shoulders of defense counsel is problematic in this time of unequal resources,[169] massive public defender caseloads,[170] and meager standards of defense counsel effectiveness.[171]

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158. Eight states indicate in their statutes that only the prosecutor or judge may move for dismissal: Alaska, California, Iowa, Minnesota, Montana, Oklahoma, Oregon (though the case law seems to permit a defendant's motion. *See* State v. Hadsell, 878 P.2d 444 (Or. 1994)), and Washington. In Iowa, this mechanism is "not available to a defendant" and the defense cannot even join in a prosecutorial motion to dismiss. State v. Lasley, 705 N.W.2d 481 (Iowa 2005).

159. People v. Konow, 88 P.3d 36 (Cal. 2004).

160. *See* Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 912 (2011) ("The current American system is marked by an adversary process so compromised by imbalance between the parties—in terms of resources and access to evidence—that true adversary testing is virtually impossible.").

161. *See* Sheila Kles, *Criminal Procedure II: How Much Further is the Furtherance of Justice?*, 1989 ANN. SURV. AM. L. 413, 417 (1991) (noting that these refilings "can circumvent the defendant's right to a speedy trial").

162. *See* People v. Hernandez, 994 P.2d 354 (Cal. 2000).

163. *See id*.

164. *See id*.

165. *See id*.

166. *See* Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049, 1078 (2013).

167. *See* State v. Hart, 723 N.W.2d 254, 259 (Minn. 2006) ("We acknowledge that our jurisprudence has created a tension between a district court's authority to dismiss a complaint in the interests of justice, and the prosecutor's right, upon such a dismissal, to refile the complaint.").

168. *See* State v. Avila, 153 P.3d 1195, 1202 (Idaho Ct. App. 2006); Kles, *supra* note 161, at 417 (noting that these refilings "can circumvent the defendant's right to a speedy trial").

169. *See* Findley, *supra* note 160, at 912.

170. *See* Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 581 (2014) (public defenders have about six minutes per week per client).

171. *See* Natapoff, *supra* note 166, at 1049 ("[T]he right to counsel . . . cannot bear the curative weight it has been assigned in the modern era of overcriminalization and mass judicial processing.");

Defense counsel may not have the time, ability, or resources to present a compelling case for dismissal.[172] Indeed, judges often hint, or more than hint, that the case was ripe for a defense dismissal motion that was never made.[173]

Even if defense counsel has the ability and willingness to file such a motion, strategic considerations may act as a restraint. If one urges that justice requires dismissal, one may be seen as urging that the prosecutor is not doing her job; this or any other kind of "aggressive" litigation risks jeopardizing a plea offer or other prosecutorial dispensation in this or another case.[174] In addition, if one makes such a motion one is liable to prolong the case[175]—particularly if the prosecutor appeals a dismissal, as they often do.[176] Prolonging the case may be untenable for those who are detained pre-trial,[177] or for whom the pre-adjudication process is destructive in other ways.[178]

In addition, with respect to many harms, these motions are available only at too late a stage.[179] The mere initiation of a prosecution can lead to deportation, for example.[180] In addition, there is often considerable pressure to plead guilty at the first court appearance, before these motions can be filed, and defendants are frequently unrepresented when they make the

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Sterling, *supra* note 149, at 2250; *id.* at 2259 ("Although the [Strickland] test anticipates an objective standard of reasonableness, the test has generally been interpreted as requiring an alarmingly low level of competence."); Rodney J. Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 741–42 (2006) (describing assistance of counsel as often involving "little more than counsel's help in facilitating a guilty plea").

172. *See* L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 879 (2017) (describing the "triage" that determines whether defense counsel will file motions).

173. *See* State v. Lowe, 466 A.2d 866, 866 n.1 (Me. 1983); People v. Outsen, 7 N.Y.S.3d 859, 860 (N.Y. Just. Ct. 2015); People v. Doe, 602 N.Y.S.2d 507, 510–511 (N.Y. Crim. Ct. 1993); People v. Donnaruma, 10 N.Y.S.3d 854, 855 (Albany City Ct. 2015); Commonwealth v. Kirkwood, 520 A.2d 451, 451 n.2 (Pa. Super. Ct. 1987).

174. *See* Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 90 (1995).

175. *See* State v. Kinchen, 707 A.2d 1255, 1260 (Conn. 1998) ("Examining the basis of a prosecution delays the criminal proceeding."); People v. LaFont, 978 N.Y.S.2d 832, 835 (N.Y. Crim. Ct. 2014) (dismissing a case after nine months against a woman alleged to have intervened when police tried to handcuff her husband who had just had heart surgery).

176. *See infra* note 220 and accompanying text.

177. *See* Natapoff, *supra* note 166, at 1051 ("Innocent defendants may plead guilty because they cannot afford bail pending trial and will lose jobs, homes, or children by remaining incarcerated").

178. *See* Benjamin Weiser & James C. McKinley, Jr., *Chronic Bronx Court Delays Deny Defendants Due Process, Suit Says*, N.Y. TIMES (May 10, 2016), https://www.nytimes.com/2016/05/11/nyregion/chronic-bronx-court-delays-deny-defendants-due-process-suit-says.html.

179. *See* Howell, *supra* note 92, at 291 ("The ready accessibility of electronic records can make any arrest, even without a conviction, an effective bar to gainful employment.").

180. *See* 5 Boro Defenders, *Call for a Moratorium on Broken Windows Prosecutions*, MEDIUM (Jan. 30, 2017) https://medium.com/@5BoroDefenders/call-for-a-moratorium-on-broken-windows-prosecutions-729e3764411a.

decision whether to accede.[181] That pressure remains considerable if bail is set at the first appearance—an event whose case-determinative nature has led Jocelyn Simonson to analogize it to a trial,[182] and, again, an event at which there may be no counsel present.[183] Even if a defense motion is filed—and succeeds—before the case is resolved, devastating pre-adjudication harms accrue rapidly[184] and cannot be undone.[185] Thus, the drafters' description of the *de minimis* statute—that it gives the judiciary the ability to "ignore merely technical violations of law"[186]—is somewhat misleading. The judiciary may ignore the alleged violation, but only after the law has imposed months- or years-long harms that cannot be erased.[187]

### *B. Reform Here Leading to Problems Elsewhere*

Another reason to take a circumspect approach toward these statutes is the risk that an apparent avenue of defendant protection creates problems elsewhere within the system.

The first aspect of this risk is that by endorsing the notion of safety valves for exceptional cases one reifies and helps to support the broader system.[188] As will be discussed below, judges often seem compelled to

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181. *See* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 369 (2011) (mentioning high rates of waiver of counsel in misdemeanor cases, and high rates of guilty pleas after waiver in some jurisdictions).

182. *See* Simonson, *supra* note 98 at 585 ("[F]or indigent defendants [bail] often serves the function that a real trial might, producing guilty pleas and longer sentences when an individual cannot afford to pay their bail.").

183. *See* Sandra Guerra Thompson, *Do Prosecutors Really Matter?: A Proposal to Ban One-Sided Bail Hearings*, 44 HOFSTRA L. REV. 1161, 1161 (2016) ("[I]n about half the local jurisdictions in this country arrested individuals appear at a pivotal hearing—the probable cause and bail hearing—and face a judge and, in many cases, a prosecutor but with no defense counsel to speak on their behalf.").

184. *See* Simonson, *supra* note 98, at 608 ("Even a few days in jail are profoundly destabilizing: defendants experience declines in physical and mental health, and potentially lose wages, jobs, stable housing, and custody of their children.").

185. *See* People v. Doe, N.Y. L.J., Apr. 6, 1979, at 12 (N.Y. Crim. Ct. 1978) ("[E]ven if the defendant were to be acquitted after a trial, irreparable harm will have been done to his reputation by virtue of the mere allegation that he was suspected of having propositioned one who purported to be a street prostitute.").

186. *See* MODEL PENAL CODE § 2.12 note (AM. LAW INST. 1985).

187. *See* Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315, 1363 (2017) (mentioning states that "do not expunge, seal, or remove dismissed charges from a person's criminal history").

188. *See, e.g.*, Jocelyn Simonson, *When the City Posts Bail*, (manuscript at 13) (on file with author) ("[C]ertain reform efforts may sometimes legitimate the systems they are trying to change by instituting small changes that appear to shift things more than they do. These deceptively small changes can, in turn, make it hard to criticize the larger system, solidifying fidelity to the practices and ideas that cause the injustice in the first place."); *see also* Jaisal Noor, *Judge Dismisses Case Against Rebel Diaz, Says "Keep Up the Good Work,"* INDYPENDENT (June 22, 2009) https://indypendent.org/2009/06/judge-dismisses-case-against-rebel-diaz-says-keep-up-the-good-work/ (describing dismissal in furtherance of justice ordered after the submission of letters of support from over thirty members of the South Bronx community in which the defendants were based, and quoting one of the defendants as saying that "[t]he outcome of the case, it's really easy to come to the

confine this remedy to what they view as exceptional cases.[189] These dismissals, therefore, risk assuaging concerns about (and diluting efforts to tackle aspects of) the broader system, by suggesting that an escape exists for the deserving few.[190] One way of understanding the *de minimis* dismissal power is as an aspect of the judge's power to avoid absurd results.[191] Under this reading, these cases would be making an implicit assertion that in those cases where dismissal is not granted the status quo is not absurd.[192]

The second aspect of this risk is that this backstop to the prosecutorial duty to do justice may incline the prosecution still further to neglect the subsidiary duty to refrain from bringing or pursuing certain cases.[193] The same phenomenon might work to decrease pressure on police to take steps other than to initiate charges. In New Jersey, for example, the drafters of the state's *de minimis* statute were alert to the risk that rather than prompting other players within the criminal justice system to more awareness of their discretionary power, this judicial power might allow them to relax their focus. The Commentary states that "[i]t should be made clear that this Section is intended as an additional area of discretion in the administration of the criminal law by way of judicial participation and not as a replacement for the traditional exercise of discretion by the prosecutor, the grand jury and the police. The Section should not be used by those agencies as an excuse for buck-passing."[194]

Case law suggests that there is indeed a risk of buck-passing. In its brief rejecting a claim that Pennsylvania's Trademark Counterfeiting

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conclusion that the system works. . . . I would say it's not so much that the system works, [but] that the system has cracks. As a community we have to exploit those cracks in the system. We need to find the small spaces of democracy that are left within this police state, whether through technology, through direct action through our communities, within our block.").

189. *See infra* Part C.

190. *See* Joseph Margulies, *The Limits of Criminal Justice Reform*, BOS. REV. (Nov. 17, 2015), http://bostonreview.net/us/joseph-margulies-criminal-justice-transformation ("[R]eform proposals aimed at population rather [than] principle are dangerously incomplete. We may say that children should not be tried as adults, and the mentally ill should not be held in solitary confinement. But solutions such as these reinforce the idea that everyone else deserves to rot."); *id.* (stating that under this mindset "[n]othing else in the system—from policing to prosecution, from prison conditions to collateral consequences—needs to change").

191. *See* Wanderer & Connors, *supra* note 27, at 849 n.92.

192. *See, e.g.*, Bryan Stevenson, *We Need to Talk About an Injustice*, TED (Feb. 2012) at 6:34, https://www.ted.com/talks/bryan_stevenson_we_need_to_talk_about_an_injustice/transcript?language=en ("Our system isn't just being shaped in these ways that seem to be distorting around race, they're also distorted by poverty. We have a system of justice in this country that treats you much better if you're rich and guilty than if you're poor and innocent. Wealth, not culpability, shapes outcomes.").

193. Paul Butler, *Gideon's Muted Trumpet*, N.Y. TIMES (Mar. 17, 2013), http://www.nytimes.com/2013/03/18/opinion/gideons-muted-trumpet.html (opining that the duty to do justice is "just words on paper").

194. N.J. CRIMINAL LAW REVISION COMM'N, THE NEW JERSEY PENAL CODE: FINAL REPORT OF THE NEW JERSEY CRIMINAL LAW REVISION COMMISSION 75 (1971).

Statute violated the First Amendment because it might sweep in such benign behavior as a "lawyer writing [Penn State in] a brief," or a "toddler painting Penn State on her tree house," the State made the following argument: "[E]ven assuming such minimal behavior is prohibited, the Commonwealth has established protections . . . regarding [d]e minimus [sic] infractions. This permits courts to dismiss charges which may fall within the technical language of the statute, but is not in which [sic] the statute intended to prohibit and punish."[195] The state's Supreme Court rejected this use of the *de minimis* statute as a security blanket:

> [W]e find no comfort in the existence of [the state statute] providing for the dismissal of *de minimis* infractions, as the concern of our overbreath [sic] jurisprudence is not directed only at the risk of prosecution under overly broad statutes but also at the chilling of speech in fear of prosecution . . . . Our citizens are provided no guarantee that a court will find that the *de minimis* statute applies to their use of "counterfeit marks."[196]

### *C. Judicial Narrowing*

Another phenomenon that is prominent in this context is judicial narrowing of the protection mentioned in the statutes. The cases often emphasize that a high bar must be met in order for a dismissal to be appropriate. Where it is explained, the high bar is said to be required by the separation of powers.[197] New York's case law has been particularly vocal on this point in interpreting the statutory language that limits dismissal to cases where it is required by "some compelling factor, consideration or circumstance."[198] New York judges have declared that these dismissals occur only because of "the tiniest crack that allows a sliver of discretion to shine through when Justice cries out for mercy in spite of the strict application of the law."[199] These dismissals are to occur only when justified by "an overriding moral issue,"[200] or the risk of a "miscarriage of justice,"[201] or "shock [to] the conscience."[202] In the opinion of one court,

195. Brief for Appellant at 12–13, Commonwealth v. Omar, 981 A.2d 179 (Pa. 2009) (No. 20 MAP 2008), 2008 WL 6090125, at *12–13.

196. Commonwealth v. Omar, 981 A.2d 179, 188 (Pa. 2009).

197. *See* People v. Izsak, 416 N.Y.S.2d 1004, 1010 (N.Y. Crim. Ct. 1979); State v. Sauve, 666 A.2d 1164, 1167 (Vt. 1995) ("[B]ecause of separation-of-powers considerations and the public's interest in the prosecution of those charged with criminal offenses, the trial court's discretion to dismiss cases in the interest of justice is necessarily limited.").

198. N.Y. CRIM. PROC. LAW §§ 170.40(1), 210.40(1) (McKinney 2007).

199. People v. Thomas, 998 N.Y.S.2d 612, 617 (Ithaca City Ct. 2014).

200. People v. Stern, 372 N.Y.S.2d 932, 936 (N.Y. Crim. Ct. 1975).

201. People v. Vurckio, 619 N.Y.S.2d 510, 513 (N.Y. Crim. Ct. 1994).

"the Legislature used the word 'compelling' as a means to put the judiciary on notice to use this section as sparingly as garlic."[203] (Of course, it is far from uncontroversial that the use of garlic should be sparing.[204])

The judicial narrowing has included a carving out of certain categories of defendants as ineligible for this relief. For example, some case law has declared that a prior record—generally, one or more prior convictions,[205] but sometimes just one or more arrests[206]—precludes dismissal.[207] Thus, in one case involving misdemeanor charges against AIDS activists who were alleged to have sat in the middle of a Manhattan intersection, the trial judge dismissed the charges against those with "no record of prior unlawful activity," but not those with such a record.[208]

Similarly, some courts have determined that, despite the absence of statutory language to this effect, certain criminal charges are categorically ineligible for this sort of dismissal. Categories deemed unsuitable by one or more jurisdictions include negligent homicide,[209] drug offenses,[210] "violent" offenses,[211] "drunk driving,"[212] and felonies.[213] As Pomorski points out, even in the *de minimis* context these blanket carve-outs are less sensible than they may at first appear given that the definition of *de minimis* in the MPC and the state statutes that follow it is not tied to the formal grading of an alleged offense.[214]

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202. People v. A.T., 589 N.Y.S.2d 980, 981 (N.Y. Crim. Ct. 1992).

203. *Stern*, 372 N.Y.S.2d at 936.

204. *See, e.g.*, *The Top Five Reasons to Add Garlic to Everything*, INST. NAT. HEALING (Sep. 20, 2013), https://www.institutefornaturalhealing.com/2013/09/the-top-5-reasons-to-add-garlic-to-everything/.

205. *See* State v. Smith, 480 A.2d 236, 238 (N.J. Super. Ct. Law Div. 1984) ("Defendant has no prior history of arrest or conviction. Were the contrary true that fact would militate against dismissal of the complaint.").

206. *See* People v. Spagnola, 855 N.Y.S.2d 817, 818 (N.Y. App. Div. 2008) (affirming dismissal where "no prior history of arrests").

207. This restriction of course has a racially disparate impact.

208. People v. Ben Levi, 565 N.Y.S.2d 404, 406 (N.Y. Crim. Ct. 1990).

209. State v. Johnson, 653 P.2d 428, 436–37 (Haw. Ct. App. 1982).

210. *See* State v. Sorge, 591 A.2d 1382, 1385 (N.J. Super. Ct. Law Div. 1991) (denying motion to dismiss charges relating to needle exchange where such activity "is contrary to the zero tolerance drug policy of this State which refuses to treat as trivial the possession of even the most minuscule amounts of a controlled dangerous substance").

211. *See* State v. Downey, 576 A.2d 945, 948 (N.J. Super. Ct. Law Div. 1988) ("Even under an expansive reading of the *de minimis* statute, [a direct intentional physical attack] should not be classified as trivial.").

212. *See* Commonwealth v. Guthrie, 616 A.2d 1019, 1021 (Pa. Super. Ct. 1992) ("[T]his court will not undermine our state's policy against drunk driving by declaring appellant's acts 'de minimis.'").

213. *See* Commonwealth v. Przybyla, 722 A.2d 183, 187 (Pa. Super. Ct. 1998).

214. *See* Pomorski, *supra* note 9, at 99. ("The concept of trivial felony is not necessarily internally contradictory considering that the rationale of the de minimis doctrine is overcoming the conflict between the formal, legal assessment of general classes of conduct on the one hand, and the substantive assessment of concrete, individual acts on the other."); *id.* (noting that some case law holds

Some courts have also indicated that dismissal is appropriate only where no "intermediate and less drastic remedial steps" were available,[215] despite the absence of statutory language to this effect. In Oregon, for example, the in furtherance statute makes no mention of a requirement that intermediate measures first be sought.[216] One court, however, imported such a requirement from a different area of the law, finding "no intention by the legislature that [the court's] authority [in this area] should not be circumscribed by the same policies."[217]

In Washington, various aspects of judicial narrowing led, in turn, to narrowing of the rule itself.[218] The 1973 version of the rule stated that "[t]he court on its own motion in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution and shall set forth its reasons in a written order."[219] It thus "appear[ed] to grant largely unfettered discretion to the trial court to dismiss a criminal prosecution."[220] The case law then "severely restrict[ed] this discretion";[221] these judicial restrictions were in turn used to justify a 1995 amendment,[222] which imported each of the restrictions (shown here in italics): "The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution *due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial*."[223] The cases have subsequently narrowed the scope of this remedy even further, holding that dismissal can occur only when there have been "truly egregious cases of mismanagement or misconduct by the prosecutor."[224]

One also sees judicial narrowing in the appellate context. Courts have ostensibly given leeway to trial judges, declaring that the standard of

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open the possibility of a *de minimis* dismissal of a felony prosecution); HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY, 260–61 (1966) ("Every crime, however precisely its boundaries are drawn, may cover violations of very different gravity.").

215. State v. Leonel-Castillo, 150 Wash. App. 1027 (2009) (reversing dismissal ordered after prosecutor had failed to appear for trial, where court did not first consider proceeding with another prosecutor or any other alternative).

216. OR. REV. STAT. § 135.755 (2003).

217. State v. Vasquez-Hernandez, 977 P.2d 400, 406 (Or. Ct. App. 1999) (holding that it was error for trial court to dismiss for discovery violations when a lesser sanction would suffice).

218. Compare with New York, where the "exceptionally serious" statutory requirement for law enforcement conduct was imported from the case law. *See* Wirenius, *supra* note 25, at 202.

219. State v. Rohrich, 71 P.3d 638, 641 n.3 (Wash. 2003) (alteration in original).

220. *Id.* at 641 (alteration in original) (quoting the drafters' comment to the 1995 amendment).

221. *Id.* (alteration in original).

222. *See id.*

223. WASH. SUPER. CT. CRIM. R. 8.3(b) (emphasis added). The language added was said to be "insubstantial in that it merely reflects preexisting common law requirements for dismissing charges." State v. Michielli, 937 P.2d 587, 592 (Wash. 1997).

224. State v. Ashley, 122 Wash. App. 1045, 1047 (Wash. Ct. App. 2004) (quoting State v. Duggins, 844 P.2d 441, 446 (Wash. Ct. App. 1993)).

review is abuse of discretion.[225] Judges and commentators have noted, however, that the standard that ends up being applied—at least where the decision below was to grant the motion to dismiss[226]—looks a lot like de novo review,[227] or even automatic reversal.[228] Indeed, in some instances the very granting of appeals from these dismissals appears to have come about through judicial stretching. In Minnesota, for example, statutory language declares that the prosecutor cannot appeal dismissals in the interests of justice.[229] At least one case, however, managed to find the ability to appeal by looking at a different statute.[230] And prosecutors do appeal,[231] with the result that a dispute over, for example, an alleged sip of beer enjoyed by a twenty-year-old, can prompt rounds and rounds of litigation.[232]

Several of these acts of judicial narrowing have garnered dissent. Thus, in Oregon, one dissenting judge pointed out that dismissals are reviewed in a more intrusive way than the "abuse of discretion" label would suggest.[233] In Washington, one judge objected to the majority's apparent restriction of dismissal to contexts where a due process violation is found, noting that

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225. *See* State v. Sauve, 666 A.2d 1164, 1168 (Vt. 1995); Pomorski, *supra* note 9, at 88–89.

226. *See* People v. Gragert, 765 N.Y.S.2d 471, 473 (N.Y. Crim. Ct. 2003).

227. *See* Pomorski, *supra* note 9, at 88–89 ("In some instances, in spite of declarations to the contrary, appellate courts have substituted their own concept of a de minimis infraction for the one applied by the decision appealed from. Thus, operationally, the review was conducted de novo . . . ."); Wirenius, *supra* note 25, at 205 ("[I]n the decade and a half in which the revised [New York] statute has held sway, review has become more exacting. While the vast bulk of the pre-amendment reversals of dismissals involved lower court failure to follow the appropriate procedures, appellate division reversals increasingly rest on simple disagreement.").

228. *See* State v. Vasquez-Hernandez, 977 P.2d 400, 407 (Or. Ct. App. 1999) (Warren, S.J., dissenting) ("In this case, the trial court clearly reviewed our decisions and carefully considered the issues that we have held to be important before it decided to dismiss this case. The majority holds, nevertheless, that the court abused its discretion. The majority thereby makes express the implication that the state draws from our cases: if a trial court dismisses a case over the state's objection, it will be reversed, no matter how carefully the court has followed our teachings.").

229. *See* MINN. R. CRIM. P. 28.04(1)(1) ("[A] pretrial order cannot be appealed . . . if the court dismissed a complaint under Minn. Stat. § 631.21.").

230. *See* State v. Hudson, No. A13–1635, 2014 WL 684710, at *6 (Minn. Ct. App. Feb. 24, 2014) ("Although there is no authority for an appeal of a dismissal [in furtherance of justice] under [Minn. Stat. §] 631.21, Minn. R. Civ. App. P. 105 provides for discretionary review in the interests of justice. . . . Under the unique circumstances of this case, where the district court's dismissal was based on both a lack of probable cause and 'in furtherance of justice,' the state has demonstrated a 'compelling reason' why discretionary review [of the furtherance of justice dismissal] and consolidation are appropriate." (alterations in original)).

231. *See* Andrew E. Taslitz, *Trying Not to Be Like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?*, 45 TEX. TECH L. REV. 315, 366 (2012) (stating that because of motivation to defend the status quo, prosecutors will "too often close their eyes to evidence that the status quo is undesirable, thus failing to acknowledge . . . the validity of defense claims that justice requires something other than the harsh penalties law enforcement seeks").

232. *See* State v. Zarrilli, 523 A.2d 284, 285 (N.J. Super. Ct. Law Div. 1987) (involving defense appeal of conviction, followed by prosecution appeal of subsequent dismissal).

233. *See Vasquez-Hernandez*, 977 P.2d at 407 (Warren, S.J., dissenting) ("[O]ur decisions under ORS 135.755 are unusual because we nominally apply an abuse of discretion standard but in fact routinely reverse trial courts when they dismiss cases over the state's objection.").

"[j]ustice may well require dismissal even where the State's conduct is not so extreme as to violate constitutional due process standards."[234] Another objected to the majority's creation of a requirement that there be "egregious" governmental misconduct in order to justify a dismissal, saying the following:

> [T]he majority's threshold requirement of egregiousness is not found in the plain language of CrR 8.3(b). . . . To hold that the misconduct must not only prejudice the defendant but also be "egregious" signals this court will tolerate some prosecutorial mismanagement resulting in prejudice to a defendants' [sic] constitutional right to a fair trial. Moreover, the majority misses the obvious point: if misconduct causes prejudice to a defendant's right to a fair trial it *is* egregious for just that reason.[235]

### *D. Bias*

A final limitation on the promise of these statutes is that the decision (not only by the judge, but also potentially by the defense attorney[236] and prosecutor[237]) to pluck a case out of the pile and scrutinize its suitability for prosecution is necessarily subjective. It hinges on the question of whether the plight of the defendant resonates with a human decision maker, and thus it is vulnerable to arbitrariness and bias.[238] "Appellant is somebody's

234. State v. Cantrell, 758 P.2d 1, 5–6 (Wash. 1988) (Dore, J., dissenting).

235. State v. Wilson, 65 P.3d 657, 664 (Wash. 2003) (Sanders, J., dissenting).

236. *See* Rapping, *supra* note 12, at 1020 (describing how "through their subconscious assumptions about their clients, what the evidence against them means, and what consequences are appropriate, defenders can be pushed to accept a lower standard of justice, and to fight a little less aggressively, for their clients of color").

237. *See* Fairfax, *supra* note 13, at 1275 ("Giving prosecutors the power to invoke or deny punishment at their discretion raises the prospect that society's most fundamental sanctions will be imposed arbitrarily and capriciously and that the least favored members of the community—racial and ethnic minorities, social outcasts, the poor—will be treated most harshly."); MICHELLE ALEXANDER, THE NEW JIM CROW 115 (2010) ("Numerous studies have shown that prosecutors interpret and respond to identical criminal activity differently based on the race of the offender.")

238. *See* Hon. Bernice B. Donald & J. Eric Pardue, *Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment*, 57 N.Y. L. SCH. L. REV. 749, 760–61 (2012) ("While judges strive to apply the law fairly and impartially, they are human and therefore must view things through their own cognitive lenses—judges, like all humans, are not free from biases. . . . [I]mplicit biases . . . 'strongly influence how courts decide particular cases . . . .'" (quoting Michael Selmi, *Why Are Employment Discrimination Claims So Hard to Win?*, LA. L. REV. 555, 562 (2001))); Richardson, *supra* note 172, at 875 ("[R]acialized justice is a foreseeable consequence of systemic triage [that is, a "situation of pressurized decision making by all courtroom actors"] because of the influence of implicit, i.e. unconscious, racial biases on behaviors, perceptions, and judgments."); *id.* at 877 (noting that implicit biases flourish when decision making is "highly discretionary").

daughter. I have a daughter,"[239] said one judge who deemed a prostitution charge to be an appropriate one for dismissal,[240] and who in this statement hinted at the importance of a sense of human connection. Mocking the notion that it was a legitimate police tactic for the undercover officer to ask the defendant to take all her clothes off, under the theory that "good girls won't do that but bad girls will," he appeared to drift into memories of happier times: "Maybe nobody was ever 19, went to college, went to fraternity and sorority parties, and in a large group both male and coed, ceremoniously 'mooned' their school's arch rival football team as it drove into the parking lot or, for that matter, tried to moon their arch rival's entire student body until the college president sent security in," he mused.[241]

In an effort to combat arbitrariness in these adjudications, both New York and the MPC introduced a set of factors that courts are to apply.[242] Yet these factors often bend in either direction,[243] and thus the importance of capturing the spirit of the individual decision maker remains. Even while the case law decries the notion that a judge should act as "a knight-errant, roaming at will in pursuit of his (or her) own ideal of beauty or of goodness,"[244] we seem to see a paean to beauty and goodness in a recent case involving graffiti charges. The defendant was charged with spray painting a pink fairy on the sidewalk outside an elementary school on a June day.[245] It turns out that the judge had a favorite piece of public graffiti, just across from the courthouse.[246] And the notion of a pink fairy—"a sprinkle of joyous whimsy"—delighting the school children,[247] and yet leading to the caging of its creator, inspired the judge not only to engage in a literary creation of his own (his opinion is sprinkled with fairy-related quotes), but also to dismiss.[248]

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239. State v. Thoreson, No. A06–454, 2007 WL 1053205, at *11 (Minn. Ct. App. April 10, 2007).

240. *Id.*

241. *Id.* at *9.

242. *See* Wirenius, *supra* note 25, at 202.

243. *See* Wanderer & Connors, *supra* note 27, at 850.

244. *See* People v. Stewart, 656 N.Y.S.2d 210, 216 (N.Y. App. Div. 1997) (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 62 (1921)) (reversing dismissal of indictment against Lynne Stewart).

245. People v. Thomas, 998 N.Y.S.2d 612, 613 (Ithaca City Ct. 2014).

246. *Id.* at 615 ("This Court's favorite public graffiti is just a few steps across from the courthouse on the Green Street garage.").

247. *Id.* ("The Court can only imagine the laughs ringing musically through the late Spring morning air as children were welcomed by this spritely visage as they entered their school on one of those painstakingly long June days before the start of summer vacation.").

248. *Id.*

Judges draw not only on their individual experience in justifying these dismissals, but also on "our collective experiences."[249] "In our collective experiences . . . we have all observed two workers or friends or a parent and child arguing when one may firmly grab the arm of the other to direct action or emphasize a point;"[250] we lawyers reading and deciding cases can all imagine the rage and frustration one might feel if a sibling were to snatch away an unopened letter from a law school admissions office.[251] But our collective experiences have their limits, and neither judges nor lawyers represent our nation's diversity.[252] Commentators note, for example, a judicial reluctance to grant dismissals in cases involving HIV and AIDS.[253] Real or perceived barriers in race, sexual orientation, class, and/or health status may prove too hard to overcome.

Research into implicit social cognition reveals a fundamental problem with the kinds of considerations that seem to move judges to dismiss.[254] As one judge has phrased it, "Ultimately an application in the interests of justice represents an appeal to one judge's individual conscience. We cannot find it within ourselves to reject our own moral belief that ultimate protection of Society is best achieved where at all possible by total rehabilitation of the one human being standing before us whose very presence calls out that he or she is human, unique and worth at least some effort—and faith—on our part."[255] The problem is that each of the assessments mentioned here—assessments of humanity,[256] of

249. *See* State v. Cabana, 716 A.2d 576, 578 (N.J. Super. Ct. Law Div. 1997); People v. Gragert, 765 N.Y.S.2d 471, 475 (N.Y. Crim. Ct. 2003) (dismissing charges relating to street protest, where inconvenience caused "could not have been that much more than the routine inconvenience we endure in this city on a regular basis").

250. *Cabana*, 716 A.2d at 578.

251. *See* Watson v. United States, 979 A.2d 1254, 1263 (D.C. 2009) (using as a hypothetical example of a case ripe for *de minimis* dismissal the scenario where "[a] letter from the admissions office of a law school, addressed to John, a college senior, arrives in the mail at John's home. John retrieves the letter. Harry, John's twin brother, who has also applied to law school and is desperate to see if John was admitted, snatches it from him. John pushes Harry to the ground and takes back the letter.").

252. *See* Robinson, *supra* note 52, at 416 (1988); Nicole E. Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception*, 47 AKRON L. REV. 693, 702 (2014) ("In state trial courts, 86 percent of judges are white."); EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 42 (2010), https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf ("Just 4.2% of lawyers and judges in the United States are African-American.").

253. *See* Wirenius, *supra* note 25, at 218.

254. *Explicit* bias in decisions whether to grant dismissals is also a concern. *See In re* Stacey, 737 N.W.2d 345, 346 (Minn. 2007) (noting that a judge committed an ethical violation by continuing for dismissal a traffic ticket issued to court employee's husband); Richardson, *supra* note 172, at 887 ("[T]he enormous discretion wielded by prosecutors, defense lawyers, and judges facilitates racial bias, both conscious and implicit.").

255. People v. James, 415 N.Y.S.2d 342, 347 (N.Y. Crim. Ct. 1979).

256. *See* Robert J. Smith & Ben Cohen, *Capital Punishment: Choosing Life or Death (Implicitly)*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 229, 236–38 (Justin D. Levinson & Robert J.

uniqueness,[257] of worth[258]—is vulnerable to implicit bias. Those from disfavored groups may not call out to the judge that they are human;[259] those from favored groups may—through the "boost" of implicit favoritism[260]—call out with particular clarity. This same phenomenon—implicit bias that favors some groups and disfavors others—affects each of the other considerations that emerge from these opinions as components of a "conscientious" determination: assessments of, and response to, harm,[261] wrong,[262] and pain suffered;[263] empathy;[264] and assessments of character,[265] seriousness,[266] dangerousness,[267] blameworthiness,[268] redemption

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Smith, eds., 2012) (implicit racial bias can pollute jury consideration of mitigating evidence by dehumanizing black defendants or fostering empathy for white defendants).

257. *See* Roberts, *supra* note 101, at 877 (racial difference can lead to a lack of attention to unique characteristics).

258. *See* Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANN. REV. L. & SOC. SCI. 269, 277 (2015) ("[I]mplicit associations between race and the value of life predict a greater likelihood of giving death sentences to Black defendants in capital cases.").

259. Phillip A. Goff, *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 304–05 (2008) (finding implicit associations between "black" and "ape," and explaining that such associations facilitate acceptance of harsher treatment and punishment of blacks within the criminal justice system).

260. *See* Smith et al., *supra* note 132, at 891 (describing implicit white favoritism as "a sort of automatic boost that one receives on account of his whiteness").

261. *See* Smith & Cohen, *supra* note 256, at 240 ("[T]he favorable implicit biases that flow toward white victims enhance the perceived harm of the crime when the victim is white."). For the centrality of calculation of harm to the *de minimis* issue, see *Watson v. United States*, 979 A.2d 1254, 1265 (D.C. 2009).

262. *See* Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 589 (2011) ("Race-based belief in a group's 'badness' . . . makes it easier to ignore the possible flaws in the legal processes by which its members are blamed and punished for their transgressions.").

263. *See* Smith et al., *supra* note 132, at 875 ("Social scientists have linked implicit favoritism to . . . the degree of empathic response to human pain.").

264. *See* Lynch & Haney, *supra* note 262, at 584 ("[T]he racial disparities that we found in sentencing outcomes were likely the result of the jurors' inability or unwillingness to empathize with a defendant of a different race—that is, White jurors who simply could not or would not cross the 'empathic divide' to fully appreciate the life struggles of a Black capital defendant and take those struggles into account in deciding on his sentence."); Richardson, *supra* note 172, at 883 ("Empathy sensitizes people to injustice . . . ."); Smith et al., *supra* note 132, at 899 ("Research from social, cognitive, and neuropsychology has found that empathy is experienced more for in-group members than out-group members."). Smith et al., supply a helpful definition of "empathy," explaining that it is used by social scientists to mean "the ability to understand and vicariously share the feelings and thoughts of other people." *Id.*

265. Smith et al., *supra* note 132, at 912 (describing influence of implicit white favoritism on character assessments).

266. *See* Katherine Beckett, Kris Nyrop & Lori Pfingst, *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 106 (2006) ("[R]acial stereotypes shape perceptions of the seriousness or dangerousness of particular situations and social problems.").

267. *See* Samuel R. Sommers & Satia Marotta, *Racial Disparities in Legal Outcomes: On Policing, Charging Decisions, and Criminal Trial Proceedings*, 1 POL'Y INSIGHTS FROM BEHAV. & BRAIN SCI. 103, 108 (2014) ("Defendant race can subtly influence jurors' expectations about culpability, dangerousness, and credibility.").

potential,[269] and common sense.[270] If these dismissals depend on judicial feelings of "I've been there, and I know what that feels like," then defendants of relative privilege are likely to do particularly well.[271]

The findings of implicit social cognition are supported by the data that exist in connection with the granting of this kind of motion.[272] This is not to suggest that this remedy should be abolished. Abolition might heighten disparity, since for those of even greater privilege it may be that a kind of *sub rosa de minimis* dismissal occurs—phrased differently, various kinds of safety valves or escape valves may exist[273]—before charges are even filed,[274] when those with privilege slide office supplies into our bags,[275] for example, or cash across the table to those who care for our children,[276] and have little reason to fear prosecution.

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268. *See* Lynch & Haney, *supra* note 262, at 588 ("[I]t is easier to believe that people from already disfavored—here, racially stigmatized—groups have done bad things if belief in their inherent 'badness' is part of their stigma."); *id.* at 589 ("[B]ecause out-groups are more feared and despised to begin with[,] it may be easier for decision makers to exaggerate the seriousness of the things that these already disfavored persons have been found guilty of doing.").

269. *See* Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 527 (2009) ("When Blacks are unfairly 'taxed' in the criminal system with perceived criminality, Whites receive an undeserved 'credit' with a perceived innocence or worthiness of redemption.").

270. *See* State v. Cabana, 716 A.2d 576, 578 (N.J. Super. Ct. Law Div. 1997) (identifying common sense as relevant to dismissal determinations); Nicole E. Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, 4 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 278, 305 (2014) ("Requiring judges to use their judicial experience and common sense may be a license to invoke implicit biases.").

271. *See* Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 565 (2014) ("[I]n-group members, and specifically White Americans, benefit from their group membership in a variety of ways. For example, in-group members display increased empathy towards each other . . . and receive the cognitive benefit of the doubt in a range of . . . situations, simply by virtue of their group membership.").

272. *See* Christopher Schmitt, *Plea Bargaining Favors Whites as Blacks, Hispanics Pay Price*, SAN JOSE MERCURY NEWS, Dec. 8, 1991, at 1A (finding racial disparity in dismissals in the interests of justice).

273. *See* Pomorski, *supra* note 9, at 99 (police "exercise de facto power of decriminalization by a practice of selective enforcement or nonenforcement").

274. *See, e.g.*, Abi Wilkinson, *White and Rich—the Justice System Gives You a Pass. What About Everyone Else?*, GUARDIAN (Oct. 27, 2016, 7:57 AM), https://www.theguardian.com/commentisfree/2016/oct/27/white-youngsters-make-mistakes-police-justice-committee.

275. *See* STUART GREEN, THIRTEEN WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE 168 (2012) (noting that as many as 60% of all American employees admit to having taken office supplies from work for personal use).

276. *See* Catherine Rampell, *How Common is Tax Evasion?*, N.Y. TIMES: ECONOMIX (Feb. 3, 2009, 8:12 PM), http://economix.blogs.nytimes.com/2009/02/03/how-common-is-tax-evasion/?_r=0 (describing 80–95% rate of violation of household employer tax rules).

## IV. THE POWER OF THESE CASES AS A GROUP

This Part brings together Part II's discussion of the potential of individual dismissals and Part III's discussion of the limitations on the dismissal power. It suggests that one can read these cases not just to see the individual attempts at justice that they represent, but also to extract the composite vision that they contain. This composite vision—revealed by drawing together the principles relied upon by the judges ordering dismissal—has potential applicability far beyond this procedural context,[277] and thus potentially beyond some of the constraints described in Part III.

Part IV.A extracts four principles of justice from the case law and explains how they can be woven together to create a composite vision of a different kind of criminal justice system. Part IV.B suggests that it may be that some of the constraints operating in this procedural context—the role of empathy, and a sense that the ramifications of a ruling would be tightly limited—helped to enable the declaration of these principles, but that there is no logical reason to confine them to this context. It thus suggests that if the principles, and the broader vision that they yield, resonate in this context, one should begin the project of considering their broader applicability.

### *A. Principles of Justice Upon Which the Cases Converge*

Judges in multiple states, interpreting multiple statutory provisions, repeatedly converge on the same principles of justice. Each of these principles has in common a theme that the court is considering more than just a decontextualized account of what the defendant is alleged to have done.[278] Each of these principles has had scholarly proponents, but those proponents have not been able to point to much real-world support.[279] The cases provide important data indicating that these principles were sufficiently compelling to persuade a variety of judges to exercise this significant power. This Part will examine each of the following principles: consideration of other mechanisms of accountability before the criminal law, consideration of the role of the state in the alleged law-breaking, a holistic calculation of costs imposed by prosecution, and consideration of defendants' motives.

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277. *See* Douglas Husak, *The De Minimis 'Defense' to Criminal Liability*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 328, 389 (R.A. Duff & Stuart Green eds., 2011) (stating that issues raised by *de minimis* dismissals implicate fundamental concepts within criminal law).

278. *See* Oliver & Batra, *supra* note 46, at 83 ("Courts generally dismiss cases under [the *de minimis*] statute only after considering all of the facts of the crime alleged as well as the circumstances of the defendant's life more generally.").

279. *See supra* note 9.

*1. Criminal Law as Last Resort*

In many of these cases, judges appear to be motivated by the notion that criminal law should be the last resort. One sees judges dismissing cases in favor of a range of mechanisms that they find as suitable as—or more suitable than[280]—the criminal law to achieve the relevant priorities.[281] Thus, judges terminated the following cases: a prosecution for assault where the complainant mostly just wanted compensation for her gunshot wound, and could get that through an insurance claim;[282] the prosecution of attorney Lynne Stewart for criminal contempt, where civil contempt was more likely to get results, and less likely to destroy her career;[283] prosecutions for failure to pay child support, where there was a framework set up for that purpose in the family court system, which again, was more likely to achieve legitimate purposes and less likely to destroy;[284] prosecutions against doctors for alleged mistreatment of patients, where the State Board of Medicine had already reviewed the case and issued sanctions;[285] riot charges against prisoners where they had been "dealt with administratively,"[286] and a prosecution for assault in the form of a political candidate allegedly pushing his rival during a heated exchange about the rival's flier on the dance floor of a Marriott hotel at the end of a long campaign.[287] "Not all inappropriate behavior leads to criminal liability,"[288] said the court in that last case: "There are instances, such as this, where public opinion will be the better judge of conduct."[289] Another judge took the opportunity to suggest non-arrest methods that the police might have attempted: rather than press ahead with efforts to get a suspected prostitute

280. *See* People v. Boyer, 430 N.Y.S.2d 936, 949 (Syracuse City Ct. 1980), *rev'd*, 459 N.Y.S.2d 344 (N.Y. Cty. Ct. 1981) ("Society suffers in that a more costly and less efficient process has been utilized, in two instances without resort ever having been made to the comprehensive Family Court System. . . . This Court does not possess the expertise, nor the jurisdiction, to adequately investigate all the necessary ingredients of support. Nor does this Court have the power to enforce the orders of support established in Family Court.").

281. *Id.* ("In effect, to continue these prosecutions would be to deprive both the defendants and their 'victims' of a more meaningful resolution of the non-support dilemma.").

282. People v. Jacobs, 432 N.Y.S.2d 614, 619–20 (N.Y. Gen. Term 1980).

283. People v. Stewart, 656 N.Y.S.2d 210, 224 (N.Y. App. Div. 1997) (mentioning the risk of "catastrophic and largely irreparable professional consequences of a conviction for criminal contempt").

284. *See Boyer*, 430 N.Y.S.2d at 948 ("A criminal conviction on a previously unblemished record can accomplish little more than impede any potential increases in earning capacity."). Of course, the civil system for enforcing child support orders can still result in incarceration. *See* Turner v. Rogers, 564 U.S. 431 (2011).

285. *See* Commonwealth v. Byers, 43 Pa. D. & C.4th 506, 520 (Pa. Com. Pl. 1999).

286. Commonwealth v. Jackson, 510 A.2d 1389, 1391 (Pa. Super. Ct. 1986); *see also* Commonwealth v. Matty, 619 A.2d 1383, 1388 (Pa. Super. Ct. 1993) ("[I]f another area of the law effectively dispels the need for conviction, the prosecution should be dismissed as unnecessary.").

287. *See* State v. Cabana, 716 A.2d 576, 579 (N.J. Super. Ct. Law Div. 1997).

288. *Id.*

289. *Id.* ("The what, why and how of which may call for an apology, not criminal charges.").

to take off her shirt so that he could arrest her, the officer could instead have said:

> Jenny, this isn't your day. Go on home and get a good night's sleep. Just tell me what bus stop to drive you to and I will, and if you are truly broke, I can spot you a couple of bucks for bus fare. Now listen to me, I have got about four hours left on my shift, and if I see you again hustling on the street corners, then I will have to run you in.[290]

Courts are particularly eager to invoke their role as gatekeepers of the criminal law when they detect that rather than a legitimate use of the criminal law, "something else is going on." Thus, a theft prosecution of a police officer was dismissed where the court detected that "there are internal problems the Pennsylvania State Police has with this officer. Whatever those problems might be, this Court is not going to allow the Criminal Justice System to be the forum in which to sort out that problem."[291] In another case, a prosecution was dismissed on the basis that a bank had "improperly used the criminal justice system to collect a debt."[292]

These cases thus serve as a useful reminder that the criminal law may have become, and should not be, a default response,[293] and serve to demonstrate that there are other mechanisms that can meet some or all of the ends in relation to which the criminal law is justified,[294] without the devastating harms. Indeed, it is not only the case that the criminal law may be unnecessary in order to meet certain goals with which it is commonly associated: it may actively thwart their realization.[295] Some courts are dismissive of the notion that a criminal prosecution could provide useful rehabilitation, for example.[296] Others point to the ways in which criminal

290. State v. Thoreson, No. A06-454, 2007 WL 1053205, at *10 (Minn. Ct. App. Apr. 10, 2007).

291. Pa. State Police v. Fraternal Order of Police, 634 A.2d 789, 792 (Pa. Commw. Ct. 1993), *rev'd*, 666 A.2d 641(Pa. 1995).

292. State v. Woll, 668 P.2d 610, 612 (Wash. Ct. App. 1983).

293. *See* Dena M. Gromet & John M. Darley, *Punishment and Beyond: Achieving Justice Through the Satisfaction of Multiple Goals*, 43 LAW & SOC'Y REV. 1, 2 (2009).

294. For deterrence, see Commonwealth v. Matty, 619 A.2d 1383, 1389 (Pa. Super. Ct. 1993) (finding dismissal appropriate where "even before he was prosecuted, appellant was punished by forces other than the criminal law [including losing his job] to the degree necessary to deter him from repeating the minor transgression").

295. *See* People v. Boyer, 430 N.Y.S.2d 936, 948 (Syracuse City Ct. 1980), *rev'd*, 459 N.Y.S.2d 344 (N.Y. Co. Ct. 1981) ("[T]his criminal stigma can foreseeably be counter-reproductive to an ability to meet future support obligations."); Brown, *supra* note 111, at 345 (cost-benefit analysis "would help examine the risk that incarceration may sometimes harm one of the primary goals it purports to serve").

296. *See* People v. M.K.R., 632 N.Y.S.2d 382, 387 (N.Y. Just. Ct. 1995) ("[W]hile it may be true that defendant may need some guidance in his life, probation for a sexual misconduct charge is not the appropriate avenue for that help.").

prosecution can disrupt efforts at self-rehabilitation.[297] Similarly, rather than deter, some convictions may in fact impel more law-breaking.[298]

By relying on the notion that the criminal law should be a last rather than first resort, these cases provide support for scholars who have urged the concept of criminal law as the *ultima ratio* (last resort),[299] but who have not been able to point to much real-world implementation of this principle, at least in this country.[300] These cases show that at least some judges can be persuaded to exercise their dismissal power on this basis.

In addition to showing that this principle has traction within our criminal justice system, these cases are valuable because of the questions that they pose by drawing on this concept. The first, of course, is the question of when the criminal law is indeed a necessary response rather than a harmful default.[301] A second, and related, question is what should be the scope of the principle that judges should bar the gate to the criminal law when "something else is going on." After all, many scholars assert that in huge swaths of the criminal justice system as currently implemented[302]—and perhaps throughout the entire system—"something else" is going on.[303] Finally, even if one is drawn to the notion of alternative mechanisms to the

297. *See* People v. Mason, 411 N.Y.S.2d 970, 976 (N.Y. Sup. Ct. 1978) (dismissing where "there has been overwhelming proof as to the extraordinary strides that defendant has taken toward total rehabilitation of himself as a valuable and contributing citizen of the community. . . . This extraordinary achievement, against what many would view as hopeless odds, would be utterly destroyed by the imposition of a jail sentence at this time."); *In re* Stephens, 413 N.Y.S.2d 591, 594 (N.Y. Fam. Ct. 1979) ("To compel the Respondent to participate in suppression hearings and fact-finding hearings in these matters, would not be productive and, in fact, would only delay the rehabilitation which the Respondent is now undergoing."); State v. Cantrell, 758 P.2d 1, 6 (Wash. 1988) ("[I]f the State's delay interferes with a particular juvenile's rehabilitation, justice would be furthered by dismissal.").

298. People v. James, 415 N.Y.S.2d 342, 346 (N.Y. Crim. Ct. 1979) ("If a prostitute is beholden to a pimp, his supplying funds to pay this fine will further obligate her to him by the rules of the jungle in which they function. If she works alone, the net effect of this punishment is to send her back to the streets to earn these funds by again selling her body.").

299. *See, e.g.*, Nils Jareborg, *Criminalization as Last Resort (*Ultima Ratio*)*, 2 OHIO ST. J. CRIM. L. 521 (2005).

300. *See supra* note 9; Jareborg, *supra* note 299, at 524 ("Criminalization is regularly used as a first resort (*sola ratio*)."); *id.* at 525 (stating that "[t]he most authoritative expression of an *ultima ratio* principle is found in a decision by the German Constitutional Court").

301. *See* GREEN, *supra* note 275, at 138 ("What conduct should be subject to criminal sanctions is one of the most complex questions in all of criminal law theory.").

302. *See, e.g.*, Henry Ordower et al., *Out of Ferguson: Misdemeanors, Municipal Courts, Tax Distribution and Constitutional Limitations* 16, 23 (St. Louis Legal Stud. Res. Paper No. 2016-14), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2854372 (arguing that in the City of Ferguson and other parts of St. Louis County, the "revenue function has supplanted the public safety function of the municipal justice system," and thus "state constitutional taxing limitations should apply").

303. *See, e.g.*, LOÏC WACQUANT, PRISONS OF POVERTY (2009) (suggesting that the growing use of criminal enforcement dissolves the welfare state and keeps poor people under control); Sterling, *supra* note 122, at 2251 ("A number of scholars have described the modern-day criminal justice system as the latest recapitulation of a legally sanctioned racial caste system that dates back to United States chattel slavery."); Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society*, 37 ARIZ. ST. L.J. 759, 786–801 (2005) (discussing the criminal justice system's social control function).

criminal law, the question remains of how to minimize the attendant risks of bias and disparity. It may be that it is in particular those of relative privilege—doctors, lawyers, and the insured, for example—who are able to point to alternative mechanisms that can address alleged harm,[304] and it may be that those with resources are more able to engage in "self-rehabilitation."[305] If one is drawn to the *ultima ratio* principle, one must consider ways in which its disparate impact can be minimized.

### *2. Clean Hands*

Governmental wrongdoing does not generally provide a defense to a criminal charge, unless one can show that the government has violated certain constitutional rights or engaged in entrapment.[306] In other words, to the extent that the criminal law has something resembling the "clean hands" doctrine, under which improper conduct can bar legal victory,[307] it is sharply limited,[308] at least when defendants invoke it.[309] Yet, in this group of cases, judges frequently dismiss because they view the government as lacking clean hands—notwithstanding the absence of entrapment or a constitutional violation[310]—and sometimes read "government" very broadly.

In some of the cases, the unclean hands are those of law enforcement agents directly involved in the case, whether police or prosecutors.[311] Police have unclean hands, for example, when they order a man out into the

304. *See* Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 981–84 (2007).

305. *See, e.g.*, Gall v. United States, 552 U.S. 38, 41–42 (2007) (describing "self-rehabilitat[ion]" of University of Iowa student arrested on drugs charges).

306. For a discussion of entrapment and its rarity as a successful defense, see Jessica A. Roth, *The Anomaly of Entrapment*, 91 WASH. U. L. REV. 979 (2014).

307. *See* Brooks v. Bank of Boulder, 911 F. Supp. 470, 476 (D. Colo. 1996) (finding of unclean hands requires "improper conduct").

308. *See* United States v. Tanke, No. 209-CR-0293-WBS-KJN-P, 2016 WL 6248413 at *4 (E.D. Cal. Oct. 26, 2016) ("The doctrine of unclean hands is not available as a defense in criminal cases."); Tate v. State, 706 P.2d 169 (Okla. Ct. Crim. App. 1985) (same). The most prominent reference to clean hands in a criminal case came in *Olmstead*, in which Justice Brandeis asserted that on the basis of the clean hands doctrine the courts should exclude evidence obtained by federal officers in violation of state criminal law. Olmstead v. United States, 277 U.S. 438, 574 (1928), *overruled in part by* Katz v. United States, 389 U.S. 347 (1967) (Brandeis, J., dissenting) ("[A] court will not redress a wrong when he who invokes its aid has unclean hands.").

309. Note that a perceived lack of clean hands, in the form of a prior conviction, or in the form of having "contributed" to a wrongful conviction by taking a plea or "confessing," can block wrongful conviction compensation. *See Compensating the Wrongly Convicted*, INNOCENCE PROJECT, https://www.innocenceproject.org/compensating-wrongly-convicted/ (last visited Oct. 18, 2017). A perceived lack of clean hands on the part of a defendant can also scupper such defenses as necessity and self-defense.

310. *See, e.g.*, People v. Joseph P., 433 N.Y.S.2d 335 (N.Y. Just. Ct. 1908).

311. For prosecutors, see, for example, *People v. Mason*, 411 N.Y.S.2d 970, 975 (N.Y. Sup. Ct. 1978).

street to move his truck and then arrest him for drunk driving two houses down the block.[312] So too when they leave a bag spilling forth electronics and cash onto a Brooklyn subway platform, and then arrest a man for picking up the bag—even absent a showing of entrapment.[313] So too when they are "gratuitously foul" in the violence, intrusiveness, and, homophobia that they display in arresting men on charges of public sex,[314] even where the court finds no due process violation.[315]

Case law has expanded this notion a little further to encompass probation officers. In one case alleging that the defendant had violated a probation condition by drinking a malt beverage, the prosecution was dismissed where the drink had been imbibed at the probation officer's house, with his "knowledge and consent."[316] The court remarked that "[g]iven his authority and position as an officer of the Department of Corrections and, effectively, as an agent of the court, Ball's misconduct must be counted heavily in mitigation of the offense."[317] The court asked, "Would not the public see [further prosecution] as the system punishing a young defendant when he did not even get the services he had a right to expect from the sentence the court imposed on him?"[318] As the defense brief argued, it was the probation officer's "grossly inadequate supervision of [the defendant] that created the environment and opportunity for [the defendant] to consume alcohol."[319]

Some of the cases go still further, hinting at the notion that if the prosecution is to claim the label of "the State," it may need to suffer for failings of the state that go beyond those of police, prosecutors, and probation officers, including failures to provide needed services. Thus, in one case, a motivation for the dismissal of the prosecution of a Vietnam

312. People v. Asche, 669 N.Y.S.2d 788, 790 (N.Y. Dist. Ct. 1998).

313. *See* People v. Arroyo, 815 N.Y.S.2d 922, 923–24 (N.Y. Crim. Ct. 2006) ("'Operation Lucky Bag' can be viewed as an unfair enticement to commit crime. In order to further fairness and justice, the circumstances at hand compel the court to dismiss all charges against the defendant.").

314. *Joseph P.*, 433 N.Y.S.2d at 338–39 ("Joseph P. stated that he was forcibly seized and handcuffed with his hands behind his back. His foot was kicked to the side when he was told to spread his legs. During the checking of his car, he stated that a police officer ripped up the rug and this allegation is not denied. He was stripped and searched by one trooper in a large open room in the State Police Barracks and held naked in that room for some period of time. Another trooper walked in stating 'Too bad an Italian had to be a faggot.'").

315. *See id.* at 339.

316. State v. Keneally, No. 2002-199, 2002 WL 34422304, at *1 (Vt. Dec. 1, 2002).

317. *Id.* at *3.

318. *Id.*

319. Brief of Appellant at *4, *Keneally*, No. 2002-199, 2002 WL 32813901 [hereinafter *Keneally* Brief]. For Supreme Court support for a broad reading of "government" failings that can be held against the prosecution, see speedy trial case Barker v. Wingo, 407 U.S. 514, 531 (1972) ("A more neutral reason [for delay] such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.").

veteran was the extent of governmental failures to protect those returning from Vietnam.[320] This dismissal was reversed,[321] but this case law forces us to confront the question of where—if one admits that governmental failings are sometimes relevant to a calculation of the defendant's punishable harms—the line should be drawn between relevant and irrelevant failures, or relevant and irrelevant involvement in the creation of an "environment and opportunity" for law breaking.[322] Within at least some of these cases one can detect an expansive vision, which rejects the notion that justice can be achieved by judging an alleged act in isolation from the context—including the context of social deprivation—that may surround it.[323]

### *3. Holistic Calculation of Costs*

An additional component of the vision of the criminal law laid out in these cases is an attempt to conduct an assessment of the costs imposed by criminal prosecution that is as holistic as possible, in terms of the variety of interests and individuals harmed and the temporal scope of the harms considered.

As regards broad consideration of the interests and individuals harmed, we see dismissals based on harm to the complainant,[324] to the defendant and his family,[325] to other third parties,[326] to the purposes commonly

320. State v. Stough, 939 P.2d 652, 654 (Or. Ct. App. 1997) ("I think the government put these people in the field, screwed them up. They come back, they self-medicate with alcohol and drugs. Many of them committed suicide. Interesting statistic is that 50,000 were killed over there, but more than 50,000 committed suicide when they came back because of the treatment that they received. And I just want to say that over 0.03 grams of cocaine, or whatever it was, I'm not willing to put him through another minute." (quoting the trial court)).

321. *Id*. (finding that "[t]he reasons for which the trial court dismissed the charge are not attributable to the prosecution").

322. *Keneally* Brief, *supra* note 320, at *4.

323. *See* Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 L. & INEQ. 9 (1985); Andrew E. Taslitz, *The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado's Rotten Social Background*, 2 ALA. C.R. & C.L. L. REV. 79, 80 (2011) (saying that Professor Delgado's article "has played an important role in the evolution of scholarship on criminal responsibility but no role whatsoever in the evolution of case and statutory law on the same subject"); *id.* at 82 (arguing that because the rotten social background doctrine asserts that "part of the blame for a crime rests on society," it "violates every major assumption of the modern American rule of criminal law").

324. *See* State v. Sauve, 666 A.2d 1164, 1165 (Vt. 1995) (dismissing prosecution for sexual abuse of a minor where "[t]he court [was] concerned about the effect on [complainant], a very troubled young lady, about participating in such a trial for a second time").

325. People v. Shanis, 374 N.Y.S.2d 912, 920 (N.Y. Sup. Ct. 1975) ("[M]ore than 50 appearances in many courtrooms have resulted in a crushing financial burden as a result of which the defendant was forced to file a petition in bankruptcy."); State v. Keneally, No. 2002-199, 2002 WL 34422304, at *2 (Vt. Dec. 1, 2002) (overturning denial of motion to dismiss a case charging possession of alcohol in violation of probation, where the harm "was more to defendant and his family than to the public").

thought to motivate the criminal law,[327] and to other potential beneficiaries of the state money that is being devoted to prosecution.[328]

As regards broad consideration of the temporal sweep of these harms, we see dismissals based on both pre-adjudication and post-conviction harms. An important component of the case law addressing pre-adjudication harm is the original set of New York factors, laid out in the landmark case of *People v. Clayton*,[329] which included consideration of the "punishment already suffered by [the] defendant."[330] While this factor is not included in the current statutory language,[331] it maintains relevance in the case law of that state and others,[332] with courts freely using the term "punishment" to refer to pre-adjudication harms.[333]

These cases thus provide useful support for those pushing to increase the extent to which harms inflicted by prosecution are calculated within, and factored into, the criminal process. First, they offer support to those who assert that there needs to be a bigger role for cost-benefit analysis within the criminal law.[334] We see judges looking at the broad swath of

326. *See* People v. Eubanks, 436 N.Y.S.2d 953, 956 (N.Y. Crim. Ct. 1981), *rev'd*, 454 N.Y.S.2d 768 (Sup. Ct. App. Div. 1982) (dismissing charge of unlawfully obtaining unemployment benefits where "defendant has been employed for more than one year as a live-in house parent for mentally retarded adults. As such, she is responsible for the welfare of these individuals."); Howell, *supra* note 92, at 329 (listing harms inflicted on individuals and communities by the prosecution of minor alleged offenses).

327. *See supra* text accompanying notes 284–88.

328. *See* Howell, *supra* note 92, at 321; *supra* text accompanying notes 80–84.

329. 342 N.Y.S.2d 106 (N.Y. App. Div. 1993).

330. *See* People v. James, 415 N.Y.S.2d 342, 346 (N.Y. Crim. Ct. 1979) ("Each of these defendants has been arrested and spent at least some time incarcerated awaiting arraignment. The Court considers this enough punishment to satisfy this element of *Clayton*.").

331. *See* N.Y. CRIM. PROC. LAW §§ 170.40, 210.40 (McKinney 2007).

332. *See, e.g.*, People v. Gragert, 765 N.Y.S.2d 471, 476 (N.Y. Crim. Ct. 2003) ("[D]ue to the erroneous warrant, the defendant has already suffered a 'punishment' far greater than what would have resulted from her conviction in this case. Finally, the defendant's loss of liberty is a 'relevant fact' under subsection (j), the 'catchall' factor, that further tips the balance of the equities in favor of a dismissal in the interest of justice.").

333. *See, e.g.*, State v. Smith, 480 A.2d 236, 239 (N.J. Super. Ct. Law Div. 1984) (dismissing case alleging bubble gum theft where "[t]he consequences which have already attended the arrest of this defendant are more punitive than those which would follow conviction. . . . The conviction if imposed would be anticlimactic, and the minor penalty which might be imposed would pale in significance to that already endured."); People v. Doe, N.Y. L.J., April 6, 1979, at 12 (N.Y. Crim. Ct. 1978) ("The defendant has been subjected to punishment by virtue of his incarveration [sic] from the time of his arrest at approximately 5:40 A.M. on Sept. 22, 1978, until his release from custody upon parole at approximately 8:30 P.M. later that day, a period of about 14 hours."); *id.* (stating that post-arrest life "effectively amounted to . . . emotional and psychological incarceration").

334. *See* Brown, *supra* note 111, at 328 (arguing that cost-benefit analysis "can be and should be applied to criminal law much as it has been applied to other executive regulation"); *id.* at 345 (cost-benefit analysis "would help examine the risk that incarceration may sometimes harm one of the primary goals it purports to serve"); Mark A. Cohen, *The 'Cost of Crime' and Benefit-Cost Analysis of Criminal Justice Policy* (working paper 2016) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2832944 (calling cost-benefit analysis of criminal justice policies an "important tool," but one that is "still in its infancy").

harms from even a relatively minor prosecution or conviction,[335] and finding that there is no, or no comparable, benefit to justify it.[336] We even see one judge attempting financial calculations on this issue, adding up what it cost to conduct a prostitution prosecution, and conjuring up a vision of what else that money might have achieved.[337]

These cases also provide fodder for those who urge that it is nonsensical to attempt to conceive of an appropriate punishment without factoring in components beyond the mandated sentence,[338] and thus that the conventional view of "punishment" must be expanded.[339] This push has been particularly evident in the context of collateral consequences,[340] and in this case law we find support for these efforts in the willingness of judges to factor in at least some of these consequences when determining whether conviction is appropriate.

By suggesting a need for a fuller calculation of harms imposed by criminal prosecution, and for inclusion of at least some of those harms in the calculation of "punishment,"[341] these cases provoke a series of related questions. First, what is to be done to address the various impacts of

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335. *See* Howell, *supra* note 92, at 329.

336. *See* People v. Boyer, 430 N.Y.S.2d 936, 948 (Syracuse City Ct. 1980), *rev'd*, 459 N.Y.S.2d 344 (N.Y. Co. Ct. 1981) ("A criminal conviction on a previously unblemished record can accomplish little more than impede any potential increases in earning capacity."); People v. Shanis, 374 N.Y.S.2d 912, 922 (N.Y. Sup. Ct. 1975) (dismissing manslaughter indictment where "[h]aving reviewed all of the facts and circumstances available, this court is unable to visualize any purpose to be served by further punishment although it is far easier to imagine its effect").

337. *See* State v. Thoreson, No. A06–454, 2007 WL 1053205, at *2 (Minn. Ct. App. Apr. 10, 2007) (guesstimating that at the trial level the case "cost the taxpayers several hundred to a few thousand dollars," and at the appellate level "another several hundred to a few thousand dollars," and pointing out that nothing was gained—"If appellant is a prostitute, after her $50 fine, she is back on the streets telling her friends to be careful of Minneapolis Vice, 'they have a new "trick" up their sleeve.'").

338. *See* Brown, *supra* note 111, at 364 ("[C]onsider what [cost-benefit analysis] could show a retributivist about the full range of unintended consequences caused by criminal punishment. If punishment policy imposes indirect harms on innocents, retributivism presumably would recognize a duty to refrain from [c]reating such harms—and injustice—if they exceed the harms of unpunished criminal conduct."); Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 303 (2015) ("Courts have consistently found that [collateral consequences] do not constitute punishment.").

339. *See* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1830 (2012) ("Sentencing is designed to impose punishment that is proportionate to the offense and consistent with that imposed on similar offenders. These goals cannot be achieved without evaluating the total package of sentencing facing an individual.").

340. *See, e.g.*, *id.* at 1830–31 (describing scholarship urging courts to classify collateral consequences as punishment); *Project Description*, NATIONAL INVENTORY ON THE COLLATERAL CONSEQUENCES OF CONVICTION (2012), https://cdpsdocs.state.co.us/ccjj/Resources/Ref/CollConsequenceProjDescrip-2012.pdf ("When particular restrictions have no apparent regulatory rationale, and cannot be avoided or mitigated, they function as additional punishment, though without due process protections.").

341. *See* ABA, STANDARDS FOR CRIMINAL JUSTICE § 19-2.4 (2004) (providing that sentencing courts "should consider[] applicable collateral sanctions in determining an offender's overall sentence").

implicit (and explicit) bias on calculations of harm and loss suffered,[342] and the fact that items assessed as "losses"—home, job, and education, for example—may have been accrued as a result of racial and other privilege?[343] Next, if costs are to be more fully calculated, the question arises of how this can be done in a more systematic fashion than the back-of-the-envelope calculations of individual judges. For example, the question arises of how and by whom collateral consequences should be calculated, if they are to be factored into the desirability of either continued prosecution or particular sentences.[344] The burden of discovering these collateral consequences currently falls on the already-exhausted shoulders of defense counsel,[345] or non-profit initiatives,[346] or defendants.[347] If judges are suggesting, however, that an assessment of what is "just" in a case includes an assessment of likely collateral consequences, then one might conclude that it is imperative for prosecutors wanting to honor their "do justice" mandate to assess the potential consequences as fully as they can.[348] After all, prominent prosecutors have declared that collateral consequences can impede just outcomes,[349] and individual prosecutors have

342. *See* STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE COLLAR CRIMINALS 144–51 (1988) (revealing judicial perceptions that white-collar defendants experience prison differently than others); I. Bennett Capers, *The Prosecutor's Turn*, 57 WM. & MARY L. REV. 1277, 1294 (2016) (noting that the "perceived softness of the defendant" may be "racially coded").

343. *See* People v. Davis, 286 N.Y.S.2d 396, 400 (N.Y. Sup. Ct. 1967) ("This court believes that the instant case involving as it does a defendant of exceptional background and promising future and charged with a crime, conviction of which would sully the one and stifle the other, is a case crying out for the application of this most humane statutory provision."); Mario L. Barnes et al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 982–92 (2010) (reviewing data showing racial disparities in income, wealth, education, housing, employment, and criminal justice).

344. *See* ABA, STANDARDS FOR CRIMINAL JUSTICE § 19-2.1 (2004) ("The legislature should collect, set out or reference all collateral sanctions in a single chapter or section of the jurisdiction's criminal code.").

345. *See* Darryl K. Brown, *Why* Padilla *Doesn't Matter (Much)*, 58 UCLA L. REV. 1393, 1395 (2011) (arguing that *Padilla v. Kentucky*, which declared that failure to advise a client of the nearly certain deportation consequences of a guilty plea constitutes ineffective assistance of counsel, *see* 559 U.S. 356 (2010), will have limited impact because it requires defense attorneys to stay apprised of a broad array of collateral consequences).

346. In compiling the NICCC, the ABA exhausted one federal grant and was able to continue only as a result of a second federal grant being awarded. *See* email from Madeline Neighly (Jan. 17, 2017) (on file with author).

347. *See* People v. Garcia, 907 N.Y.S.2d 398, 400–01 (N.Y. Sup. Ct. 2010) (describing efforts of defendant—"an admitted neophyte in immigration matters" with "limited financial resources"—to overcome his attorney's admitted ignorance about the immigration consequences of the proffered plea deal, by paying an immigration paralegal to assess his situation (inaccurately, as it turned out)).

348. For this mandate, see Berger v. United States, 295 U.S. 78, 88 (1935).

349. *See, e.g.*, ABA COMM'N ON CRIMINAL SANCTIONS, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM 41 (2007) ("At times, the collateral consequences of a conviction are so severe that we are unable to deliver a proportionate penalty in the criminal justice system without disproportionate collateral consequences." (quoting Robert M.A. Johnson, President of the National Defense Attorneys Association)).

shown themselves willing and able to collate these consequences in cases in which they urge that because of the attendant collateral consequences conviction *should* be permitted.[350]

Assuming that "punishment" continues to be interpreted to cover less than the full range of harms imposed through prosecution, these cases also raise the question of whether the "theories of punishment" commonly used to justify sentences need to be supplemented by "theories of prosecution" that would be required to justify other harms, and that would support dismissal when such justification is lacking.[351] In a world where the conviction or formal punishment can be "anticlimactic" in light of all that has gone before,[352] the end cannot be assumed to justify the means.[353]

### *4. Noble Human Motives*

The traditional view within criminal law is that defendants' alleged motives are irrelevant to the question of liability.[354] This body of case law challenges that view. Again and again, one finds judges moved to dismiss in light of their assessment of defendants' motives.[355] When those motives

350. *See* State v. Corchado, 512 A.2d 183, 185 (Conn. 1986) ("[T]he state claims that significant governmental and societal interests favor 'identifying those guilty of criminal activity and having valid convictions entered against them.' It postulates that the strength of such interests is 'fortified by the substantial collateral consequences attending conviction for a serious crime.'" (quoting Fitzgerald v. U.S., 472 A.2d 52, 54 (D.C. App. 1984))); Commonwealth v. Grinnan, No. 2126-EDA-2013, 2014 WL 10920262, at *2 (Pa. Super. Ct. May 8, 2014) (mentioning "the Commonwealth's desire to prosecute to preserve Appellant's criminal record and for potential license suspension consequences").

351. For the "gap in the socio-legal literature" relating to theories of prosecution, see Ronald F. Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecutors*, 91 MARQ. L. REV. 9, 28 (2007). For case law reaching toward this idea, see, for example, *Watson v. United States*, 979 A.2d 1254, 1263 (D.C. 2009) (noting circumstances suggesting that an alleged offense was "not a crime meriting prosecution or conviction").

352. *See* People v. Joseph P., 433 N.Y.S.2d 335, 339 (N.Y. Just. Ct. 1980) ("Political scientist Malcom Feeley has suggested that lawyers may be inappropriate for misdemeanors where prison is not a realistic possibility. *In these cases, the process itself is the punishment.* The defendant wants to get in and out of court as soon as possible. But he must suffer bail, attorneys' fees, adjournments to get an attorney, time for an attorney to make motions, and so forth. After all that, paying a fifty dollar fine is certainly anticlimactic." (quoting Paul Nejelski, *Do Minor Disputes Deserve Second-Class Justice?*, 61 JUDICATURE 102 (1977))).

353. *See* State v. Martinez, 86 P.3d. 1210, 1217 (Wash. Ct. App. 2004).

354. *See* Elaine M. Chiu, *The Challenge of Motive in the Criminal Law*, 8 BUFF. CRIM. L. REV. 653, 656 (2005) ("Generations of scholars of the criminal law have learned that motive is irrelevant in the criminal law. It is especially irrelevant with respect to liability for a crime." (footnote omitted)); Douglas Husak, *Motive and Criminal Liability*, 8 CRIM. JUST. ETHICS 3, 3 (1989) ("This thesis is endorsed, sometimes with minor qualifications, by almost all leading criminal theorists."); Margulies, *supra* note 2 ("Because motive has no place in a criminal trial, the prosecutor does not need to understand *why* events happened, or why they might have been endorsed by the community. She does not need to understand the complex social, racial, and political dynamics at work.").

355. *See* Pomorski, *supra* note 9, at 97–98 ("[I]n [Hawaii case] *Ornellas*, the court pointed out that the assault was committed 'without any apparent provocation,' a clear suggestion that not only the actor's intent, but also his or her motivation should have a bearing on the triviality issue." (footnote omitted) (citation omitted)).

are ones esteemed as noble—when, for example, they are focused on the welfare of children[356]—courts show no hesitation in deeming motive a ground for dismissal.

Thus, the top three counts were chopped off a robbery indictment in a case alleging armed robbery of an office building so that the defendant could obtain a sentence of probation.[357] While the court found the offense "serious" and the prosecution's case "a strong one," it was moved by the desperate financial situation that the defendant faced after losing his job, and his inability to "thread his way through the labyrinth of city agencies" for financial assistance for himself, his paraplegic wife, and his two-year-old daughter.[358] Where a defendant was charged with custodial interference in relation to his three-day effort to get legal custody of his son, who had shown up at his house saying that he was scared of his mother's new husband, the court dismissed, finding it "obvious" that the defendant "would be prejudiced if he is convicted of the crime by his 'so called criminal activities' when in fact he was using a legal remedy with his son's best interest at heart."[359] And turning back to the pink spray-painted fairy, the judge seemed moved by the notion that her creator was merely trying "to provide fleeting joy to school children."[360]

Thus, again, this case law offers support for those commentators who have suggested that there is indeed a place within the criminal law for considerations of motive, even on the question of liability.[361] As with the other principles, however, it forces us to consider difficult line-drawing questions: which motives, for example, should be relevant?[362]

### *B. Expanding the Applicability of These Principles*

Part IV.A laid out four principles that emerge from these geographically disparate cases and that create a vision of a criminal law system in which a holistic accounting of factors is attempted in lieu of a

356. *See* Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 107–08 (2006) (identifying motive of helping one's family as a mitigating factor at sentencing).

357. People v. Perez, 553 N.Y.S.2d 659, 661–62 (N.Y. App. Div. 1990).

358. *Id.*

359. People v. Tegins, 395 N.Y.S.2d 907, 909 (N.Y. Dist. Ct. 1977).

360. People v. Thomas, 998 N.Y.S.2d 612, 616 (Ithaca City Ct. 2014) ("Here, all of the circumstances evince not evil intent, but rather enthusiasm and exuberance. This Court finds that Defendant Thomas' intent was to provide fleeting joy to school children, not to damage or deface public property.").

361. *See* Chiu, *supra* note 354, at 656 ("Recently . . . several criminal law scholars and legal philosophers have begun to debate the role of motive in the criminal law."); Hessick, *supra* note 356, at 97–98 (mentioning the relevance of motive to justification defenses).

362. See, for example, judicial reluctance to dismiss prosecutions against those charged with organizing needle exchange programs designed to protect drug users. *E.g.*, State v. Sorge, 591 A.2d 1382 (N.J. Super. Ct. Law Div. 1991).

decontextualized consideration of alleged law breaking. These principles are not mainstream components of our criminal justice system,[363] and this judicial reliance on them offers support to those scholars who have urged them. This is a confined area of procedure, however, and this Part will begin to explore the possibility of the broader application of these factors beyond this procedural context.

It is first worth noting that it may be that some of the constraints discussed in Part III have helped to free up judges to invoke the broad principles upon which the dismissals rest. It may be, for example, that the judicial narrowing of this remedy—including the carving out of certain crimes and defendants, the availability of (sometimes intrusive) appellate review, the ability of prosecutors to refile after a case is dismissed, and the limiting of dismissals to cases that courts find exceptional—reassures judges that they can declare or rely on broad principles within this discrete procedural context and not create too many ripples. Similarly, it may be that the human connectivity whose workings are so vulnerable to bias helps inspire judges to enunciate broad principles. We see traces of this inspiration in some of these opinions: judges call upon poetry,[364] novels,[365] operetta,[366] philosophy,[367] and declarations of our Founding Fathers.[368] They are delving deep into the sources and expressions of human inspiration—they are the very opposite of mechanical case-processors.

This Article proposes that these principles deserve consideration not only in this context, but also in other, less constrained contexts. They deserve consideration in connection with defendants whose circumstances

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363. *See, e.g.*, Brown, *Cost-Benefit Analysis*, *supra* note 112, at 340 ("[C]riminal law traditionally focuses only on the benefits of punishment (deterrence, retribution) regardless of the costs on others—employees, clients or creditors of firms, offenders' families, and communities—of punishing individual or corporate offenders."); *id.* at 326–27 ("[T]here is an emerging literature comparing the range of costs imposed by criminal law to its benefits, but it so far has had little effect on the practice or administrative structure of criminal justice. Indeed, current practice even makes it hard to imagine how it could."); Jennifer M. Collins et al., *Punishing Family Status*, 88 B.U. L. REV. 1327, 1333 n.12 (2008) (recognizing that an *ultima ratio* approach "stands at odds with current constitutional doctrine that permits promiscuous use of severe criminal sanctions").

364. *See* State v. Thoreson, No. A06-454, 2007 WL 1053205, at *10 (Minn. Ct. App. Apr. 10, 2007) ("Drunkards and whores are doomed to hell, so men declare, Believe it not, 'tis but a foolish care; If drunkards and lovers are for hell, Anon, heaven will be empty." (quoting Omar Khayyam's *Rubaiyat*)).

365. *See, e.g.*, *Thomas*, 998 N.Y.S.2d at 615 (quoting J.M. Barrie's *Peter Pan*).

366. *See* Watson v. United States, 979 A.2d. 1254, 1263 n.9 (D.C. 2009) (quoting W.S. Gilbert's *The Mikado*).

367. *See* People v. Shanis, 374 N.Y.S.2d 912, 923 (N.Y. Sup. Ct. 1975) (quoting Aristotle).

368. *See* Commonwealth v. Moll, 543 A.2d 1221, 1226 (Pa. Super. Ct. 1988) (dismissing prosecution based on alleged cutting of a hole in a county-installed drain pipe to avoid flood damage to the defendant's property and quoting Thomas Jefferson letter to James Madison, which asserted that "a little rebellion, now and then, is a good thing, and as necessary in the political world as storms in the physical").

may resonate less with judges,[369] and deserve consideration by decision makers other than judges.[370] For, even while these principles may lead to dismissal only in certain cases, there is no logical reason why, if they are relevant and persuasive in these cases, they should not be considered in all cases: nothing in them declares or suggests their limited applicability.

In urging the opportunity to take the principles that moved the judges in these cases and explore their broader applicability, this Article joins recent articles that have suggested that when one finds an area of the criminal law that appears to embody disparity—greater protection of suspects when they are police officers, for example,[371] or lighter sentences for those convicted of sexual assault when they are white[372]—one should resist the general trend toward ratcheting down to a vision of equality that restricts freedom for all (Stop coddling the cops! Stop coddling the White rapists![373]) and instead explore visions of equality that ratchet up in the direction of extending freedom for all.[374]

While a full exploration of the extent to which these kinds of principles are, or might be, applied in a context beyond this procedural one is beyond the scope of this Article, some hopeful signs are worth flagging. Recent editions of model prosecutorial guidelines urge these kinds of criteria as potentially relevant in cases of all kinds,[375] and potentially relevant even before charges have been filed.[376] The federal prosecutorial guidelines

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369. *See* Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237, 250 (1995) ("States which have adopted [MPC 2.12] have not been able to reach uniform results within their own jurisdictions, much less between them.").

370. *See* State v. McDonald, 137 P. 362, 363 (Okla. Crim. App. 1914) ("It must never be forgotten that the enforcement of justice is the sole object of the law."), *overruled by* State v. Shi, 566 P.2d 1170 (Okla. Crim. App. 1977).

371. *See* Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197, 1202 (2016) ("upend[ing] the dominant response from scholars and politicians" to enhanced protections for law enforcement suspects by arguing that we should extend some of these protections "to all suspects rather than strip them from the police").

372. *See* Gabby Bess, *How Racial Bias Influenced Stanford Swimmer's Rape Case*, VICE (June 7, 2016, 3:25 PM), https://broadly.vice.com/en_us/article/brock-turner-rape-case-sentencing-racial-bias.

373. *See* Tara Culp-Ressler, *Mandatory Minimums Aren't the Right Way to Fix Rape Culture*, THINKPROGRESS (Aug. 30, 2016, 2:49 PM), https://thinkprogress.org/mandatory-minimums-arent-the-right-way-to-fix-rape-culture-3d217f28b911#.e3i5u2qsb (saying with respect to California's post-Brock Turner mandatory minimum sentencing provision enactment, "We have falsely equated punishment and protection in the United States.").

374. *See* Brown, *supra* note 111, at 328 ("For a quarter century, the United States has addressed crime through drastically increased use of incarceration.").

375. *Cf.* Leipold, *supra* note 99, at 316 (recommending a nullification defense "available to all similarly-situated defendants, not just to those who happen upon a jury that knows of [its] nullification power").

376. *See* ABA, STANDARDS FOR CRIMINAL JUSTICE § 3-4.4 (2015) (among "the factors which the prosecutor may properly consider in exercising discretion to initiate, decline, or dismiss a criminal charge" are any "voluntary restitution or efforts at rehabilitation; . . . whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender; . . . any improper conduct by law enforcement; . . . potential collateral impact on third parties,

contain some of the same components.[377] The problem remains, however, that these guidelines have not been adopted as actual prosecutorial policies at the state level, much less the kinds of prosecutorial rules that some demand: "rigorous, publicly-vetted, legislatively-implemented guidelines."[378] One can at least hope that the fact that judges in so many states in interpreting so many bits of statutory language have converged on these principles, and found them to be important enough components of justice that they were persuaded to dismiss,[379] will assist the project of persuading prosecutors to do the same.[380]

## CONCLUSION

These statutes and the cases interpreting them rebut the notion that it is necessary to choose between an approach that chips away at some of the worst aspects of our criminal justice system and one that pushes toward a vision of a very different system. In these dismissals discrete acts of rebellion are occurring: both against facets of the criminal justice system and against the notion that state court judges are powerless to address them. At the same time, the threads of justice that appear in these individual cases can be woven together into a patchwork vision of a very different system.

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including witnesses or victims; . . . the fair and efficient distribution of limited prosecutorial resources; . . . [and] whether the public's interests in the matter might be appropriately vindicated by available civil, regulatory, administrative, or private remedies"); NAT'L DIST. ATTORNEYS ASS'N, PROSECUTION STANDARDS (2009), http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf ("Prosecutors should screen potential charges to eliminate from the criminal justice system those cases where prosecution is not justified or not in the public interest," and factors that they may consider include "[t]he availability of adequate civil remedies; . . . [w]hether non-prosecution would assist in achieving . . . legitimate goals; . . . [t]he attitude and mental state of the accused; . . . [u]ndue hardship that would be caused to the accused by the prosecution; . . . [f]ailure of law enforcement to perform necessary duties; . . . [and w]hether the accused has already suffered substantial loss in connection with the alleged crime.").

377. Under the DOJ's Principles of Federal Prosecution, one "situation in which the prosecutor may properly decline to take action" is where "[t]here exists an adequate non-criminal alternative to prosecution." U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION § 9-27.220(A)(2) (2017). One consideration relevant to whether there is a substantial federal interest to justify prosecution is "Federal law enforcement priorities," since "Federal law enforcement resources [and Federal judicial resources] are not sufficient to permit prosecution of every alleged offense over which federal jurisdiction exists." *Id.* at § 9-27.230(B)(1). Another is "[t]he probable sentence or other consequences if the person is convicted." *Id.* at § 9-27.230(A)(8).

378. John Pfaff (@JohnFPfaff), TWITTER (Aug. 30, 2016, 5:45 PM), https://twitter.com/JohnFPfaff/status/770784656799268864 ("What we need are rigorous, publicly-vetted, legislatively-implemented guidelines that cover every stage of the prosecution process."); *see also* Barry Friedman (@barryfriedman1), TWITTER (Aug. 30, 2016, 5:52 PM), https://twitter.com/barryfriedman1/status/770786270687657984 (retweeting Professor Pfaff's message and expressing apparent endorsement with the hashtag #DemocraticProsecution).

379. *See* People v. Winters, 342 P.2d 538, 541–42 (Cal. App. Dep't Super. Ct. 1959) (referring to the "great power" of dismissal).

380. For the idea that in exercising these dismissals judges are sending messages to law enforcement, see, for example, *State v. Vasquez-Hernandez*, 977 P.2d 400, 407 (Or. Ct. App. 1999).

In those cases that resonate with them—where, for example, a judge can see a defendant as his child—judges are moved to lay out broad principles of justice. We should consider the possibility of applying these principles more broadly, in contexts that are less constrained, and in ways that are more systematic. For each of us is someone's child.