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### The Community Prosecutor: Questions of Professional Discretion

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## THE COMMUNITY PROSECUTOR: QUESTIONS OF PROFESSIONAL DISCRETION

*Bruce A. Green\**  
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This Article examines community prosecuting from an ethics perspective. Our focus is not on prosecutors' compliance with the disciplinary rules, however. The strategies that have been said to exemplify community prosecuting are almost invariably compliant with disciplinary rules and other aspects of the law governing prosecutors. Rather, we take a broader perspective. Our focus is on how prosecutors exercise discretion in the context of adopting community prosecution strategies. We examine this question from both normative and procedural perspectives. We propose that the addition of community-based defense lawyers could help mitigate concerns about prosecutorial discretion in community justice programs by broadening community participation and helping inform the community about an array of potential solutions and their implications.

### I. BACKGROUND

A quick Google search for the term "community prosecution" yields nearly twenty-five million hits, including descriptions of community prosecution units in county after county across the nation. What began as a small effort in Manhattan in 1985 was implemented more actively in Portland and Seattle in 1990 and 1991, respectively, and community prosecution soon became a national trend as more jurisdictions found ways to implement its principles.<sup>1</sup> By 2003, the American Prosecutors Research Institute ("APRI") estimated that nearly half of all prosecutors' offices

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1. *History of Community Prosecution*, BUREAU OF JUST. ASSISTANCE, <https://www.ncjrs.gov/html/bja/commpros/bja1.html> (last visited Feb. 10, 2012) (showing chronology of community-based prosecution efforts).

engaged in activities that constituted community prosecution.<sup>2</sup> Generous federal grant funding supported the efforts.<sup>3</sup>

Despite the prevalence and popularity of community prosecution, its definition still remains hazy.<sup>4</sup> Perhaps the one point of agreement is that community prosecutors have implemented the lessons of community policing into a prosecution model.<sup>5</sup> Accordingly, the starting point for understanding the current state of community prosecution, and contrasting it with traditional prosecution models, is an understanding of community policing and the distinction between it and traditional policing.

### A. *Outgrowth of Community Policing*

Traditional policing in the last half of the twentieth century<sup>6</sup> was marked by a reactive, rapid-response model of policing.<sup>7</sup> In

2. M. ELAINE NUGENT, AM. PROSECUTORS RESEARCH INST., WHAT DOES IT MEAN TO PRACTICE COMMUNITY PROSECUTION? 4 (2004).

3. *History of Community Prosecution*, *supra* note 1 (documenting federal funding distributed in the late 1990s and early 2000s to support the development, continuation, and growth of community-based prosecution efforts).

4. *See, e.g.*, M. ELAINE NUGENT ET AL., AM. PROSECUTORS RESEARCH INST., THE CHANGING NATURE OF PROSECUTION: COMMUNITY PROSECUTION VS. TRADITIONAL PROSECUTION APPROACHES 3–4 (2004) [hereinafter THE CHANGING NATURE OF PROSECUTION] (describing prosecutors' differing understandings and uses of the term); Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 323 (2002) ("It is not at all obvious . . . what the term 'community prosecution' actually means.").

5. AM. PROSECUTORS RESEARCH INST. CRIMINAL PROSECUTION DIV., COMMUNITY PROSECUTION: A GUIDE FOR PROSECUTORS 1 (n.d.) [hereinafter GUIDE FOR PROSECUTORS], available at <http://www.ndaa.org/pdf/Community%20Prosecution%20guide.pdf> ("Community prosecution has derived some of its basic elements from community policing (i.e. directly engaging with community residents; responding proactively to crime; increasing accountability to the public; and decentralizing operations)."); NAT'L DIST. ATT'YS ASS'N & NAT'L CTR. FOR CMTY. PROSECUTION, KEY PRINCIPLES OF COMMUNITY PROSECUTION 3–4 (2009) [hereinafter KEY PRINCIPLES OF COMMUNITY PROSECUTION], available at [http://www.ndaa.org/pdf/final\\_key\\_principles\\_updated\\_jan\\_2009.pdf](http://www.ndaa.org/pdf/final_key_principles_updated_jan_2009.pdf); Russ Freyman, *D.A.s in the Streets*, GOVERNING, Sept. 1998, at 28, 28 (noting that community prosecution derived from community policing).

6. Early forms of policing in the United States did focus more on order-maintenance than reactive, investigatory crime control. *See* George L. Kelling & Mark H. Moore, *From Political to Reform to Community: The Evolving Strategy of Police*, in COMMUNITY POLICING: RHETORIC OR REALITY 3, 3–11 (Jack R. Greene & Stephen D. Mastrofski eds., 1988) (noting law enforcement's shift during the twentieth century from a focus on social welfare work toward a prioritization of crime control); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 565–73 (1997) (documenting historical trends in American policing).

7. Mark H. Moore & George L. Kelling, *"To Serve and Protect": Learning from Police History*, PUB. INT., Winter 1983, at 49, 60; Thompson, *supra* note 4, at 338–39.

reactive policing, it is a crime's occurrence that triggers police involvement. Police then investigate, seeking to identify the perpetrator and to gather evidence with an eye toward prosecuting and punishing the offender. When law enforcement focuses on reactive case creation, each law enforcement actor plays a separate role—police investigate after a crime has occurred, prosecutors join in after an arrest to represent the government in adjudication, and corrections officers step in post-conviction.<sup>8</sup> Police interaction with the community is minimal as law enforcement looks to citizens only for their assistance as victims and witnesses to help identify and prosecute offenders.<sup>9</sup>

Community policing emerged in the late 1970s and started to gain momentum in the 1980s.<sup>10</sup> It was one of law enforcement's institutional responses to “[s]kyrocketing crime rates, riots, accusations of racism and brutality, corruption, inefficiency,” and the public's general lack of faith in the police and the government as a whole in the 1960s and 1970s.<sup>11</sup> It rose in popularity in the 1990s with governments' renewed emphasis on revitalization of cities and reduction of crime.<sup>12</sup> The “bandwagon”<sup>13</sup> grew so quickly<sup>14</sup> that it became “ubiquitous.”<sup>15</sup>

8. Alafair S. Burke, *Unpacking New Policing: Confessions of a Former Neighborhood District Attorney*, 78 WASH. L. REV. 985, 989 (2003).

9. Thompson, *supra* note 4, at 339.

10. Stephen D. Mastrofski & James J. Wills, *Police Organization Continuity and Change: Into the Twenty-First Century*, in 39 CRIME AND JUSTICE: A REVIEW OF RESEARCH 55, 118 (Michael Tonry ed., 2010).

11. *Id.*

12. In his 1994 State of the Union Address, President Clinton vowed to place 100,000 community-oriented police officers on America's streets. President William Clinton, State of the Union Address (Jan. 25, 1994), in 30 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 148, 155–56 (1994). Within a year, the Department of Justice created its Office of Community Oriented Policing Services (“COPS”) to accomplish that goal by expanding community policing and distributing grant funds to support local community policing projects. Ted Gest, *The Evolution of Crime and Politics in America*, 33 MCGEORGE L. REV. 759, 762 (2002).

13. WESLEY G. SKOGAN & SUSAN M. HARTNETT, COMMUNITY POLICING, CHICAGO STYLE, at vii (1997) (“The concept [of community policing] is so popular with the public and city councils that scarcely a chief wants his department to be known for failing to climb on this bandwagon.”).

14. Between 1997 and 1999, the number of police departments employing community policing techniques doubled, and the number of police officers designated as community policing officers quadrupled. MATTHEW J. HICKMAN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, COMMUNITY POLICING IN LOCAL POLICE DEPARTMENTS, 1997 AND 1999, at 2 (rev. 2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cplpd99.pdf>.

15. Tracey L. Meares, *Praying for Community Policing*, 90 CALIF. L. REV. 1593, 1593 (2002) (collecting sources evidencing that the term community policing “has become ubiquitous among law-enforcement practitioners and scholars”).

In contrast to traditional policing, community policing looks to the community, not just as witnesses and victims, but as stakeholders who help shape law enforcement's priorities and design and implement solutions.<sup>16</sup> The literature on community policing identifies three other defining characteristics, but each of these can be seen as stemming from the defining hallmark of community input. First, when community members are permitted to shape law enforcement priorities and programs, it is not surprising that community police officers hear different community concerns in different neighborhoods. One neighborhood might be plagued by street-level drug dealing, another by prostitution, and another by noise caused by kids skateboarding at midnight. Accordingly, community policing, unlike rapid-response policing, tends to adopt strategies by intrajurisdictional, geographic distinctions, rather than adopting a monolithic approach to the entire jurisdiction.<sup>17</sup>

Second, unlike traditional policing that prioritizes investigation of serious offenses over minor ones, community-based policing tends to focus on relatively "low-level, quality-of-life" problems.<sup>18</sup> This is because, in at least some neighborhoods, community members' biggest complaints are about relatively minor offenses such as graffiti, trespassing, public intoxication, and other forms of disorder. Advocates of aggressive enforcement of relatively minor crimes often invoke George Kelling and James Wilson's influential "broken windows" theory, which posits that one broken window is a sign of general lawlessness, leading to another and then others.<sup>19</sup> The appearance of disorder deters law-abiding residents from exerting control over their neighborhoods while validating the conduct of lawbreakers.<sup>20</sup> In contrast, the theory goes, police enforcement of positive social norms will empower law-abiding residents in their

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16. Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 502 (2000) (discussing the influence of community "stakeholders" in shaping police norms); Joan W. Howarth, *Toward the Restorative Constitution: A Restorative Justice Critique of Anti-Gang Public Nuisance Injunctions*, 27 HASTINGS CONST. L.Q. 717, 720 (2000) (observing that "stakeholder" agreement is important to restorative justice programs).

17. Archon Fung, *Beyond and Below the New Urbanism: Citizen Participation and Responsive Spatial Reconstruction*, 28 B.C. ENVTL. AFF. L. REV. 615, 629 (2001) (discussing neighborhood-specific identification of problems and solutions); Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L.J. 407, 421 (2000) ("[P]olice are accountable to neighborhoods as well as to cities . . .").

18. Eric W. Nicastro, *Confronting the Neighbors: Community Impact Panels in the Realm of Restorative Justice and Punishment Theory*, 9 ROGER WILLIAMS U. L. REV. 261, 261 (2003).

19. James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29, 31-32; Livingston, *supra* note 6, at 583-85 (discussing the broken windows theory's influence on contemporary policing).

20. Wilson & Kelling, *supra* note 19, at 31-32.

own communities and send a message to the lawless that they are unwelcome.<sup>21</sup>

Finally, because community-based police officers are called on to respond to low-level but common and chronic problems, the traditional, reactive approach of investigation, arrest, and prosecution is untenable.<sup>22</sup> Instead, community policing employs Herman Goldstein's recommended approach of proactive policing, seeking to develop long-term, preventative, programmatic responses to recurring quality-of-life problems.<sup>23</sup> In this form of policing, arrest and prosecution are used only as a means to an end, not for purposes of punishment.<sup>24</sup>

In a model of law enforcement in which prosecution is only a means to an end, what is "community prosecution"? Prosecutors use the term in different and, at times, contradictory ways. The vague concept may be thought to refer to a philosophy, a strategy, or both.<sup>25</sup> The concept's list of "commonly cited operational elements," such as prioritization of "problem-solving" and quality-of-life issues, partnerships with community, geographic focus, and integration of "proactive strategies," clearly shares ground with community policing principles.<sup>26</sup> At the same time, however, the community prosecution concept clearly extends—at least for some—well past the hallmark characteristics that initially defined community policing. Although some identify community prosecuting exclusively

21. See *id.* at 33. For more thorough discussions of the role of enforcement of social norms in community policing efforts, see Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 367–77 (1997); Livingston, *supra* note 6, at 578–84; Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 377 (2001); Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 GA. L. REV. 1253, 1256–58 (2000).

22. Waldeck, *supra* note 21, at 1270–71.

23. See Heymann, *supra* note 17, at 423 (noting Goldstein's influence in shifting police priorities to the prevention of crime as a primary goal); Livingston, *supra* note 6, at 573–75 (discussing Goldstein's influence on contemporary policing). See generally HERMAN GOLDSTEIN, *PROBLEM-ORIENTED POLICING* (1990); Herman Goldstein, *Improving Policing: A Problem-Oriented Approach*, 25 CRIME & DELINQ. 236 (1979).

24. Heymann, *supra* note 17, at 420 (“[O]ur policing strategies in the last decade have turned heavily towards prevention of crimes . . . rather than individual events.”).

25. See, e.g., GUIDE FOR PROSECUTORS, *supra* note 5, at 1 (“APRI defines community prosecuting as a philosophy, as well as a strategy, involving prosecutors focusing their resources in response to the needs of specific communities.”).

26. See *id.* at 5–7 (listing nine “elements critical to the success” of community prosecution); KEY PRINCIPLES OF COMMUNITY PROSECUTION, *supra* note 5, at 3–4.

or primarily with responses to quality-of-life crimes,<sup>27</sup> others use it equally to describe nontraditional responses to serious crimes such as drug trafficking and gang violence.<sup>28</sup> Although some assume that community prosecuting exclusively or primarily involves “proactive” strategies,<sup>29</sup> others identify the concept with a combination of reactive and proactive strategies.<sup>30</sup> In fact, as the pliant term has come to be used, community prosecuting is not necessarily about either community or prosecuting. Community prosecuting strategies do not necessarily target particular communities<sup>31</sup>—although they typically do<sup>32</sup>—and many of these strategies do not include prosecuting criminal offenders.<sup>33</sup>

### B. Contrast with Traditional Prosecution

Community prosecuting, regardless of how it is defined, is viewed as a departure from how prosecutors traditionally think about and conduct their work.<sup>34</sup> Despite the prevalence of guilty

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27. See, e.g., THE CHANGING NATURE OF PROSECUTION, *supra* note 4, at 3 (community prosecution is an “integrated, solutions-based approach to eradicate crime. . . . [It] brings prosecutors together with residents to identify quality-of-life issues (such as graffiti, vandalism, trespassing, disorderly conduct, drug solicitation, prostitution, aggressive panhandling, etc.) in an attempt to develop and implement long-term strategies to address community concerns”).

28. See, e.g., GUIDE FOR PROSECUTORS, *supra* note 5, at 9–10, 43 (illustrating the concept of community prosecuting through programs aimed at violent felons).

29. See, e.g., *id.* at 4 (asserting that community prosecuting “involves a long-term, proactive partnership”).

30. See, e.g., THE CHANGING NATURE OF PROSECUTION, *supra* note 4, at 7 (Community prosecuting is commonly thought to include “[a]n integrated approach involving both reactive (e.g., prosecuting crimes identified by the police) and proactive strategies (e.g., anticipatory actions aimed at addressing problems at their root cause).”).

31. See, e.g., MICHAEL R. KUYKENDALL, AM. PROSECUTORS RESEARCH INST., FROM THE COURTROOM TO THE COMMUNITY: ETHICS AND LIABILITY ISSUES FOR THE COMMUNITY PROSECUTOR 10 (2004) [hereinafter FROM THE COURTROOM TO THE COMMUNITY] (suggesting that community prosecutors can avoid unwanted variations “by expanding their community prosecuting initiative jurisdiction-wide”).

32. See, e.g., THE CHANGING NATURE OF PROSECUTION, *supra* note 4, at 7 (listing among commonly cited characteristics of community prosecuting the concentration on “[a] clearly defined focus area, which has traditionally been defined as a targeted geographic area”).

33. See, e.g., FROM THE COURTROOM TO THE COMMUNITY, *supra* note 31, at 9 (“Neighborhood clean-ups, formation of block watches and foot patrols, and turning on porch lights are all tools used by community prosecutors to actually prevent crime.”).

34. THE CHANGING NATURE OF PROSECUTION, *supra* note 4, at 15–16; Kay Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1173–74 (2005) (noting “ambivalence or hostility” in prosecutors who see community-based, problem-solving role as beyond their traditional prosecutorial duties). However, even the APRI concedes that “many prosecutors, policymakers, and scholars are

pleas, most prosecutors imagine themselves as trial lawyers whose work is centered at the courthouse.<sup>35</sup> They focus attention on whether a particular crime was committed, by whom, and what should be done about it through the use of the criminal process, not on broader social problems and how to solve them by employing the full arsenal of government powers. Their work is reactive, commenced in response to crimes and police investigations. In the investigative stage, prosecutors' work is most often in support of, and ancillary to, that of the police and other investigators. They secure search warrants, wiretap authorizations, arrest warrants, or other court orders, or obtain documents and evidence with the aid of the grand jury. In the prosecution stage, prosecutors decide whether to file criminal charges or offer an alternative disposition. They negotiate conditions of guilty pleas and serve as the state's counsel at trial. The traditional role involves employing prosecutorial power to achieve criminal justice objectives: incapacitating criminals (i.e., "putting away bad guys") and deterring future crimes while protecting and avoiding harm to the innocent. This necessitates the exercise of discretion,<sup>36</sup> sometimes on an ad hoc basis and sometimes based on preestablished office policy. Discretionary decisions may draw on a host of factors relating to criminal justice—such as the seriousness of the offense, the dangerousness of the offender, the strength of the evidence, and the availability of resources—and are essentially immune from judicial review.<sup>37</sup>

Community prosecuting takes prosecutors out of the courthouse and into the community and casts them in a more proactive role. Community prosecutors typically work with members of the community to identify recurring, ongoing criminal justice problems (drug dealing, graffiti, vagrancy) and then work in tandem with community representatives and agencies to address these problems through a project, policy, or strategy, often involving nontraditional

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still at a loss to explain how community prosecution differs from traditional prosecution." THE CHANGING NATURE OF PROSECUTION, *supra* note 4, at 3.

35. Frank O. Bowman, III, *American Buffalo: Vanishing Acquittals and the Gradual Extinction of the Federal Criminal Trial Lawyer*, 156 U. PA. L. REV. PENNUMBRA 226, 237 (2007), <http://www.pennumbra.com/responses/11-2007/Bowman.pdf>.

36. Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 837–38 ("Few decisions prosecutors make are subject to legal restraints or judicial review. Consequently, the key question for prosecutors ordinarily is not whether their decisions are lawless, in the sense that a court might overturn them, but rather whether the decisions are wise or imprudent." (citations omitted)).

37. See *id.* at 877 ("[P]rosecutors must confine their decision-making criteria to a combination of resource considerations and policy considerations that drive the justifications for punishment.").



methods.<sup>38</sup> Some community prosecuting activities engage prosecutors in such extralegal pursuits as community education;<sup>39</sup> others involve responses to criminal conduct, including, but not exclusively, quality-of-life crimes and other low-level crimes, through mechanisms aside from arrest and prosecution;<sup>40</sup> and still other examples involve the use of criminal justice authority in ways that exploit information from, or relationships with, the community.<sup>41</sup>

While a prosecutor's office may include one or more lawyers who are designated as community prosecutors, this work supplements the ordinary work of a prosecutor's office.<sup>42</sup> Many prosecutors' offices do not consciously engage in community prosecuting at all, and as far as we know, none engage exclusively in community prosecuting.<sup>43</sup> The first order of priority for prosecutors' offices is the bread-and-butter work of processing, investigating, and prosecuting felony cases, or what Portland, Oregon prosecutor Michael Schrunk calls "taking care of business," by which he means

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38. GUIDE FOR PROSECUTORS, *supra* note 5, at 1 ("The community prosecution approach is proactive and views community residents and law enforcement as partners in maintaining public safety."). In 1995, APRI adopted the following definition: "Community prosecution focuses on targeted areas and involves a long-term, proactive partnership among the prosecutor's office, law enforcement, the community and public and private organizations, whereby the authority of the prosecutor's office is used to solve problems, improve public safety and enhance the quality of life in the community." *Id.* at 4.

39. *E.g.*, *id.* at 27 (describing Milwaukee's "education and prevention effort to teach the public about the criminal justice system, particularly courts and drug-case processing"); *id.* at 41 (describing a Manhattan youth education program "to educate elementary, junior high, and high school students about the criminal justice system").

40. *E.g.*, *id.* at 32 (describing a Jackson County, Missouri, prosecutor's creation of a drug court "to allow first-time substance abuse offenders charged with lesser drug felonies to receive substance abuse treatment in lieu of prosecution and prison time"); *id.* at 35 (describing a Jackson County, Missouri, prosecutor's project to identify close residential and commercial buildings that were sites of drug activity through "controlled buys, search warrants, health and fire code inspections, property owner notification, evictions, civil abatement and forfeiture actions"); *id.* at 44 (describing Manhattan prosecutors' use of obscure civil law to evict drug dealers from residential apartment buildings).

41. *E.g.*, *id.* at 10 (describing programs of Philadelphia District Attorney's Office aimed at drug trafficking, including a program whereby selected cases were transferred to the federal authorities to be prosecuted under tougher federal criminal laws and a program "focusing intense prosecution efforts on a single police district"); *id.* at 43 (describing a Manhattan program in which information is gathered from specific neighborhoods to facilitate prosecutions of gang leaders for violent crimes); *id.* at 54 (describing a Multnomah County prosecutor's policy of excluding individuals arrested for drug offenses from areas defined as "Drug-Free Zones" and arresting those who entered these areas for trespassing).

42. NUGENT, *supra* note 2, at 15-16.

43. *Id.* at 27.

prosecuting murderers, rapists, and other serious criminals.<sup>44</sup> This engages much or most of an office's time and resources. Community prosecuting is, in most cases, an add-on—indeed, one that may be eliminated if funding is reduced. Thus, community prosecuting does not involve a rejection of the traditional role and responsibilities so much as an expansion of them.

The activities said to comprise community prosecuting seem to reflect a broader philosophy of prosecuting than the traditional one. Community prosecuting enlarges the prosecutor's role, emphasizing and calling attention to the prosecutor's status as a public official, as opposed to merely a courtroom lawyer or advocate for the state in criminal adjudication. The community prosecutor is more like the mayor than the public's criminal trial lawyer. Community prosecuting takes the prosecutor not only outside the courthouse but outside the conventional "administrative" role of processing individual cases.<sup>45</sup> The prosecutor's object of concern goes beyond criminal justice. The prosecutor may deal with vagrancy, drawing graffiti on private and public property, and drug use not as criminal problems but as social issues, as might officials of departments of homelessness, sanitation, and public health. This typically requires the adoption of proactive policies as distinguished from ad hoc reactions to individual cases.

Even when serving a decidedly lawyerly role, community prosecutors try to develop "integrated, solutions-based" approaches to crime.<sup>46</sup> For example, community prosecutors might work to draft and implement ordinances to authorize police to engage in earlier, more discretionary intervention in quality-of-life crimes and general disorder.<sup>47</sup> Portland's celebrated community prosecution unit, for instance, responded to neighborhood complaints about high concentrations of drug offenses with a "drug-free zone" ordinance that permitted police officers to banish suspected offenders from the targeted safety zone.<sup>48</sup> Offenders who violated the order of exclusion were subject to arrest for criminal trespass.<sup>49</sup> In the name of community, laws have also been passed to regulate sitting or lying

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44. FROM THE COURTROOM TO THE COMMUNITY, *supra* note 31, at 13.

45. With regard to prosecutors' administrative role, see generally Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332 (2008), and Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).

46. THE CHANGING NATURE OF PROSECUTION, *supra* note 4, at 3.

47. For a general discussion of laws targeting low-level offenses, see Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1217–19 (1996), and Schragger, *supra* note 21, at 378 (discussing laws targeting low-level offenses).

48. PORTLAND, OR., CITY CODE §§ 14B.20.010–.070 (2002) (creating "drug free zones" from which drug offenders can be excluded).

49. *Id.* § 14B.20.035.

on sidewalks,<sup>50</sup> sleeping and eating in parks,<sup>51</sup> panhandling,<sup>52</sup> and juvenile curfews.<sup>53</sup> Community prosecutors may then be called upon to process the cases that arise from the new policing, often with alternative approaches, such as community-based courts.<sup>54</sup>

Prosecutors are traditionally independent of, if not isolated from, public officials and agencies other than criminal law enforcement agencies, such as the police, and are equally removed from the public.<sup>55</sup> Community prosecuting implies less autonomy and more interaction with other officials and public representatives in order to deal with criminal and social problems in a more comprehensive manner.<sup>56</sup> Collaboration with other public agencies may be useful either because the prosecutor is willing to employ prosecutorial powers toward noncriminal objectives or because the prosecutor seeks to commandeer noncriminal powers to prevent or deter crime or achieve other criminal justice objectives. Interaction with the community may both assist the prosecution in identifying problems and provide an ally in the prosecution's efforts to deter, investigate, or prosecute criminal activity.

Community prosecuting also implies both a less abstract idea of public accountability and greater transparency. Traditional prosecutors, like judges, expect to work in accordance with professional expectations, not particular public expectations; in fact, they often stand as buffers against the popular hue and cry. Prosecutors may announce arrests, indictments, and convictions, but they traditionally do not publicly justify discretionary decisions or publicly announce and explain their internal policies.<sup>57</sup> The community prosecutor, however, is accountable in a more concrete, geographically confined sense, and is more open, since the success of

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50. See *Roulette v. City of Seattle*, 97 F.3d 300, 302–06 (9th Cir. 1996) (upholding a Seattle ordinance prohibiting sitting or lying on sidewalks).

51. See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1562–84 (S.D. Fla. 1992) (enjoining enforcement against the homeless of prohibitions against sleeping and eating in public).

52. See *Loper v. N.Y.C. Police Dep't*, 999 F.2d 699, 701–06 (2d Cir. 1993) (finding unconstitutional an ordinance prohibiting loitering for the purpose of begging); Helen Hershkoff & Adam S. Cohen, *Begging To Differ: The First Amendment and the Right To Beg*, 104 HARV. L. REV. 896, 896 n.5 (1991) (summarizing laws regulating and prohibiting panhandling).

53. See generally Brian Privor, *Dusk 'Til Dawn: Children's Rights and the Effectiveness of Juvenile Curfew Ordinances*, 79 B.U. L. REV. 415 (1999) (discussing juvenile curfews).

54. THE CHANGING NATURE OF PROSECUTION, *supra* note 4, at 22.

55. See John L. Worrall, *Prosecution in America: A Historical and Comparative Account*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR 3, 8–9 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008).

56. *Community Prosecution: Key Dimensions*, BUREAU OF JUST. ASSISTANCE, <https://www.ncjrs.gov/html/bja/commpros/bja2.html> (last visited Feb. 10, 2012).

57. Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 443 (2001).

community prosecuting strategies often depends on publicizing them and obtaining the community's support for them. Normatively, community prosecuting implies that community representatives' perceived interests deserve consideration, whether in the development of prosecutorial policies or in the ad hoc exercise of discretion in individual cases, and that the relevant normative expectations are not exclusively those implicit in legislation, in the history of the office, or in the prosecutor's own professional philosophy.

## II. PROSECUTORIAL DISCRETION AND COMMUNITY PROSECUTING

When it comes to exercising discretion in the course of prosecutors' traditional work, conventional understandings or principles have developed over time.<sup>58</sup> Rooted in the objectives of the criminal justice process, these understandings are broadly, if not universally, shared, and are communicated in various ways within prosecutors' offices and among prosecutors of different offices. These understandings do not dictate particular outcomes in particular cases, but do channel prosecutors' decision making and provide benchmarks against which the public can judge prosecutors' actions. Community prosecution strategies may be inconsistent with ordinary principles regarding how prosecutors should employ their discretion, and the departures may not be sufficiently justified by the social utility of these strategies. We explore these concerns in the context of a story that is loosely drawn from a twenty-year-old Pennsylvania state court decision.<sup>59</sup> We offer the story to suggest both how the insights of community prosecuting may broaden decision making in prosecutors' traditional work and how community prosecuting may lead to unjustified departures from traditional principles of prosecutorial discretion.

The story is set in Delaware County in the southeast corner of Pennsylvania in the late 1980s. As it remains today, the county was mostly rural and mostly white, except for the City of Chester, which was working class and populated mostly by people of color, most of whom were black. The story is of a simple drug deal, like those that occurred many times daily in Chester and other cities throughout the United States.

One evening, three coworkers at a local manufacturing company decided to try to purchase some cocaine. They were recreational drug users and had never before been arrested. They knew of a place in Chester near a bar where drugs could be bought quickly and

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58. Catherine M. Coles, *Evolving Strategies in 20th-Century American Prosecution*, in *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR*, *supra* note 55, at 177, 182 (explaining how prosecutors developed standards and strategies for handling cases throughout the 20th century).

59. *Commonwealth v. Agnew*, 600 A.2d 1265 (Pa. Super. Ct. 1991).

easily. The police knew the spot, too, but it was poorly lit, and drug sellers could get away by dashing into the bar or into an apartment above it if they were spotted. The three white men in a Toyota were noticeable in a neighborhood comprised primarily of racial minorities and attracted the attention of plain-clothed surveillance officers sitting in unmarked police cars who knew that there was no commerce in the area and no reason for the men to be there except to buy drugs. The officers observed two black men approach the car and complete what appeared to be a drug sale, then followed the Toyota back to the company parking lot, where the officers arrested the three men and retrieved two plastic bags of cocaine from the floor of the car. One of the men claimed both bags were his.

The police brought the case to the Delaware County prosecutor, who then had to decide whether to bring charges and whether to offer the three men some kind of deal. There were various options. The men might be charged with purchasing drugs, conspiring to purchase drugs, and/or drug possession. The prosecutor could choose not to file any charges, to file only certain of the possible charges, or to offer to defer bringing charges for a period of time, during which the men would be required to avoid any further drug use or other criminal conduct. Another possibility was to offer the men admission into the state's Accelerated Rehabilitative Disposition ("ARD") program for which first offenders with low-level drug offenses were eligible if they would benefit from drug rehabilitation.<sup>60</sup> Those who successfully completed the program avoided a criminal record.<sup>61</sup>

The traditional prosecutor would make the charging and plea bargaining decisions based on a number of considerations, which may or may not be codified in internal office policy. Among these would be whether, based on the evidence, the prosecutor thought that the defendants were guilty of a crime and, if so, whether a crime could be proven beyond a reasonable doubt if the case went to trial.<sup>62</sup> One conventional understanding is that prosecutors should not bring charges unless they are personally convinced of the defendants' guilt—although there is no consensus on the requisite level of conviction.<sup>63</sup> Another is that prosecutors should not initiate

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60. 234 PA. CODE §§ 300–320 (2000).

61. *Id.* §§ 319–320.

62. MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES 1129 (4th ed. 2011).

63. See generally Alafair S. Burke, *Prosecutorial Agnosticism*, 8 OHIO ST. J. CRIM. L. 79, 84–86, 91–99 (2010) (noting the general belief that prosecutors must be personally convinced of the defendant's guilt but arguing that prosecutors should strive for agnosticism); Bruce A. Green & Ellen Yaroshesky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 497–501 (2009) (describing alternative approaches that prosecutors might take to the question of how convinced they must be of a defendant's guilt); Recommendation for Dismissal at 4, *People v. Strauss-Kahn*,

or continue charges unless there is some possibility or likelihood of securing a conviction—although there is no consensus on how likely.<sup>64</sup> Beyond that, prosecutors may offer more lenient resolutions in cases where they are worried about the ability to win at trial.

Other considerations relate to whether particular punishment would fit the crime and whether the ends of the criminal process can be adequately served without a conviction or imprisonment. Is incapacitation needed to keep the public safe or to deter future lawbreakers, or are there less harsh ways to prevent the offender and others from committing future crimes? Prosecutors generally agree that not all offenders should be prosecuted and that offenders should be treated in proportion to the magnitude of their wrongdoing and their dangerousness.<sup>65</sup> For example, prosecutors typically treat murderers more harshly than shoplifters, treat willful and venal offenders more harshly than negligent offenders, and treat repeat offenders more harshly than one-time offenders.<sup>66</sup> Another commonly held principle is that similarly situated offenders should be treated similarly, and not treated more or less harshly because of irrelevant considerations.<sup>67</sup> Given two men who

No. 02526/2011 (N.Y. Sup. Ct. Aug. 22, 2011), (“[F]or generations, before determining whether a case should proceed to trial, felony prosecutors in New York County have insisted that they be personally convinced beyond a reasonable doubt of the defendant’s guilt, and believe themselves able to prove that guilt to a jury. . . . If, after careful assessment of the facts, the prosecutor is not convinced that a defendant is guilty beyond a reasonable doubt, he or she must decline to proceed.”), *available at* <http://www.documentcloud.org/documents/238252-motion-to-dismiss-dominique-strauss-kahn-case.html>.

64. *See, e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION § 3-3.9(a) (1993) [hereinafter ABA STANDARDS] (“A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.”); FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 35 (1970) (“[P]rosecutors are not willing to devote resources to charging merely because the law would permit them to do so. Instead they insist that the evidence be of a nature that conviction is very likely to follow.”).

65. *Cf.* ABA STANDARDS, *supra* note 64, § 3-3.9(b)(ii)–(iii) (listing “the extent of the harm caused by the offense” and “the disproportion of the authorized punishment in relation to the particular offense or the offender” among factors relevant to the decision to prosecute).

66. *Cf. id.*; UNITED STATES ATTORNEYS’ MANUAL § 9-27.420 (2011) (advising federal prosecutors to consider the defendant’s criminal history and the “nature and seriousness of the offense” in evaluating the propriety of a plea bargain), *available at* [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcr.htm#9-27.420](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcr.htm#9-27.420).

67. *See, e.g.*, Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 634 (1999) (“[M]ost would agree . . . [that the prosecutor should] treat lawbreakers with rough equality; that is, similarly situated individuals should generally be treated in roughly the same way.”);

committed the same crime, have the same criminal history, and have all other relevant characteristics and attributes in common, it would ordinarily be regarded as an abuse of discretion to charge one but not the other for no reason or based on an irrelevant reason, such as that they have different lawyers or that one is better connected.<sup>68</sup> On the other hand, relevant distinctions might be taken into account. For example, that one was employed and the other unemployed might be relevant to the likelihood of recidivism.

It is also understood that law enforcement and administrative interests might be given weight.<sup>69</sup> Individuals may be given leniency without regard to their culpability and dangerousness to serve such interests. For example, a mob hit man might be given leniency in exchange for testifying against members of the mob. Arguably, individuals may also be treated more harshly than otherwise deserved or expected in order to serve law enforcement interests.<sup>70</sup> Many defendants who plead guilty are offered more lenient treatment than if they stand trial<sup>71</sup>; whether this means treating those who plead guilty leniently to promote administrative efficiency and spare witnesses or treating those who stand trial with disproportionate harshness is subject to debate.

In the case of the three men arrested for buying cocaine in Chester, the Delaware County prosecutor was disinclined to dismiss the charges.<sup>72</sup> The evidence would have seemed strong, given the officers' observations and the discovery of the cocaine. The question for the prosecutor was whether to invite the men either to enter the ARD program as an alternative to facing trial or to plead guilty to one or more of the possible charges.<sup>73</sup> In cases involving offenders in the county who purchased small amounts of cocaine for their recreational use, the Delaware prosecutor's ordinary practice was to

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Press Release, Ala. Dist. Att'y's Ass'n (Sept. 17, 2007), available at [http://blog.al.com/bn/2007/09/das\\_group\\_issues\\_response\\_to\\_a.html](http://blog.al.com/bn/2007/09/das_group_issues_response_to_a.html) (defending a district attorney "for trying to ensure that similarly-situated defendants are treated similarly" in response to the state attorney general's attack on a district attorney who agreed that an accomplice to homicide should not receive the death penalty after the triggerman was held ineligible for the death penalty because of his age).

68. See M. ELAINE NUGENT-BORAKOVE, *Performance Measures and Accountability*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR, *supra* note 55, at 91, 99–100.

69. See, e.g., Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1256–58 (2011); Lynch, *supra* note 45, at 2140–41.

70. See, e.g., Bruce A. Green, "Package" Plea Bargaining and the Prosecutor's Duty of Good Faith, 25 CRIM. L. BULL. 507 (1989) (discussing scenarios in which prosecutors seek to induce defendants to plead guilty in exchange for leniency to family members who might not ordinarily be prosecuted but for prosecutors' interest in obtaining leverage).

71. MILLER & WRIGHT, *supra* note 62, at 1108.

72. Commonwealth v. Agnew, 600 A.2d 1265, 1266 (Pa. Super. Ct. 1991).

73. *Id.*

offer the defendants entry into the ARD program and to prosecute them on drug charges if they declined. There was nothing in the nature of the men's background or conduct that called for harsher treatment.

The Delaware County prosecutor might have come under criticism for allowing the men into the ARD program, however, not so much for the particular resolution but for the overall approach to drug crimes that it would have exemplified. This approach, typical of how prosecutors traditionally exercise discretion,<sup>74</sup> would have been narrow, ad hoc, and reactive. The resolution of the individual case would seemingly have failed to account for the magnitude of drug problems in the City of Chester. By the late 1980s, the city had become a magnet for open drug sales, which led to drug-related violence and property crimes. Drug buyers flocked from surrounding areas. If the defendants were allowed into the rehabilitation program, the release of these young white men and others like them, whose demand for drugs had helped turn parts of Chester into an open-air drug market, might have been viewed by city residents as an expression of indifference to the local problem. The prosecutor's ad hoc approach to drug arrests would not have been perceived as part of a serious prosecutorial, law enforcement, or general public strategy to deal with the drug problem in Chester; if prosecutorial discretion was being exercised in service of such a strategy, the public would not have known.

In fact, the prosecutor did not take the traditional, ad hoc approach. The prosecutor implemented a nonpublic internal policy under which low-level drug offenders arrested in the City of Chester were categorically excluded from the ARD program. The policy was meant to target the city as a high-crime area. In the actual case, the prosecutor was not acting consciously as a "community prosecutor"; the decision predated the first explicit "community prosecution" programs.<sup>75</sup> Nonetheless, one can reimagine the prosecutor's decision, and the policy on which it was based, as the product of community prosecuting and not traditional prosecuting. The imaginative retelling underscores some of the potential ethical problems that may arise in community prosecuting.

In our fictional account, the Chester County prosecutor regarded himself as a community prosecutor, not a traditional prosecutor. He recognized that Chester was different from surrounding areas of the county in that it was plagued by drug crimes and the attendant violence. He met with business owners, teachers, clerics, and others at town hall meetings in Chester, as well as with the police and public officials, to understand how

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74. Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 2-3 (1971).

75. See *History of Community Prosecution*, *supra* note 1 (showing chronology of community-based prosecution).



community representatives and other agencies perceived the problem, what they expected from the prosecutor and other public officials, and whether the community was willing to assist. Afterward, the prosecutor responded by adopting an official zero-tolerance policy for the city of Chester.<sup>76</sup> Drug offenders arrested in Chester would be ineligible for ARD, even in situations in which drug offenders in surrounding parts of the county were routinely allowed into the program.

Under the zero-tolerance policy, the three men were required either to stand trial on charges that were difficult to defend or plead guilty to a criminal charge. Although the men were unlikely to be sentenced to imprisonment even if convicted, a conviction would carry a permanent stigma and a host of "collateral" legal consequences, impeding their future ability to obtain jobs, loans, and other opportunities.

The ethical problem, as some would see it, is that the policy is unfair to individuals arrested in Chester for simple, low-level drug offenses. Denying admission to the ARD program to anyone arrested for a drug offense in Chester, while allowing admission to individuals with identical backgrounds arrested for identical conduct in other parts of the county, arguably violated two conventional normative understandings governing a prosecutor's exercise of discretion.

First, the policy arguably violated the proportionality principle, resulting in unduly harsh treatment of the defendants. Ordinarily, prosecutors are expected to make individualized charging and plea bargaining decisions based on all the relevant considerations. The existence of the ARD program presupposes that, for some low-level, first-time drug offenders, the proportionate disposition is to offer treatment, rehabilitation, and the opportunity for a fresh start rather than punishment. The prosecutor's policy foreclosed this possibility based on the assumption that a harsher charging policy would somehow reduce the drug trade in Chester or that the existence of the policy would achieve other social values, such as greater community satisfaction or cooperation with law enforcement authorities.

Second, the policy arguably violated the equality principle, in that similarly situated drug offenders were treated more or less harshly depending on which side of the city line their offense occurred. This consideration is unrelated to their culpability or dangerousness and, thus, seems like an arbitrary basis for deciding whether or not to pursue drug charges or instead admit individuals into the drug rehabilitation program.

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76. In *Agnew*, the policy was unwritten and, presumably, non-public, at least until it was challenged. *Agnew*, 600 A.2d at 1267. A community prosecutor, however, would ordinarily publicize the policy to promote both public accountability and deterrence.

A 2004 manual on the ethics of community prosecution noted these potential problems<sup>77</sup> and offered two unsatisfactory responses. The first was a suggestion that community prosecution be defined to exclude punitive strategies and thereby avoid the possibility of disproportionately harsh punishment.<sup>78</sup> Community prosecuting, as so limited, would focus on quality-of-life offenses and would seek to prevent or deter them through strategies other than prosecution, such as neighborhood watches, cameras, and brighter lighting.<sup>79</sup> The problem, of course, is that the response defines “prosecution” out of the concept of “community prosecution” by excluding strategies that include the use of traditional prosecutorial charging power. The second response was that inequities could be avoided by making community prosecuting strategies universal—that is, by applying them throughout the prosecutor’s jurisdiction rather than targeting them to particular communities.<sup>80</sup> This approach, in the name of equal treatment, eliminates the distinctive focus on “community” and results in extending policies to segments of the jurisdiction where they are unjustified. For example, the Delaware County prosecutor might avoid unequal treatment by denying low-level drug offenders access to the state’s rehabilitation program whether they were arrested in or out of Chester, but the result would be to deprive everyone access to a program that the state designed for them and that results in more proportionate disposition in order to promote a social good that relates to only some of their situations.

An alternative answer is that the social good achieved by the community prosecuting policy justifies disproportionate or unequal treatment of some offenders. Just as a mob hit man who testifies against his confederates may be treated different and more leniently than other hit men to promote the criminal justice objective of

77. Others have as well. See, e.g., Anthony V. Alfieri, *Community Prosecutors*, 90 CALIF. L. REV. 1465, 1474 (2002) (noting that pilot community prosecution programs “raise[d] issues of priority and proportionality in prosecution”); Kelley Bowden Gray, *Community Prosecution: After Two Decades, Still New Frontiers*, 32 J. LEGAL PROF. 199, 205–09 (2008) (discussing various ethical concerns regarding community prosecution, including “that similarly situated defendants may not be treated equally”).

78. FROM THE COURTROOM TO THE COMMUNITY, *supra* note 31, at 8–9.

79. The APRI explains that defendants may be singled out for deterrence but not for disproportionate treatment. *Id.* at 8. The aim is to “reduce an impediment to livability” by focusing on low-level criminal conduct through policing, not punishment. *Id.* Prosecutors prevent crime through “[n]eighborhood clean-ups, formation of block watches and foot patrols, and turning porch lights on at night . . . [T]here is no focus on criminal convictions at all, and offenders in the neighborhood therefore cannot be treated more harshly than their counterparts in the conventional prosecution scenario.” *Id.* at 9.

80. *Id.* at 10 (“Chief prosecutors can avoid [the failure to treat like cases alike] by expanding their community prosecution initiative jurisdiction-wide.”).

punishing other offenders, one might argue that low-level drug offenders can be treated more harshly than would ordinarily be expected (though still within the limits prescribed by law) in order to serve criminal justice objectives or other worthy social ends. The problem, however, is that the particular policy may not in fact serve the intended objectives and, indeed, may be counterproductive. When a prosecutor violates conventional principles governing the exercise of discretion to serve what the prosecutor regards as the greater good of the community, there is no particular reason to assume that the prosecutor has exercised discretion fairly and prudently—just the contrary. And with the benefit of hindsight, many would now say that harsh drug-prosecution policies like the one adopted in Chester proved unsuccessful.

### III. THE COMMUNITY'S INFLUENCE ON PROSECUTORIAL DISCRETION

The story of the Delaware County prosecutor is not meant as an examination of all the issues of prosecutorial discretion that might arise in the context of community prosecuting. It is meant simply to illustrate a point that may be intuitively obvious, namely, that some community prosecution strategies may entail an unwise use of prosecutorial power. If obvious, this should nonetheless warrant concern for at least two reasons. The first is that community prosecution strategies are relatively new for prosecutors and are departures from their ordinary work. Traditional principles governing the exercise of decision-making authority may not be a good fit. But guidance on the wise use of the new strategies has not yet developed.<sup>81</sup> The second reason for concern is that community prosecuting entails an expansion of the prosecution's power and role. Even in traditional criminal cases, the prudent exercise of prosecutorial discretion is essential in light of the enormity of the power that prosecutors wield for criminal law enforcement ends.<sup>82</sup> Community prosecuting potentially gives prosecutors access to additional powers arising out of their collaborations with civil government agencies and community institutions, and potentially involves serving public objectives aside from traditional law enforcement objectives. Expanded power and expanded jurisdiction imply the ability to cause greater harm and, therefore, the need for

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81. See *What Have We Learned From Evaluations of Community Prosecution?*, BUREAU OF JUST. ASSISTANCE, <http://www.ojp.usdoj.gov/BJA/evaluation/program-adjudication/comm-prosecution2.htm> (last visited Feb. 13, 2012) ("There has been some disagreement within the field regarding the goals and objectives of prosecution generally and how to measure its accomplishments. . . . [A]s of yet there have been no strong, systematic evaluations undertaken to assess the performance of community prosecution initiatives.").

82. Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 261 (2001).

more careful attention to how discretionary decisions are made—for example, in accordance with what norms and by what process.<sup>83</sup>

One might argue that a community prosecutor's cooperation with and accountability to the affected community provide their own checks on the prosecutor's discretionary decision making. After all, scholars and commentators frequently call on prosecutors to employ greater transparency and public accountability to improve the exercise of traditional prosecutorial discretion,<sup>84</sup> and community prosecution is founded on principles of transparency and accountability. In the community policing context, community justice advocates have argued that community participation in the identification of problems and the development of solutions helps ensure that police discretion is unleashed to maximize social good. For example, Dan Kahan and Tracy Meares have argued that courts should permit greater police discretion for law enforcement strategies that have been endorsed by minority-dominated neighborhoods.<sup>85</sup> In their view, members of the affected communities are better situated "practically and morally" to strike the balance between liberty and order in their own neighborhoods.<sup>86</sup> Similarly, Debra Livingston has argued in favor of extrajudicial, community-based checks on police discretion, such as civilian oversight boards.<sup>87</sup> Because community prosecutors, unlike traditional prosecutors, exercise discretion outside their insular offices, in view of the community to which they are accountable, we might be less concerned about the risks of discretionary decision making by community-based prosecutors than traditional prosecutors.

But to rely on community participation as a means of improving prosecutorial discretion is to assume that the community is

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83. Cf. Robert Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 18–20 (1940) (encouraging prosecutors to use their discretion in an ethical and moral manner).

84. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 3–16, 176–77 (2007); Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 494 (2006); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 917 (2006); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 391; Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 177–78 (2004).

85. Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1166–71 (1998); Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 410 (2000).

86. Kahan & Meares, *supra* note 85, at 1177–80.

87. Livingston, *supra* note 6, at 664–65; see also Reenah L. Kim, *Legitimizing Community Consent to Local Policing: The Need for Democratically Negotiated Community Representation on Civilian Advisory Councils*, 36 HARV. C.R.-C.L. L. REV. 461, 476–82 (2001) (summarizing arguments that community partnerships serve as police oversight).

sufficiently democratic, informed, and powerful to ensure that community prosecution policies serve the community interest, but not so powerful as to override other prosecutorial priorities. Without participation by representative, well-informed, and empowered stakeholders, there is a risk that law enforcement may co-opt the politically popular rhetoric of “community,” simply to advance its own agenda.<sup>88</sup> At the same time, trusting the community to oversee the exercise of prosecutorial discretion creates a risk that community-based voices will co-opt prosecutorial values. The remainder of this Part examines these dual concerns and then turns to the potential of community-based defense lawyers to help foster a different kind of partnership between communities and law enforcement.

#### A. *Co-Opting of Communities*

Just as the term “community prosecution” is difficult to define, so is the very notion of “community.”<sup>89</sup> Out of a recognition that crime and disorder tend to vary by neighborhood, community justice programs tend to define community by geographic boundaries.<sup>90</sup> However, any meaningful idea of community suggests commonalities among its members that go beyond physical proximity.<sup>91</sup> Because of the significant exit costs to residential relocation, one’s address may not be a valid indication of voluntary membership in a geographically defined community.<sup>92</sup> Although one’s neighborhood may be a predictor of socioeconomic status or race, defining community geographically can mask the significant divisions that exist in a neighborhood, both among and within identifiable groups, especially about law enforcement.<sup>93</sup> To say that

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88. See Kim, *supra* note 87, at 462.

89. JEROME E. MCELROY ET AL., *COMMUNITY POLICING: THE CPOP IN NEW YORK* 3–4 (1993) (noting that the term community is “imprecise” and can be “idealized”).

90. See *supra* note 32 and accompanying text.

91. JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 254 (1993) (noting that communities are rare if defined as having “a commonality of interests, traditions, identities, values, and expectations”); MCELROY, *supra* note 89 (“Virtually all commentators agree that the concept of ‘community’ as used in the rhetoric of community policing is imprecise . . . and largely uninformed by a century of sociological usage and study.”).

92. See EDWARD GLENN GOETZ, *CLEARING THE WAY: DECONCENTRATING THE POOR IN URBAN AMERICA* 71, 86–87 (2003) (identifying expenses as significant barriers to voluntary relocation).

93. See Regina Austin, “*The Black Community, Its Lawbreakers, and a Politics of Identification*,” 65 S. CAL. L. REV. 1769, 1770–71 (1992); David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1085 (1999) (“[I]nner-city communities, like all communities, do not speak with one voice . . .”); Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669, 689 (1998); Eric K.

a community endorses law enforcement's efforts assumes that divergent constituencies within a neighborhood can agree.<sup>94</sup>

Moreover, even if the residents of a neighborhood could reach something resembling a consensus in identifying and responding to local crime and disorder, police and prosecutors may not be well situated to assess that consensus. Involvement in community justice programs is typically by only a small, nonrepresentative segment of the population.<sup>95</sup> Organizational and institutional stakeholders might be businesses, churches, and other "issue-oriented" groups with their own narrow agendas.<sup>96</sup> For example, Multnomah County's Neighborhood District Attorney Program, commonly seen as a leader in the growth of community prosecution, was formed in response to business leaders who were concerned that local disorder would interfere with the growth of an emerging commercial district.<sup>97</sup> More than twenty years later, local businesses continue to provide partial funding of the program.<sup>98</sup> As for individual stakeholders, the neighborhood associations that community justice programs often look to for residential participation tend to be dominated by older, whiter, and more fearful homeowners.<sup>99</sup> Other community members might be chilled from participation based on distrust of law enforcement or simply because they are too busy. One study of eight early community

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Yamamoto, *The Color Fault Lines: Asian American Justice from 2000*, 8 ASIAN L.J. 153, 157–58 (2001) (discussing "color on color" conflicts).

94. Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 402 (2005) ("[C]riminal justice policies are largely imposed on underrepresented inner city communities by middle-class politicians and citizens who may have a radically different experience of crime and law enforcement.").

95. See Burke, *supra* note 8, at 1006–07; Kim, *supra* note 87, at 482.

96. Kim, *supra* note 87, at 483.

97. JOHN S. GOLDKAMP ET AL., BUREAU OF JUSTICE ASSISTANCE, COMMUNITY PROSECUTION STRATEGIES: MEASURING IMPACT 2 (2002) ("The immediate origins of the community prosecution movement are often traced to the pioneering efforts of Multnomah County District Attorney (DA) Michael Schrunck, who established the Neighborhood DA Unit in Portland, Oregon, in 1990 in response to business leaders' concerns that quality-of-life crimes would impede development of a central business district.").

98. *Neighborhood DA Unit*, OFFICE OF THE DIST. ATTY., <http://www2.co.multnomah.or.us/cfm/da/NDAP/index.cfm?fuseaction=overview&menu=1> (last visited Feb. 11, 2012) (noting financial support from federal and local government, the local transportation agency, and local businesses).

99. See Michael E. Buerger, *A Tale of Two Targets: Limitations of Community Anticrime Actions*, in COMMUNITY JUSTICE: AN EMERGING FIELD 137, 137–38 (David R. Karp ed., 1998); Wesley G. Skogan, *Community Organizations and Crime*, in 10 CRIME AND JUSTICE: A REVIEW OF RESEARCH 39, 68 (Michael Tonry & Norval Morris eds., 1988) (concluding that residents are more likely to organize in "homogeneous, better-off areas of cities"). But see WESLEY G. SKOGAN, POLICE AND COMMUNITY IN CHICAGO: A TALE OF THREE CITIES 137 (2006) (reporting that participation in Chicago community policing programs "was highest in the city's most violent, drug-infested neighborhoods").

justice programs concluded that, despite the varied approaches the programs took to spur community involvement, only a “small core group of residents” was involved, while “ordinary” residents had no idea about, or only a vague awareness of, the programs operating in their neighborhoods.<sup>100</sup>

Even the most active community members may not have sufficient information to assess the desirability of community-based law enforcement programs. Consider, for example, the Delaware County community prosecutor’s policy designating Chester as a drug-selling zone, where all drug offenses would be prosecuted. Predictably, the policy would lead to a shift in police resources to Chester, where the prosecutor had determined to treat drug offenses more seriously. Residents seeking safer streets through more law enforcement might initially support such a program. However, in the long term, one could expect the policy to fall disproportionately on residents of Chester, who spent much more of their time in the targeted community, rather than on white out-of-towners who occasionally drove into the city to buy drugs. Recreational drug users in suburban and rural parts of the county who kept out of Chester would largely be left alone, while young men and women of color who were found in possession of drugs would be prosecuted and convicted. This would lead in Chester to the problem that Michelle Alexander calls “the new Jim Crow”<sup>101</sup>: the mass incarceration and relegation to second-class status of people (especially men) of color who were prosecuted for nonviolent drug offenses that are almost entirely ignored in middle-class white communities. It is hard to imagine that, if the long-term consequences of the prosecutor’s zero-tolerance drug policy were described to Chester residents in 1990, it would be particularly welcome.

Similarly, to the extent that community justice programs often seek to improve the quality of life in neighborhoods by targeting the enforcement of low-level offenses, residents who might otherwise be wary of aggressive policing might endorse the programs on the assumption that low-level offenses do not trigger serious punitive consequences. However, they may do so without understanding fully how the cases would otherwise be treated without their input, how the programs work, or how the collateral consequences of the programs they are supporting might affect their community and its members. They may not, for example, consider the possibility that aggressive street policing might undermine cooperative relationships between the community and law enforcement in the

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100. Randolph M. Grinc, *“Angels in Marble”: Problems in Stimulating Community Involvement in Community Policing*, 40 CRIME & DELINQ. 437, 442–45 (1994).

101. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 11–17 (rev. ed. 2012).

long term.<sup>102</sup> They may not know that the most minor misdemeanors can trigger not only informal policing of social norms, but also a full-blown custodial arrest.<sup>103</sup> They may not know that the government is permitted to hold a person who is arrested without a warrant for up to forty-eight hours without a probable cause hearing.<sup>104</sup> They may not realize that police can use minor offenses as a pretextual basis for making an arrest.<sup>105</sup> They may not understand that the search that is permitted incident to such arrests<sup>106</sup> might yield drugs or guns that result in felony convictions and lengthy sentences, leaving members of the community with whom they share a “linked fate”<sup>107</sup> out of the neighborhood, away from their children, and with a criminal history that undermines their ability to participate in society. Although the prosecutor, as an attorney, will have such knowledge, there is no guarantee that prosecutors will fully inform the community about consequences of the program that might provoke public concern.

Finally, the community may not be in a position to identify or to fight for alternative solutions to neighborhood problems beyond the strategies proposed by law enforcement.<sup>108</sup> They may not realize, for example, that criminal cases can be resolved through diversion programs that enable defendants to avoid criminal convictions. They may not know about nuisance law, property maintenance codes, or other civil approaches to regulating neighborhood disorder

102. Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219, 1227 (2000) (“Community tension with and distrust of police may rise with more aggressive policing of low-level offenses.”); Debra Livingston, *Gang Loitering, the Court, and Some Realism about Police Patrol*, 1999 SUP. CT. REV. 141, 178 (“[E]ven when properly employed, aggressive use of stop and frisk can alienate and estrange communities in ways that ultimately detract from, rather than contribute to, the maintenance of a vibrant civil order.”).

103. See *Virginia v. Moore*, 553 U.S. 164 (2008) (holding that a custodial arrest for a misdemeanor was valid even when the state legislature had designated the crime a non-arrestable crime); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (holding that a custodial arrest for a seatbelt offense was lawful, even though the maximum penalty was a fine, not imprisonment, because the offense was designated a crime by the legislature).

104. *City of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

105. See *Whren v. United States*, 517 U.S. 806, 816–19 (1996) (upholding police seizure of a driver who had committed a minor traffic offense and holding that the officer’s subjective intentions for the seizure were immaterial).

106. See generally *Chimel v. California*, 395 U.S. 752 (1969).

107. Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 215–17 (1998) (discussing the concept of “linked fate,” both in people generally as they consider how government policies affect family and friends, and specifically by African Americans, who feel a connection even to Black strangers because of shared circumstances that have been shaped historically by race).

108. See Grinc, *supra* note 100, at 456 (reporting that even the neighborhood group leaders who were most knowledgeable about community justice programs did not understand the community’s role in them).



and other concerns. If the prosecutor fails to identify alternative approaches to problem solving, the community might support a program proposed by law enforcement as the best of the known alternatives. Although a well-intentioned community prosecutor presumably shares the community's interest in devising the most effective response, she is also accountable to her office and to the government and must therefore be mindful of internal concerns. The community, in contrast, might prefer far more expensive strategies than the larger jurisdiction to whom the prosecutor is ultimately accountable is willing to pay for.<sup>109</sup>

If neighborhood involvement in community prosecution programs is not truly representative of the relevant community and is not sufficiently informed or empowered, the rhetoric of community can be co-opted by law enforcement to advance its own objectives.<sup>110</sup> Some of the leading scholars of criminal procedure have warned against the over lifting of the powerful and popular rhetorical banner of "community." Professors Albert Alschuler and Stephen Schulhofer, for example, once observed a need "to be on guard against the appealing but highly manipulable rhetoric of 'community,' a rhetoric that is increasingly prevalent in contemporary discourse."<sup>111</sup> Debra Livingston has noted "that a bewildering and sometimes inappropriate variety of police initiatives could well be implemented in community policing's name."<sup>112</sup> Paul Chevigny has said, "So-called community policing that does not mean participation by the people isn't really community policing."<sup>113</sup> And Robert Weisberg has cautioned that a "somewhat sentimental notion of 'community'" can sometimes conceal "a dangerously majoritarian anti-Constitutionalism."<sup>114</sup>

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109. Cole, *supra* note 93, at 1088 (observing that inner-city residents might prefer expensive alternatives that the larger community is unwilling to pay for); Erik G. Luna, *The Models of Criminal Procedure*, 2 BUFF. CRIM. L. REV. 389, 453 (1999) ("Inner-city minorities have opted for discretionary policing techniques not on the merits but because society at large refuses to provide adequate resources to safeguard urban communities.").

110. See Mastrofski & Willis, *supra* note 10, at 113 (citing WILLIAM LYONS, *THE POLITICS OF COMMUNITY POLICING: REARRANGING THE POWER TO PUNISH* (1999)) (noting that a study of community policing programs in Seattle concluded that, despite early progress in developing "participatory and deliberative democracy," the programs ultimately became "less a two-way communications mechanism than a means to garner community acquiescence to police priorities and acceptance of police-generated programs").

111. Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Mearns and Kahan*, 1998 U. CHI. LEGAL F. 215, 216 (1998).

112. Livingston, *supra* note 6, at 577.

113. Roundtable, *Law and Disorder: Is Effective Law Enforcement Inconsistent with Good Police-Community Relations?*, 28 FORDHAM URB. L.J. 363, 366 (2000) (comments of Paul Chevigny).

114. Robert Weisberg, *Foreword: A New Agenda for Criminal Procedure*, 2 BUFF. CRIM. L. REV. 367, 370 (1999).

Without assurances that an affected community is actually represented, informed, and empowered, community participation and oversight may not serve as an effective check on prosecutorial discretion.

### B. Co-Opting of Prosecutorial Values

At the same time that we may worry about prosecutors who might advance an agenda driven entirely by law enforcement, but in the name of community, community prosecution also poses the opposing concern that majoritarian will might override prosecutorial values.<sup>115</sup> A prosecutor's well-known duty is not simply to punish, but to promote justice.<sup>116</sup> In the interest of justice, prosecutors generally prioritize serious offenses over minor ones, seeking punishment that fits the severity of the crime.<sup>117</sup> As a general matter, they also seek to have similarly situated offenders treated equally.<sup>118</sup>

In contrast, a neighborhood overridden by low-level crime and disorder does not approach crime-related problems like lawyers, let alone like prosecutors. Community members may overestimate the comparative severity of their concerns, failing to prioritize local problems in light of overall jurisdictional needs. They might also demand differential treatment of the offenders who are deteriorating the quality of life in their communities as compared to offenders in another location. A public afraid of crime is known to respond by asking for more policing and more punishment, failing to recognize criminal law's traditional retributive limits to utilitarian-based punishment.<sup>119</sup>

115. Lanni, *supra* note 94, at 369–70.

116. *Berger v. United States*, 295 U.S. 78, 88 (1935); MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2009); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1980); ABA STANDARDS, *supra* note 64, § 3-1.2(c).

117. Devin J. Doolan, Jr., *Community Prosecution: A Revolution in Crime Fighting*, 51 CATH. U. L. REV. 547, 547–48 (2002).

118. Gray, *supra* note 77, at 206.

119. Susan A. Bandes, *Child Rape, Moral Outrage, and the Death Penalty*, 103 NW. U. L. REV. COLLOQUY 17, 21 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/27/lrcoll2008n27bandes.pdf> (noting the connection between fear and the public's retributive impulses); Francis T. Cullen, Bonnie S. Fisher & Brandon K. Applegate, *Public Opinion about Punishment and Corrections*, in 27 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1 (Michael Tonry ed., 2000) (assessing public opinion about punishment); *cf.* Thompson, *supra* note 4, at 348, 353–54 (“Some might contend that placing too much emphasis on community sentiment could undermine the detachment the prosecutor needs in order to exercise discretion and fulfill the role of minister of justice. . . . [A]ny design of a community program must take into account the delicate balance between appropriate respect for and cooperation with the community on the one hand and the risk of ceding undue control to (or simply being perceived as having ceded undue control) to community members on the other.”).

The Delaware County prosecutor's decision to prosecute all drug offenses committed in Chester can be considered through this lens. Vocal business owners, churches, and residents—tired of operating, worshipping, and living in the middle of the county's drug district—may have demanded action. The designation of a zero-tolerance zone would be a quick, clear, and highly visible reaction to crime concerns.<sup>120</sup> Community prosecution is intended to promote consideration and implementation of alternatives to traditional punishment. But when vocal and empowered communities demand more law enforcement, their participation might lead to *more* unleashing of punishment, not less, if the prosecutor is unable or unwilling to shape or resist community sentiment.

### C. *Leveling the Playing Field: Community Defense Lawyers*

The movement of prosecutors out of the courthouse and into local neighborhoods poses special concerns about the exercise of discretion by community-based prosecutors. In developing community prosecution strategies, prosecutors may employ processes that compensate for the absence of well-developed normative understandings: the involvement of the community, other agencies, and others in the formulation of community prosecution strategies may help prevent policies that are unproductive or counterproductive and unfair. Although the transparency and accountability on which this model of prosecution is premised provide some theoretical promise of guiding discretion,<sup>121</sup> the community's potential to oversee prosecutorial decision making can be undermined if participation in prosecutorial programs is not sufficiently representative of all affected constituencies or if the community is not sufficiently knowledgeable or empowered to serve

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120. The rhetoric of "zero tolerance" has been traced to Ronald Reagan's escalation of the war on drugs. See DIANA R. GORDON, *THE RETURN OF THE DANGEROUS CLASSES: DRUG PROHIBITION AND POLICY POLITICS* 199 (1994); ANDREW B. WHITFORD & JEFF YATES, *PRESIDENTIAL RHETORIC AND THE PUBLIC AGENDA: CONSTRUCTING THE WAR ON DRUGS* 55–63 (2009). Since then, policy makers have adopted "zero tolerance" policies in response to a broad array of public concerns. See BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 2 (2001) (street crime and minor offenses); J. Richard Chema, *Arresting "Tailhook": The Prosecution of Sexual Harassment in the Military*, 140 *MIL. L. REV.* 1 (1993) (sexual harassment in the military following the highly publicized Tailhook scandal); Fairfax, *supra* note 69, at 1258 n.56 (domestic violence); Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 *ARIZ. L. REV.* 1067, 1069 (2003) (school violence); Cara Suvall, *Restorative Justice in Schools: Learning from Jena High School*, 44 *HARV. C.R.-C.L. L. REV.* 547, 551 (2009) ("[Z]ero tolerance policies have expanded to include a wider range of student behavior including other violence, bullying, threatening, use of profanity, alcohol or tobacco consumption, and other offenses.").

121. See *supra* note 84.

as a meaningful counterbalance. At the same time, politically powerful contingents of the community may have the potential to co-opt prosecutorial values such as proportionality and equality.

One purpose of community prosecution is to bring a lawyer's expertise to community justice efforts, demonstrating an understanding that lawyers are important to the process.<sup>122</sup> But prosecutors are not general practitioners. They have expertise in criminal law and from a prosecutorial perspective. They tend to be isolated within their own profession, rarely participating in bar activities or engaging with other lawyers.<sup>123</sup> Community prosecution often calls on them to apply nonadvocacy, "social work" types of skills that they may not have and may even be hostile toward.<sup>124</sup> If the goal of community justice is to address neighborhood concerns outside the narrow approach of the usual rapid-response model of policing and prosecution, it is not obvious why the only legal expertise is being provided by prosecutors. When we shift to community prosecution, there is a missing voice that is equally informed in law. Defense lawyers may be in a better position to draw on the perspective of a clientele of people who commit crimes and are accused of doing so. Defense lawyers can identify other "stakeholders" who may not be part of the community prosecution advisory circle. They can also provide citizen participants with another perspective of the programs in question. The defense lawyer's perspective might help prosecutors temper their impulse to resort to traditional prosecution methods.

Consider, as a contrast to Delaware County's drug-free zone policy, what has become known as the "High Point" model of intervention in the drug trade, shaped by Professor David Kennedy's efforts in High Point, North Carolina.<sup>125</sup> Kennedy describes the initiative as follows:

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122. GOLDKAMP ET AL., *supra* note 97, at 7 ("[C]ommunity prosecutors can offer the legal expertise and authority to bring creative community policing solutions to fruition.").

123. *The Effect of State Ethics Rules on Federal Law Enforcement: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary*, 106th Cong. 53 (1999) (testimony of John Smietanka, former prosecutor) (stating that "[t]ime, money and, to some unfortunate extent, a cultural chasm" prevent prosecutors from "meaningful participation" in bar activities); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 208 (1988) (noting that prosecutors tend to be isolated from groups who might encourage empathy for defendants, while surrounded by populations "who can graphically establish that the defendant deserves punishment, and who have no reason to be concerned with competing values of justice").

124. See Levine, *supra* note 34, at 1173–74 (documenting prosecutorial wariness of the "social work components" of California's community-based Statutory Rape Vertical Prosecution Program).

125. See David Kennedy, *Drugs, Race and Common Ground: Reflections on the High Point Intervention*, NAT'L INST. JUST. J., March 2009, at 12 (2009).

A particular drug market is identified; violent dealers are arrested; and nonviolent dealers are brought to a "call-in" where they face a roomful of law enforcement officers, social service providers, community figures, ex-offenders and "influentials"—parents, relatives and others with close, important relationships with particular dealers. The drug dealers are told that (1) they are valuable to the community, and (2) the dealing must stop. They are offered social services. They are informed that local law enforcement has worked up cases on them, but that these cases will be "banked" (temporarily suspended). Then they are given an ultimatum: if you continue to deal, the banked cases against you will be activated.<sup>126</sup>

In developing the model, Kennedy encountered deeply held beliefs on the part of both law enforcement and community residents that threatened to undermine cooperation between the two. Law enforcement believed that the community lacked positive social norms and was apathetic or even supportive of drug dealing and its accompanying violence.<sup>127</sup> Residents, on the other hand, believed that the police were part of a conspiracy to destroy their community.<sup>128</sup> To get through a "brick wall that preclude[d] meaningful conversations," Kennedy had to engage in "blunt conversations" with both sides, asking police to understand why residents saw them as the enemy and asking residents if they had done enough to express positive expectations of their own friends and family members.<sup>129</sup> Importantly, in this model, the message to offenders that their drug activity must stop comes not only from police and prosecutors, but also from the community itself.<sup>130</sup> And because the government has agreed to "bank" potential charges, community members who might otherwise be wary of criminal punishment are willing to engage in partnerships with law enforcement and to accept the charges that do result for offenders who fail to heed the community's pleas for change.<sup>131</sup>

The High Point model demonstrates the broad array of discretion left to the prosecutor seeking to develop community prosecution strategies, the lack of any single ideal process, and the host of questions that might be raised. For example, in seeking to develop community prosecution strategies, what information should be sought and from whom? Should the prosecutor speak only with business leaders, clergy, and educators? Or should the prosecutor also speak with the very population whose activities are at the heart of the community's concerns? To what extent should prosecutors

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126. *Id.* at 12–13.

127. *Id.* at 13.

128. *Id.*

129. *Id.* at 15.

130. *Id.* at 12–13.

131. *Id.* at 16.

look beyond community representatives and government agencies—that is, to social scientists, health care professionals, social workers, and others who might offer different perspectives? What should community prosecutors do with the information they gather? When should prosecutors promote community objectives and when should they serve as a check on community sentiment?

Prosecutors may not be in a position on their own to either identify all of the relevant stakeholders or to explore all of the divergent outlooks on a community problem. Criminal defense lawyers, who have access to prior clients and their families, and who may generally hold a contrasting worldview from prosecutors, can bring lawyering skills to community justice efforts from a different perspective.

#### IV. TRANSPARENCY AND TRADITIONAL PROSECUTION

We have posited that the public's ability to serve as a check on prosecutorial discretion in the community prosecution context will depend on whether a diversely constituted community is fully participatory in prosecution efforts, and whether the public is sufficiently informed and empowered to meaningfully express its will. At the same time, however, we have expressed an opposing concern that an overly empowered public can impose majoritarian will and override traditional prosecutorial values, such as treating similarly situated offenders equally or prioritizing more serious offenses. We have suggested that the addition of defense lawyers to community justice conversations might increase community participation and education, while also tempering prosecutorial impulses toward traditional law enforcement methods.

We close by considering whether the lessons of community prosecution might be imported into other areas of traditional discretion. As currently implemented, community prosecution takes place on a separate track from traditional prosecution, practiced by different lawyers and reflecting different models of law enforcement.<sup>132</sup> Prosecutors who favor community-based prosecution have failed to articulate why the model's tenets should not apply more broadly to all prosecutorial action.<sup>133</sup> If

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132. See Lanni, *supra* note 94, at 362 (“The result [of community justice programs] is a two-tiered system in which minor and serious crimes are addressed through separate procedures with entirely different assumptions about what crime is and what punishment ought to accomplish.”); Levine, *supra* note 34, at 1173–74 (noting culture divide between traditional and community-based prosecutors).

133. See Lanni, *supra* note 94, at 362–63 (“There is . . . a plausible rationale for diverting minor offenders from the traditional criminal justice process . . . . But if the community justice movement aims to enhance the legitimacy of the criminal justice system as a whole by fostering popular participation and making law enforcement responsive to local community needs, community

transparency, public accountability, and an exploration of nonpunitive responses to crime are sensible in developing proactive law enforcement strategies, the obvious question is why these same principles should not apply to traditional prosecutorial work that is reactive to individual criminal offenses.<sup>134</sup>

One possible argument for separating "new" prosecution from "traditional" prosecution might hinge on a distinction between the minor, quality-of-life offenses that tend to be the subject of community prosecution and the serious crimes that almost universally trigger traditional prosecution. One might argue that, from a retributive perspective, serious offenses demand a minimum level of punishment. Therefore, it is improper for society to explore alternative, nonpunitive responses to these crimes. In contrast, quality-of-life offenses are less wrong and, in some instances, are criminalized only as a means to an end of maximizing social good. Retribution calls for little or no punishment for these offenses. Accordingly, law enforcement may adopt an instrumentalist approach, seeking the most effective, responsive strategy, without offending society's retributive notions of justice. Reliance on a utilitarian model of punishment for minor offenses, while invoking retributive justifications for serious ones, would concede (and justify) a two-tiered system.<sup>135</sup>

However, the distinction between minor ("new") and serious ("traditional") offenses, and an accompanying differentiation between consequentialist and desert-based schools of punishment, does not explain why public participation, transparency, and accountability are appropriate for the former, but not the latter. While half of all prosecutors' offices practice some form of community prosecution,<sup>136</sup> prosecutors' offices are still widely seen as insular, reluctant to relinquish their broad discretion, and resistant to calls for increased transparency.<sup>137</sup> Community

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justice initiatives must address the crimes that make up the mainstream criminal docket.").

134. See Thompson, *supra* note 4, at 361 ("Those informed by a vision of community prosecution believe that prosecutors should make regular efforts to learn from those they serve, to explain choices they may be considering or find themselves pursuing, and to hold themselves more transparently accountable for their policies, decisions, and record.").

135. This two-tiered system might be seen as an application of Norval Morris's philosophy of limiting retribution, which provides that the principle of just deserts should define the outer limits of an offense's punishment, but that society may pursue utilitarian objectives within the permissible range. See generally NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 73-75 (1974); NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* 199 (1982); NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* 84 (1990). The authors thank David Yellen for this point.

136. *History of Community Prosecution*, *supra* note 1.

137. See Bibas, *supra* note 84, at 911.

prosecutors may leave the courthouse to engage with outside voices, but much of what the traditional prosecutor does takes place not only at the courthouse, but also off the record, unseen, and unseeable from public view.<sup>138</sup>

Consider again, for example, the Delaware County prosecutor's response to drug activity in the City of Chester. Community input might assist the prosecutor in determining whether low-level drug transactions should be considered minor enough to qualify for "new" models of prosecution (and what those models should look like), or whether they are sufficiently harmful to justify retribution-based punishment. Or if this decision is left entirely within the prosecutor's discretion, perhaps the public should be informed about the adoption of a two-tiered system and the factors that guide the prosecutor's determination about which types of cases are treated as "new" and which will be treated "traditionally."

Moreover, traditional prosecution—even applying reactive, retributive models of punishment—might benefit from engagement with voices outside the prosecutor's office. As scholars have previously noted, prosecutorial transparency increases public confidence in prosecutors and courts and enhances the legitimacy of the criminal justice system.<sup>139</sup> Public elections of prosecutors would be more reliable if the public were better informed about prosecutorial policies and discretionary decision making.<sup>140</sup> Prosecutors might also be able to neutralize the kinds of cognitive biases that can result in wrongful convictions by talking about their cases with people—perhaps even defense attorneys—who might see the evidence or the offense in a different light.<sup>141</sup>

At the same time, in the context of much of prosecutors' traditional work—namely, the prosecution of individual cases—there are practical and ethical limits on the ability to make decision making transparent and respond to community input. Discretionary decision making is pervasive;<sup>142</sup> prosecutors would not

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138. See Fairfax, *supra* note 69, at 1256–58; Medwed, *supra* note 84, at 177–78; Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 18 (2009).

139. DAVIS, *supra* note 84, at 176–77; Bibas, *supra* note 84, at 949; Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1589 (2010).

140. Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334, 336 (2002); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 963 (1997); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 583 (2009).

141. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1621 (2006); Findley & Scott, *supra* note 84, at 391.

142. Green & Zacharias, *supra* note 36, at 840–41, 902 ("Discretion pervades every aspect of [prosecutors'] work, including investigations, charging and plea



have time to become transparent and accountable in every individual case even if it were desirable and proper to do so. Prosecutors are limited by the interests in investigative secrecy and in fairness to the accused in their ability to discuss publicly the facts relevant to charging decisions and other discretionary decisions or the reasons for their decisions.<sup>143</sup> The Manhattan District Attorney's recent, highly publicized prosecution of Dominique Strauss-Kahn was a rare one in which the prosecutor had an opportunity, in the context of judicial proceedings, to explain the facts and standards governing a discretionary decision—in that case, the decision to seek to dismiss previously filed charges.<sup>144</sup> In contrast, if the Manhattan prosecutor had decided not to bring charges in the first place and had issued a public statement explaining why, the prosecutor might have been criticized for being unfair both to the alleged accuser, whose credibility was called into question, and to the accused, who remained under a cloud of suspicion. Similarly, if the prosecutor had solicited community input before deciding whether to bring or continue charges, the prosecutor would have been criticized for abdicating his authority to exercise independent professional judgment. Prosecutors might be encouraged, based on the community prosecuting model, to develop and publicly articulate general principles governing their traditional work,<sup>145</sup> but it would be unrealistic to expect in their ad hoc, reactive decision making the kind of transparency and community engagement that is characteristic of the work of community prosecuting.

#### CONCLUSION

This Article set out to explore the special problem of discretion by the community prosecutor. We have suggested that the exercise of prosecutorial discretion in developing community prosecution strategies poses unique problems from traditional prosecution work. One implication is that prosecutors ought to discuss and develop

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bargaining, trials, sentencing, and responding to postconviction events. . . . The practical realities of the criminal justice system, including the sheer volume of cases that need to be disposed of, to a large extent require society to trust prosecutors to make decisions in the right way and on the right grounds." (citations omitted)).

143. *Id.* at 902 ("Prosecutors would be far less effective if their work were transparent. Full transparency might also compromise the safety and privacy of agents, witnesses, and others.").

144. Recommendation for Dismissal, *supra* note 63, at 1–3.

145. Green & Zacharias, *supra* note 36, at 903 ("Prosecutors' limited public accountability might be acceptable, or at least more acceptable, if there were well-established normative standards governing prosecutors' discretionary decision-making. . . . [There is] a need for deeper thinking by prosecutors and for a public articulation of clearer first- and second-order principles that can guide prosecutors' decisions.").

normative understandings regarding the use of proactive strategies and policies of the kind that have been labeled as community prosecuting. Another is that the public should be attentive to community prosecuting strategies, should ask how they are justified, and should evaluate the justifications with sufficient information to serve a meaningful participatory function. And finally, whatever lessons emerge about the relationship between the public and prosecutorial discretion when prosecutors step out of the courthouse might also, within limits, inform the proper exercise of discretion within traditional prosecutorial functions.

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