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Urban Policing and Public Policy— The Prosecutor’s Role

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URBAN POLICING AND PUBLIC POLICY— THE PROSECUTOR’S ROLE

*Bruce Green**

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I. INTRODUCTION

Federal class action lawsuits challenged the lawfulness of the New York City Police Department's stop-and-frisk policy, resulting in a district court finding in 2013 that police practices were unconstitutional and must be remedied.¹ Public debate over the efficacy of the city's stop-and-frisk policy did not end the following year when the city dismissed its appeal, but became a topic in the 2016 presidential election.² While many civic groups, public officials, editorialists, and others chose sides in the years leading up to the court's ruling, the city's district attorneys mostly stayed on the sideline, playing virtually no visible role in the public discussions before or during the lawsuits.

This Essay uses prosecutors' response to New York City's stop-and-frisk policy as a lens through which to examine larger questions about elected prosecutors' functions as public officials. The Essay asks whether elected prosecutors, in the course of their work, should formulate views on controverted public policy issues, such as stop-and-frisk, about which they may have expertise and perspectives. And if so, how can prosecutors' public policy perspectives legitimately factor into their work, given the functions they serve?

The Essay examines both prosecutors' core, traditional function of processing criminal cases and three other functions that some contemporary prosecutors serve—namely, providing legal advice to the police, seeking to improve the law, and addressing criminal law-related problems proactively in collaboration with the community and other public agencies (i.e., “community prosecution”). Given these functions, urban prosecutors would be justified in responding to concerns about policing policies, such as New York's pre-2014 stop-and-frisk policy. But the challenging question is how prosecutors should best respond. The Essay suggests that prosecutors might look to the community for its input on what, if any, measures prosecutors should take. Further, the Essay concludes by identifying a new function that prosecutors

¹ See *infra* note 9 and accompanying text.

² See, e.g., Jim Dwyer, *What Donald Trump Got Wrong on Stop-and-Frisk*, N.Y. TIMES (Sept. 27, 2016), https://www.nytimes.com/2016/09/28/nyregion/what-donald-trump-got-wrong-on-stop-and-frisk.html?_r=0.

might serve—namely, as intermediaries between interested public agencies and civic and community groups, which represent different interests and perspectives with regard to contested questions of criminal process-related policy.

II. BACKGROUND

A. THE PROBLEMATIC NATURE OF STOP-AND-FRISK AS A CRIME CONTROL MEASURE

In *Terry v. Ohio*, stop-and-frisk was analyzed as a criminal investigation practice.³ A police officer stopped Terry and two other men who allegedly were acting suspiciously; the officer frisked them, found that two of them possessed guns, and arrested them.⁴ The question for the trial court and, eventually, the U.S. Supreme Court, was whether the guns were admissible as evidence in a criminal prosecution.⁵ The Supreme Court rejected Terry's Fourth Amendment challenge, concluding that the police officer had reasonable suspicion of criminal activity, which was what the Fourth Amendment required to justify stopping the men, and that the officer had reason to believe the men were armed and dangerous, justifying a pat down for weapons.⁶

Over time in some U.S. cities, stop-and-frisk evolved from a criminal investigative step in individual cases into a wholesale crime control measure, designed to deter people from carrying weapons and otherwise to discourage criminal activity.⁷ In cities such as New York, Philadelphia, Newark, and Chicago, where class actions were brought against policing policies, this allegedly meant that the police would stop and question, or stop-and-frisk, many people, not all of whom were genuinely acting suspiciously, and very few of whom were carrying illegal weapons or otherwise engaged in criminal conduct. But catching criminals was beside the point. The

³ 392 U.S. 1, 22 (1968).

⁴ *Id.* at 1, 5–7.

⁵ *Id.* at 8.

⁶ *Id.* at 27–29.

⁷ See Jeffrey Bellin, *The Inverse Relationship between the Constitutionality and Effectiveness of New York City "Stop and Frisk,"* 94 B.U. L. REV. 1495, 1519–20 (2014) (describing the evolution of New York City's stop-and-frisk policies); MICHAEL D. WHITE & HENRY F. FRADELLA, STOP AND FRISK: THE USE AND ABUSE OF A CONTROVERSIAL POLICING TACTIC 113–14 (2016) (citing Bellin's history of the stop-and-frisk policies in New York City).

very prospect that individuals in high-crime neighborhoods might be stopped without giving the police a specific reason to suspect them of wrongdoing was expected to deter them from carrying weapons, thereby making the streets safer.⁸

Urban police departments' stop-and-frisk policies and practices, as developed in the decades after *Terry*, have been a subject of controversy and debate, especially in recent years. In New York City, most prominently, class action lawsuits successfully challenged the police practice based largely on statistical studies.⁹ In around 2003, the New York City police began stopping people in public places by the hundreds of thousands annually, peaking at

⁸ WHITE & FRADELLA, *supra* note 7, at 84–85 (discussing the emerging role of stop and frisk in New York in the 1990s “as a tool in the NYPD efforts to seize guns and address social disorder . . . [and] as a central component of the department’s targeted effort against marijuana,” and as a component of the department’s “order-maintenance policing (OMP)” policy, which involved “zero tolerance [for] social disorder”); *id.* at 92–93 (discussing the “deterrence-based philosophy” justifying the use of stop-and-frisk); *id.* at 101 (quoting statement attributed to New York City Police Commissioner Kelly, that minority youth “are less likely to carry weapons” because they fear “that they could be stopped and frisked every time they leave their homes”).

⁹ See *Ligon v. City of New York*, 925 F. Supp. 2d 478, 486 (S.D.N.Y. 2013) (granting an injunction against NYPD stops on constitutional grounds); *Floyd v. City of New York*, 959 F. Supp. 2d 540, 627 (S.D.N.Y. 2013), *appeal dismissed* (Sept. 25, 2013) (holding that officers’ stop and frisk of plaintiff without any objective basis violated the Fourth Amendment); *Floyd v. City of New York*, 959 F. Supp. 2d 668, 671 (S.D.N.Y. 2013) (explaining why a permanent injunction against stop and frisk is an appropriate remedy); see generally Bellin, *supra* note 7, at 1540 (describing the “special needs rubric” stop-and-frisks must pass to be constitutional); Kaitlyn Fallon, Note, *Stop and Frisk City: How the NYPD Can Police Itself and Improve a Troubled Policy*, 79 BROOK. L. REV. 321, 321–22 (2013) (asserting that lower courts have eroded the force of the original Terry standard and given police more power in stop and frisks); Paul J. Larkin, Jr., Commentary, *Stops and Frisks, Race, and the Constitution*, 82 GEO. WASH. L. REV. ARGUENDO 1, 1 (2013) (exploring the history of class actions used to restrain the practice of stop-and-frisks); William A. Margeson, Note, *Bringing the Gavel Down on Stops and Frisks: The Equitable Regulation of Police Power*, 51 AM. CRIM. L. REV. 739, 739–40 (2014) (asserting that class actions involving stop-and-frisks showcase the need for greater regulation of police policies and stop-and-frisks protocol); David Rudovsky & Lawrence Rosenthal, Debate, *The Constitutionality of Stop-and-Frisk in New York City*, 162 U. PA. L. REV. ONLINE 117, 130 (2013) (discussing the role of *Floyd* in NYPD stop-and-frisk guidelines); Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3200–02 (2014) (describing the history of private civil lawsuits related to stop-and-frisks); Brittany Williams, Comment, *Courts and the Political Process — How Activists Can Implement Social Change*, 58 HOW. L.J. 637, 641–43 (2015) (surveying New York City cases related to stop-and-frisks); *Civil Procedure — Class Actions — Southern District of New York Certifies Class Action Against City Police for Suspicionless Stops and Frisks of Blacks and Latinos*, 126 HARV. L. REV. 826, 827 (2013) (describing the effects of *Floyd* on NYPD stop-and-frisk policy and procedure).

685,724 stops in 2011.¹⁰ They rarely uncovered evidence of criminal wrongdoing. In as many as 30% of the cases or more, the police made no record of the encounter, although they were required to do so as a result of prior litigation.¹¹ A study by the state attorney general found that 15% of the recorded stops were unconstitutional because the police lacked reasonable suspicion of criminal conduct¹² and that “Black and Hispanic citizens were disproportionately targeted for stops at rates that could not be explained by community demographics (racial makeup) or crime levels.”¹³ Other statistical studies supported the conclusion that the stop-and-frisk practices were racially discriminatory.¹⁴

The practice was strongly defended by the New York City police, its union, and Mayor Bloomberg’s administration.¹⁵ It was opposed by civil liberties organizations, criminal defense organizations, and some public officials, including Bill de Blasio, the Democratic candidate who succeeded Bloomberg as mayor.¹⁶ The state attorney general, which has civil rights enforcement authority, also expressed concerns about racial and ethnic discrimination.¹⁷

Individual stops and frisks for investigative purposes are not invariably unconstitutional or racially motivated, and police policies regarding stop-and-frisk do not invariably foster unconstitutional or undesirable police conduct.¹⁸ While the New York City litigation was pending, some urged the city to make

¹⁰ See WHITE & FRADELLA, *supra* note 7, at 91.

¹¹ See *id.* at 89 (estimating that only 70% of stop-and-frisks were documented).

¹² *Id.* at 99 (citing 1999 report).

¹³ *Id.*

¹⁴ *Id.* at 99–101, 103–04.

¹⁵ See Anil Kalhan, *Stop and Frisk, Judicial Independence, and the Ironies of Improper Appearances*, 27 GEO. J. LEGAL ETHICS 1043, 1062 (2014) (describing the Bloomberg administration’s “aggressive media campaign”).

¹⁶ See *id.* at 1045 (stating de Blasio’s position that stop-and-frisk practices had “become excessive”).

¹⁷ NYS OFFICE OF THE ATTORNEY GENERAL, THE NEW YORK CITY POLICE DEPARTMENT’S “STOP & FRISK” PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL (1999), https://ag.ny.gov/sites/default/files/pdfs/bureaus/civil_rights/stp_frsk.pdf; see also NYS OFFICE OF THE ATTORNEY GENERAL, A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT’S STOP-AND-FRISK PRACTICES 4 (2013), https://ag.ny.gov/pdfs/OAG_REPORT_ON_SQF_PRACTICES_NOV_2013.pdf.

¹⁸ See WHITE & FRADELLA, *supra* note 7, at 181, 185–86 (asserting that “[s]top and frisks should not be used interchangeably with ‘racial profiling’”).

reforms to better satisfy constitutional concerns and avoid racial disparities while meeting legitimate investigative needs.¹⁹ After the district court held the police policy to be unconstitutional, the de Blasio administration withdrew the City's appeal in order to participate in a joint remedial process involving a broad array of stakeholders and overseen by a court-appointed mediator and to develop reforms that would strike a better balance among legitimate, competing interests.²⁰

Employed as an urban crime control measure, however, stop-and-frisk presents at least two legal problems. One is that the Fourth Amendment does not permit random stops of pedestrians in public places as a deterrent measure, the way it permits the FAA to make air travelers go through a metal detector before boarding a plane. The use of stop-and-frisk as a deterrent presupposes that the police are likely to stop many people without reasonable suspicion, which is to say, unconstitutionally and therefore illegally. The second problem is that, in racially-mixed urban communities, the practice encourages discriminatory policing, particularly on racial and ethnic grounds. In New York City, for example, young men of color in low-income neighborhoods were disproportionately likely to be stopped and patted down.²¹

The legality of individual stops and frisks are rarely challenged when they do not result in the discovery of a gun or other evidence and lead to an arrest. Young people of color in low-income neighborhoods who are stopped illegally have no realistic means of individual redress, since they lack the resources and incentive to bring individual lawsuits arguing that their Fourth Amendment rights were violated. In New York City, the practice was not brought into sharp relief until the Center for Constitutional Rights and others challenged it in class action lawsuits. The plaintiffs

¹⁹ See, e.g., NY CITY BAR ASS'N, REPORT ON THE NYPD'S STOP-AND-FRISK POLICY 2 (2013), <http://www2.nycbar.org/pdf/report/uploads/20072495-StopFriskReport.pdf>.

²⁰ See CENTER FOR CONSTITUTIONAL RIGHTS, Joint Remedial Process in *Floyd v. City of New York*: What You Need to Know, <https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/timeline-floyd-v-city-new-york> (last updated Jan. 18, 2017) (stating that the purpose of the Joint Remedial Process is to develop reform with the input of those affected by the policies).

²¹ See WHITE & FRADELLA, *supra* note 7, at 99 ("Research clearly demonstrates that [stop and frisk] tactics employed by the NYPD have disproportionately targeted minority citizens in mostly poor neighborhoods.").

could not win simply by showing the police happened to make thousands of stops without any legal basis or that reflected racial bias, but had to show that this was a result of city policy.²²

Broader debates over policing policy are not strictly limited to the question of their legality, however.²³ In New York City, there was disagreement about whether stop-and-frisk practices are effective. Some gave them partial credit for the city's declining crime rates,²⁴ while others thought their impact on crime rates was trivial.²⁵ There was also disagreement about whether the practice is necessary to ensure police safety as well as about whether any benefits justified costs to individuals and communities. Many who were stopped for no good reason and who perceived that they were racially targeted came to mistrust or resent the police.²⁶ Throughout low-income minority communities, the practice undermined trust in police, law enforcement and government in general—which, of course, made the work of law enforcement more difficult.²⁷ As the district court found in the New York City litigation:

[I]t is important to recognize the human toll of unconstitutional stops. While it is true that any one stop is a limited intrusion in duration and deprivation of liberty, each stop is also a demeaning and humiliating experience. No one should live in fear of being stopped whenever he leaves his home to go about the activities of daily life. Those who are routinely subjected to stops are overwhelmingly people of color,

²² *Floyd v. City of New York*, 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013) (“In order to hold a municipality liable for the violation of a constitutional right, plaintiffs ‘must prove that ‘action pursuant to official municipal policy’ caused the alleged constitutional injury.’”).

²³ See WHITE & FRADELLA, *supra* note 7, at 82 (“The confluence of media coverage, legal proceedings, and public opinion related to stop and frisk has resulted in the strategy becoming one of the most controversial and contested topics in the United States.”).

²⁴ See *id.* at 81, 95 (quoting former NYC police commissioner and police spokesman); *id.* at 93–94, 97 (citing studies).

²⁵ See *id.* at 82, 94–96.

²⁶ *Id.* at 109–10 (summarizing Vera Institute of Justice study); *id.* at 110–11 (summarizing the Center for Constitutional Rights study).

²⁷ *Id.* at 109 (“Several studies have found that as a result of the disparate treatment of racial and ethnic minorities in New York, minority youth in New York City distrust the police, feel uneasy when they see the police, and view contact with the police as negative and adversarial.”).

and they are justifiably troubled to be singled out when many of them have done nothing to attract the unwanted attention. Some plaintiffs testified that stops make them feel unwelcome in some parts of the City, and distrustful of the police. This alienation cannot be good for the police, the community, or its leaders. Fostering trust and confidence between the police and the community would be an improvement for everyone.²⁸

At the same time, the court recognized that it lacked authority to adjudicate the wisdom of stop-and-frisk practices.²⁹

While the New York City litigation progressed, commentators and public officials chose sides in the media and in other public fora. One might have expected the elected district attorneys, as the chief elected criminal-law enforcement officers of New York City's five counties, to have a voice in the debates. But they were virtually silent.³⁰

B. PROSECUTORS' RESPONSE TO PROBLEMATIC STOP-AND-FRISK PRACTICES

Suppose that, before or during the New York City class action litigation, an elected district attorney in the city—perhaps one seeking to be regarded as a progressive prosecutor³¹—concluded that the city's police were engaged in illegal or unwise stop-and-

²⁸ *Floyd*, 959 F. Supp. 2d at 557.

²⁹ *Id.* at 556 (“This Court’s mandate is solely to judge the *constitutionality* of police behavior, *not* its effectiveness as a law enforcement tool.”).

³⁰ In 2012, before the district court ruled, challengers seeking the Democratic nomination for Kings County District Attorney criticized the incumbent, Charles Hynes, for acceding to the police department’s stop-and-frisk practices. See Mosi Secret, *Brooklyn District Attorney Has a New Rival*, N.Y. TIMES (Oct. 15, 2012), <http://www.nytimes.com/2012/10/16/nyregion/charles-hynes-faces-re-election-fight-from-lawyer-in-strauss-kahn-case.html>. Manhattan District Attorney Cyrus Vance Jr. publicly criticized the police policy after the District Court ruled it to be unconstitutional in 2013. See Daniel Prendergast & Jamie Schram, *Manhattan DA Knocks NYPD’s Stop-Frisk*, N.Y. POST (Sept. 24, 2013), <http://nypost.com/2013/09/24/manhattan-da-rips-nypds-stop-frisk-will-prosecute-abuse/>.

³¹ See, e.g., Editorial Board, *A Wiser Generation of Prosecutors*, N.Y. TIMES (Feb. 6, 2017), https://www.nytimes.com/2017/02/06/opinion/a-wiser-generation-of-prosecutors.html?_r=0 (discussing the contemporary importance of “[r]eformist prosecutors” who are rethinking criminal prosecution, such as those declining to seek the death penalty and steering nonviolent offenders into treatment programs).

frisk practices. Or suppose that, hearing the concerns of the community, the prosecutor perceived a need to address the erosion of public trust that the practices caused. How, if at all, should the prosecutor respond? Is there a role for a prosecutor to play in the contemporary public policy debate over stop-and-frisk, and if so, what might that role be?

Until the district court ruled, the city's prosecutors took no public position on the challenged policy and practice. The only apparent reaction on the part of any of them came from Bronx District Attorney Robert Johnson, and it was somewhat oblique. In September 2012, while the class action challenges were pending, Johnson's office announced that it would no longer prosecute individuals arrested for trespassing in public housing unless the arresting officer personally justified the arrest.³² The office did not publicly explain its motivation and did not explicitly connect the new policy to the police department's stop-and-frisk practices. However, it could be inferred that the prosecutor's announcement was animated by concern that minorities were unfairly and disproportionately targeted for stops that preceded trespassing arrests and by a desire to retain the trust of a constituency with a large low-income, minority population. It is unclear why the other prosecutors did not respond and why Johnson did not respond more explicitly—whether they hesitated out of political concern or to avoid straining their relationship with the police, they thought it was beyond their authority or expertise to respond, or they were busy with other things.

The question of how prosecutors might have responded is less about stop-and-frisk per se than about prosecutors' role as public officials in relation to public policy debates—for example, in making prosecutorial decisions based on public policy preferences, or in seeking to influence the development of the law and the work of other government agencies. Whether prosecutors as public officials should take a stance on public policy questions or instead simply stick to prosecuting crimes, is a question of increasing currency and academic interest. Some assume that prosecutors

³² Graham Rayman, *Robert Johnson, Bronx DA, to NYPD: No More Frivolous Stop and Frisk Trespassing Arrests*, THE VILLAGE VOICE (Sept. 27, 2012), <http://www.villagevoice.com/news/robert-johnson-bronx-da-to-nypd-no-more-frivolous-stop-and-frisk-trespassing-arrests-6684033>.

should play a restrained role with regard to regulatory issues or other public-policy issues outside their traditional authority and expertise. For example, Jennifer Arlen has criticized white-collar prosecutors for venturing into questions of corporate internal governance by using their leverage to compel corporations to implement internal reforms, arguing that it is inconsistent with rule-of-law principles for prosecutors to use their authority to influence internal corporate regulation.³³ In contrast, Angela Davis and others favor a broader prosecutorial role in relation to public policy when they urge prosecutors to take account of excessive incarceration rates in making charging and plea bargaining decisions.³⁴

Police stop-and-frisk policy presents an interesting question about elected prosecutors' role and responsibilities with regard to questions of public policy. There is room to debate whether these prosecutors should take a view of whether the police in their jurisdiction are employing stop-and-frisk in illegal and discriminatory fashion and, even if not, whether the impact on community relations with the police casts doubt on whether the practice is presently well employed. Assuming this is a proper subject of prosecutors' concern, it is also uncertain how prosecutors troubled by policing practices can express their concerns most appropriately and effectively. The following Parts of this Essay explore these questions.

III. THE ROLE OF PUBLIC POLICY IN CASE PROCESSING

A. PROSECUTORS' CORE ROLE AS CASE PROCESSORS

The principal objective of a prosecutor's office "is to ensure the efficient and effective prosecution or disposition of cases presented for the prosecution," and some offices may view this as the limit of

³³ Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 203 (2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2767065.

³⁴ Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1064–65 (2016).

their responsibilities.³⁵ Prosecutors' core task, in this view, is to investigate and prosecute criminal cases, which includes making discretionary decisions about whether to bring charges, how to present their cases in court, and what plea bargains to make and sentences to seek. Prosecutors traditionally make these discretionary decisions in light of the law, the purposes of criminal punishment—e.g., promoting public safety by incapacitating dangerous offenders and deterring future crime—and in light of other public interests related to criminal law enforcement—e.g., protecting victims, witnesses, and communities, gathering evidence of criminal wrongdoing, and conserving resources. In making discretionary decisions, prosecutors are not supposed to simply pile up convictions or seek the harshest punishment for offenders but are expected to “seek justice,” which includes avoiding the conviction of innocent people, affording criminal defendants a fair process, and seeking proportional punishment.³⁶

If one takes a narrow view of prosecutors' case-processing function, then even when considerations of social policy seem relevant to individual decisions, prosecutors might be obligated to ignore them. The idea is that a prosecutor must investigate, evaluate and prosecute cases in a nonpartisan manner,³⁷ and that prosecutors' views regarding public policy other than criminal justice policy are irrelevant in doing so.³⁸ Prosecutors sometimes

³⁵ Catherine M. Coles, *Evolving Strategies in 20th-Century American Prosecution*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR 177, 184 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008).

³⁶ See generally Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607 (1999) (discussing the basis of prosecutors' duty to act in the interests of justice). The function of processing criminal cases has its evident complexities. Many have noted the tension, in performing this function, between prosecutors' role as advocates or “adversarial lawyers” and their role as (ideally) disinterested administrators of criminal law. See, e.g., Eric Fish, *Prosecutorial Constitutionalism*, S. CAL. L. REV. (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2643065###.

³⁷ See generally Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837 (arguing that prosecutors should remain neutral when making discretionary decisions).

³⁸ This view of prosecutorial nonpartisanship was suggested by then-Attorney General Robert Jackson in his iconic speech to the U.S. Attorneys:

In spite of the temptation to divert our power to local conditions where they have become offensive to our sense of decency, the only long-term policy that will save federal justice from being discredited by entanglements with local politics is that it confine itself to strict and impartial enforcement of federal law, letting the chips fall in the community where they may. Just

convey this narrow conception of their role when they purport to do nothing more than “follow the evidence” or “follow the facts” wherever they lead.³⁹ To the extent prosecutors take account of social consequences, and not simply evidence of guilt or innocence, one might argue that they are deviating from their role as trial lawyers for the state or as ministers of justice (with emphasis on the ministerial).

This conception is reinforced by separation-of-powers considerations. One may argue that prosecutors lack legal authority to formulate and implement immigration policy, corporate regulatory policy, and other civil policy, and that using criminal power to achieve civil ends would be an abuse of authority. Government power is divided up among different government agencies at different levels. The federal government decides questions of foreign policy and others on which state and local governments have no role. Within state and local governments, agencies other than prosecutors’ offices address questions of family welfare, mental health, and a host of others. Prosecutors should not try to influence, or take account of, non-criminal public policy that is entrusted to other branches of government or other agencies. Further, prosecutors lack expertise in formulating and implementing public policy outside criminal justice, and attempting to do so would lead to mistakes and abuses. Prosecutors may be selected for their trial skills, administrative abilities, political leadership or connections, but they are rarely selected based on civil policy expertise. Therefore,

as there should be no permitting of local considerations to stop federal enforcement, so there should be no striving to enlarge our power over local affairs and no use of federal prosecutions to exert an indirect influence that would be unlawful if exerted directly.

Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC’Y 18, 20 (1940).

³⁹ Press Release, Office of the Dist. Attorney Risa Vetri Ferman, Montgomery County, Cosby Charged With Aggravated Indecent Assault, Dec. 30, 2015, <http://www.montcopa.org/ArchiveCenter/ViewFile/Item/2730>; Ruth Marcus, *No Swift Blessing for Meese Regulation*, WASH. POST, Aug 15, 1988 (quoting Attorney General Thornburgh regarding the need for an independent prosecutor to investigate crimes by members of Congress: “we will follow the evidence wherever it leads, no matter who’s involved, if there is a violation of federal criminal law involved”); John Mintz & Marc Fisher, *D.C. Probe’s Familiar Pattern is Laced With Issue of Race*, WASH. POST, June 7, 1987 (quoting U.S. Department of Justice spokesman: “We go after criminal cases and follow the facts wherever they lead. . . . We don’t look at the color, race or national origin of the defendant.”).

as executive branch officials, they should constrain themselves to executing the criminal law.

On this view, prosecutors have no business worrying about the overwhelming majority of stops and frisks—namely, those that have nothing to do with a criminal case. Prosecutors do not have a role or expertise in policing. Prosecutors work with the police in the context of individual investigations and prosecutions, but much police work has little if anything to do with criminal prosecutions. Prosecutors do not oversee the police and so cannot tell the police how to do their jobs. Prosecutors' principal responsibilities relate to processing criminal cases—for example, ensuring that inculpatory evidence is gathered lawfully, so that it is admissible in court; that criminal investigations are thorough, to reliably separate the guilty from the innocent; and that evidence is preserved so that it can be used in assessing guilt or innocence, offered in evidence, and disclosed to the defense as required by law or as otherwise appropriate. To the extent police use a stop-and-frisk strategy for crime control, not for a criminal investigation, it is outside prosecutors' area of responsibility and expertise.

B. QUESTIONS OF LEGALITY IN INDIVIDUAL CASES

Even on the narrow view of prosecutors' role as individual case processors, police stop-and-frisk practices may be relevant to prosecutors' work in either of two situations—first, where there is evidence that a particular police officer conducted a stop or frisk that was not merely unconstitutional but criminal; and second, where evidence relevant to a criminal prosecution resulted from an arguably illegal stop or frisk. In these scenarios, the prosecutor might form a view about whether particular police conduct was criminal or unconstitutional. It does not follow, however, that the prosecutor would need to formulate and implement a view of whether the police department's underlying stop-and-frisk policy is a sound or lawful one.

1. *Prosecuting Police for Criminal Stops and Frisks.* Prosecutors have authority to prosecute crimes by the police—as we know from recent cases involving police shootings of civilians. And New York City prosecutors do occasionally bring criminal

charges against police officers.⁴⁰ In theory, prosecutors can initiate investigations and criminal prosecutions against police officers who execute a stop or frisk in a criminal manner. For example, one can imagine prosecutors bringing assault or kidnapping charges in extreme cases where a police officer conducted a stop and frisk without any arguable justification or with excessive force.

It is unclear whether evidence to justify prosecuting a New York City police officer for conducting a stop-and-frisk came to prosecutors' attention during the period when the police practices were in dispute.⁴¹ The police were unlikely to initiate investigations of their own conduct. Victims might also have been reluctant to complain to prosecutors.⁴² But if prosecutors saw such evidence, they would have been expected to put aside their sympathies for the police and their self-interest in maintaining good relationships with the police,⁴³ in order to follow the evidence wherever it led.

But that said, prosecuting individual police officers in extreme cases, even if the cases presented themselves, would not be an appropriate way for a prosecutor to express a concern over police stop-and-frisk policy. Isolated prosecutions would have implied that wrongful stops-and-frisks were aberrational, not a systemic problem. Prosecutions of extreme wrongdoing would not have addressed the core concern about stop-and-frisk in New York City,

⁴⁰ *E.g.*, Rick Rojas, *Two N.Y.P.C. Officers Are Charged With Lying About a Suspect*, N.Y. TIMES, Feb. 18, 2017, at A24.

⁴¹ The Manhattan District Attorney reportedly prosecuted police officers for perjury for lying under oath about the circumstances of a stop-and-frisk. *See* Prendergast & Schram, *supra* note 30. But I am unaware of cases where New York City police were charged with a crime in conducting a stop or frisk.

⁴² In New York, the Civilian Complaint Review Board receives and reviews complaints by civilians against the police and, in appropriate cases, might bring evidence of police wrongdoing to prosecutors' attention. Reportedly, allegations of illegal stops-and-frisks are not a high priority for the agency, because it receives many allegations of more serious police misconduct. *See* Matt Sledge, *NYPD Oversight Chair Considers Punting on Stop-and-Frisk*, HUFFINGTON POST, Aug. 7, 2014, http://www.huffingtonpost.com/2014/08/05/nypd-oversight-stop-and-frisk_n_5652759.html.

⁴³ Whether prosecutors can in fact investigate police disinterestedly has been much debated in cases involving police shootings of civilians. *See* Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447 (2016) (arguing that a conflict of interest exists when local prosecutors lead cases against the police); *see also* Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463 466–67 (2017) (identifying prosecutorial conflicts of interest as the source of misconduct and abuse).

which was that its everyday use as a crime control measure fosters unconstitutional and race-based intrusions into individuals' autonomy, leading to community resentment and mistrust. Further, it would be an abuse of prosecutorial power for prosecutors to bring charges against individual street-level police officers for the avowed purpose of expressing displeasure with policing policies that may or may not have contributed to the police misconduct and that were adopted by higher-ups in the police department with the approval of the city's lawyers.

2. *Prosecuting Civilians Based on Illegal Stops and Frisks.* Prosecutors may also have examined police conduct in individual cases brought against civilian defendants when a stop-and-frisk led to the defendant's arrest. But, for various reasons, prosecutors were unlikely to look probingly at police stop-and-frisk policy in this context.

In their daily professional work, urban prosecutors ordinarily encounter a police stop-and-frisk only when it leads to the discovery of evidence and to an arrest. When stop-and-frisk is a crime control measure, this is a small minority of cases and they are unrepresentative. Even when a case involving a stop-and-frisk comes to a prosecutor, the prosecutor may never investigate the lawfulness of the police conduct, since cases are often resolved by a plea bargain before suppression motions are filed. On rare occasions when the defense challenges the legality of the stop, the prosecutor will likely perceive that the prosecutor's office has a responsibility to defend the police conduct if there are plausible legal and factual grounds to do so—for example, by arguing that the officer had "reasonable suspicion" to justify the initial stop, and that the initial deprivation of liberty was not so significant as to amount to an arrest requiring "probable cause." As an advocate, the prosecutor will tend to credit the officer's account of the facts and put the most positive spin on the facts and the law. In other words, the prosecutor will become an advocate for the particular stop-and-frisk, not a detached observer, analyst, or critic. Moreover, in most cases, if a plea bargain does not end the case, the judge will ultimately uphold the police conduct. Although the fact that the police uncovered evidence is legally and logically irrelevant to the lawfulness of the initial stop, the discovery of evidence may influence the judge's thinking, if only unconsciously,

regarding the reasonableness of the avowed suspicion that led the officer to act.

Based on the cases that come through the prosecutor's door, police stop-and-frisk policies may seem unobjectionable. In the trial prosecutor's experience, the practices lead to the discovery of criminal conduct and evidence of a crime and, as verified by judges' rulings, the practices are ordinarily lawful. The elected chief prosecutor may have no reason to see things differently. Cases involving a stop-and-frisk will be easy to ignore, since these are unlikely to be the most significant cases in the office. There may be no way or reason to accumulate the office's knowledge about these cases. But even if district attorneys look at these cases, they may not perceive a problem. They will see a collection of cases in which prosecutors in the office plausibly argued that the stops were reasonable; police officers' avowed suspicions were confirmed by the discovery of evidence; and the legality of the police conduct, if challenged, was usually upheld by the court.

The district attorney will only be concerned about stop-and-frisk based on an understanding of what occurs on the streets rather than in the courthouse—for example, by speaking with people in the community and civic and defense representatives or from reading studies and reports about the problem. But even if a progressive prosecutor concludes that police stop-and-frisk practices involve racial profiling and unjustified encroachments on individuals' liberty, there might still be no occasion to comment or otherwise respond professionally in the context of individual criminal prosecutions. At least from the perspective of the prosecutor who takes a narrow view of the prosecutorial role, this is someone else's problem. For the most part, this appears to have been the reaction of New York City prosecutors, with the exception of the Bronx prosecutor, who determined to look at certain trespassing cases more closely, presumably to ensure the sufficiency of the evidence of criminal wrongdoing and the lawfulness of the underlying police conduct.⁴⁴

One can imagine a progressive prosecutor adopting a more impactful policy in response to the office's general skepticism about the lawfulness of police stop-and-frisk practices and the credibility

⁴⁴ See *supra* pp. 1186–1187.

of the justifications given by police when they engaged in this practice.⁴⁵ For example, the office might adopt a policy of closely scrutinizing every case that began with a stop or frisk and declining to go forward unless the office was satisfied that the police conduct was lawful. One might wonder whether closer scrutiny would be useful, however, or whether prosecutors would simply be burdening themselves, with little impact on policing practices of which they are skeptical. In theory, one might want prosecutors to scrutinize all cases that the police bring them to ensure that the defendant is guilty and that the case can be proven based exclusively on legally admissible evidence. But in the urban setting, where there is a high volume of cases, prosecutors take shortcuts, especially in misdemeanor and violation cases that can be resolved quickly and with minimal effort. Devoting greater prosecutorial time to low-level cases that began with a police stop would mean devoting less prosecutorial time to other, potentially more serious cases. If the objective were simply to ensure the integrity of these particular prosecutions and not to make a bigger point, the policies might seem to involve a misallocation of resources.

Even more boldly, a prosecutor might refuse to go forward with any case in which evidence was procured by an on-the-street stop-and-frisk. This would be less time-consuming to administer, but this approach would seem to paint with too broad a brush. Especially in cases of serious wrongdoing, this approach would seem to overvalue the interest in deterring police misconduct at the expense of the public interest in enforcing the criminal law. Further, this categorical approach would deny police officers the opportunity to show to the prosecutors' satisfaction that their policing conduct was lawful and justified. Finally, this approach would be contrary to how prosecutors ordinarily handle cases, which is to examine them individually to determine the sufficiency and admissibility of the evidence, not to rely on presuppositions about whether evidence was lawfully obtained.

⁴⁵ This would not have been the first time there was skepticism about explanations given by the police of their on-the-street encounters with civilians. See, e.g., *People v. McMurty*, 314 N.Y.S.2d 194, 195-96 (N.Y. Crim. Ct. 1970) (discussing "dropsy" cases).

C. THE RELEVANCE OF SOCIAL POLICY TO CASE PROCESSING

One might argue that even if prosecutors adopt a narrow, case-processing role, they cannot be indifferent to, or agnostic about, social policy. Prosecution occurs in a broader social context. Considerations of social policy—even those that may seem initially remote from criminal justice—matter to prosecutors' work, both because social policy has implications for the exercise of discretion and because the exercise of discretion has implications for social policy.

First, considerations of public policy are relevant to decisions regarding whether criminal charges are necessary or whether wrongdoing can be adequately deterred and punished through civil sanctions or by other means. While some decisions, such as whether to prosecute a low-level tax evader, might be resolved without regard to the broader social context, judgments about social welfare policy are often relevant to questions of deterrence and retribution. For example, where vagrancy is the result of poverty or homelessness, a prosecutor must determine whether the state should respond through criminal prosecutions or whether social welfare programs that address the underlying causes will better serve societal ends. While the police might view vagrancy as a criminal justice problem warranting the use of arrest power, a prosecutor may conclude otherwise.

Likewise, where a criminal offense was a product of the offender's mental illness or imprisonment will exacerbate the prisoner's mental illness, the prosecutor must consider whether the state should address the conduct as a criminal problem or a mental health problem. The creation of mental health courts, veterans courts, and drug courts reflects an understanding that prosecution and imprisonment often are not the appropriate government response—that mental illnesses, including drug addiction, are often better addressed as mental health problems even if they involve criminal conduct. Given the prevalence of mental illness among offenders, a responsible prosecutor must invariably formulate views about mental health policy and the appropriate role of leniency as part of a sensible government response to problems of mental illness. This is not extraneous to what prosecutors do, but goes to its core. Whether it is fair to punish a particular person who was driven by mental illness to

commit a crime, given principles of deterrence and proportionality, and whether rehabilitation and public safety are best served by incapacitating that person in prison, are questions about criminal justice, albeit questions that are informed by a broader understanding of mental health policy.

To give another example: In deciding whether to bring charges against non-citizens and what charges to bring, prosecutors cannot ignore immigration policy, even if immigration is, in some respects, a uniquely federal concern.⁴⁶ Prosecutors are not expected to bring all charges that the evidence supports. Among the relevant considerations are “the impact of prosecution or non-prosecution on the public welfare” and “whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender.”⁴⁷ With regard to non-citizens, prosecutors might fairly consider whether a prosecution could result in deportation and, if so, whether that would be an unduly harsh punishment for the offender and have negative consequences for the offender’s family and community. Whether a prosecutor gives weight to these concerns, and how much weight she gives, almost invariably will be affected by the prosecutor’s general views of immigration policy—e.g., the legitimacy and importance of deporting non-citizen offenders.

Second, in exercising discretion, it is sometimes legitimate, if not essential, to consider public policy implications. Prosecutions have impacts that are not necessarily intended,⁴⁸ including broader community and social impacts. While it is generally agreed that prosecutors should not use their power for partisan political ends and while it is true that different political parties often take different perspectives on questions of social policy, it does not necessarily follow that, in order to stay neutral,

⁴⁶ See, e.g., Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 265 (2016) (arguing that discretionary decisions by prosecutors are central to deportation issues).

⁴⁷ AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION 3-4.4 (4th ed. 2015).

⁴⁸ This was much discussed with regard to the 2016 presidential campaign, when it was noted that federal prosecutorial policy required prosecutors to avoid conduct that might influence an imminent election. See, e.g., Linda Qiu, *Clinton campaign says Comey letter violates Justice Department protocols*, POLITIFACT (Oct. 30, 2016), [http://www.politifact.com/truth-o-meter/statements/2016/oct/30/robby-mook/clinton-campaign-says-comey-letter-violates-justice/](http://www.politifact.com/truth-o-meter/statements/2016/oct/30/robby-mook/clinton-campaign-says-comey-letter-violates-justice).

prosecutors must be indifferent to the broader significance of their decisions.

For example, prosecutors' decisions also have an impact on prison conditions and overcrowding. The extent of the prison population is in part a function of prosecutors' decisions in the aggregate about whether to prosecute low-level offenses and how harshly to prosecute more serious offenses. If prosecutors do not consider the problem of prison overcrowding when they make charging, plea bargaining, and sentencing decisions, they risk exacerbating the problem through neglect or indifference. While prison overcrowding might once have been regarded as a problem exclusively for prison officials, others in the executive branch, or legislatures, it now seems obvious that prosecutors need to formulate understandings and opinions about prison conditions and overcrowding in order to make informed judgments about how to exercise their discretion.⁴⁹

Prosecutions also implicate social policy that is much more distantly related to criminal justice. For example, public corruption prosecutions have implications for how politicians run for office and how government officials function once in office. Corruption prosecutions of foreign government officials have foreign policy implications.⁵⁰ One might be critical if prosecutors' explicit purpose is to exert influence in areas of public policy outside the criminal justice arena. But if prosecutions have unavoidable impact, indirect if not direct, in areas of social policy, it seems irresponsible for prosecutors to be indifferent to that impact—to simply let the chips fall where they may. Historically, criminal law has been abused and misused for social policy ends,⁵¹ including, no doubt, by prosecutors who are not self-conscious

⁴⁹ See, e.g., Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677, 680 (2016) (arguing that prosecutors need an incentive to decrease incarceration numbers); see also Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 45 HOFSTRA L. REV. 387, 388 (2016) (arguing that prosecutors have an ethical duty to reduce incarcerations).

⁵⁰ See, e.g., Matthew J. Spence, *Policy Comment: American Prosecutors as Democracy Promoters: Prosecuting Corrupt Foreign Officials in U.S. Courts*, 114 YALE L.J. 1185, 1191 (2005) (proposing procedures to ensure that prosecution of foreign corruption does not adversely affect foreign policy).

⁵¹ See generally RISA L. GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* (2016) (dissecting vagrancy laws and how challenges to them impacted social movements during the 1960s).

about their role. Prosecutions will always affect broader ends, for better or worse. If so, the question for prosecutors is how to take account of social policy in a wise manner when prosecution decisions have broad social impacts.

Further, from a separation-of-powers perspective, there is nothing wrong with taking account of broader social policy in making prosecution decisions. Prosecutors are not exercising power that they do not have, but instead are exercising their authority to prosecute or decline to prosecute in light of all of the relevant public interests, not just criminal justice interests. This is not to say that prosecutors have *carte blanche* to implement all of their views on questions of public policy or to do so in any way they wish. It is illegitimate for prosecutors to use the power of the criminal justice system to achieve entirely civil ends. For example, a prosecutor could not undertake a grand jury investigation solely for the purpose of gathering evidence to be used by a civil government agency.⁵² But it is entirely legitimate to temper the use of criminal authority based on considerations of public policy—for example, to conclude that drug use should be addressed by other agencies as a mental health problem rather than by the prosecutor's office as a criminal justice problem.

It would be artificial for a prosecutor, as a public official, to look at only one narrow set of public interests and policies, rather than considering how to resolve the various potentially-conflicting public interests that come together in a criminal case. Prosecutors represent the public—the “state,” the “government,” or the people—and the public has a multiplicity of interests that are implicated in a criminal case.⁵³ It would be a public disservice and possibly an injustice to elevate one set of interests—the criminal justice interests—and ignore the others. The public trusts the prosecutor to decide how to exercise criminal power, but not necessarily in a small-minded way. In a system of checks and balances, the prudent exercise of discretion by prosecutors as members of the executive branch can serve as a check on bad legislative decisions.⁵⁴

⁵² *United States v. Sells Eng'g*, 463 U.S. 418, 432–23 (1983).

⁵³ Green, *supra* note 36, at 613.

⁵⁴ Green & Zacharias, *supra* note 37, at 873–74.

The legality and efficacy of police stop-and-frisk policies may matter to prosecutors' decision making precisely because prosecutors' response—or failure to respond—in individual cases may have an indirect impact on police practices that progressive prosecutors consider to be undesirable. While New York City prosecutors, in staying sidelined, may have conceived of themselves as adopting a neutral position among disputants while continuing to serve their traditional function of processing cases, the police and the public might have viewed their silence differently. With the exception of the Bronx prosecutor, New York's prosecutors appeared to accept police stop-and-frisk practices unquestionably.⁵⁵ By prosecuting cases that began with a stop or frisk and defending police conduct when challenged by a suppression motion, prosecutors tacitly approved and encouraged questionable policing practices. To be sure, it would have been difficult for prosecutors to decline viable criminal cases or to refuse to defend police conduct as a way to express disapproval. Doing so would place prosecutors squarely in the center of a debate that they sought to stay out of. The public might not understand why prosecutors refused to “do their job,” particularly given that the unresolved question of the lawfulness of police policy was in the process of being adjudicated in a federal civil class action lawsuit. But progressive prosecutors might have sought some other way to express disapproval, so that their routine treatment of criminal cases initiated by a stop-and-frisk would not be construed as tacit support for questionable police practices.

IV. BROADER CONCEPTS OF THE PROSECUTOR'S ROLE AND THE RELEVANCE OF PUBLIC POLICY

So far, this Essay has examined prosecutors' traditional case-processing function; whether prosecutors serving in that role may or must legitimately form views on questions of social policy; and if so, whether social-policy views about police stop-and-frisk practices in particular may be relevant to how urban prosecutors process cases. The Essay now turns to additional conceptions of the prosecutor's role. Most or all commentators would agree that

⁵⁵ See *supra* pp. 1186–1187.

prosecutors' core function is to process criminal cases, but some would say that this is not prosecutors' exclusive function. This Part considers three other roles: as advisor to the police, as criminal law reformer, and as social problem solver. It suggests that prosecutors may conceivably respond to questionable stop-and-frisk practices in any or all of these roles.

A. PROSECUTORS AS ADVISORS TO THE POLICE

In some jurisdictions, prosecutors serve as legal advisors to the police. The ABA Criminal Justice Standards instruct that prosecutors "may provide independent legal advice to law enforcement . . . about law enforcement practices in general,"⁵⁶ that they "should promote compliance by law enforcement personnel with applicable legal rules, including rules against improper bias,"⁵⁷ and that they "should meet and confer regularly with law enforcement agencies regarding . . . law enforcement policies."⁵⁸

This suggests that, at the very least, a district attorney who concludes that stop-and-frisk practices are illegal, biased, or simply unwise, should express this view privately to representatives of the police department. Of course, the police department might simply ignore the prosecutor's concerns. In New York City, it is uncertain whether prosecutors shared private concerns with the police, but if so, the police were unmoved, and unsurprisingly so. The policing policy was developed at the highest level by experienced, sophisticated police personnel. The police department had access to legal advice about the policy from the police department's in-house counsel and the city's law department who publicly supported the policies in the face of criticism from other government agencies, not-for-profits, community groups, and some in the media.⁵⁹ In this context, it is hard to imagine that prosecutors' private misgivings would dampen the police enthusiasm.

⁵⁶ AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION 3-3.2(b) (4th ed., 2015).

⁵⁷ *Id.* at 3-3.2(c).

⁵⁸ *Id.* at 3-3.2(d).

⁵⁹ See *supra* pp. 1184-1186 (discussing arguments for and against the policies).

B. PROSECUTORS' ROLE IN CRIMINAL JUSTICE LAW REFORM

There is a growing professional consensus that, beyond processing individual cases, prosecutors also have a responsibility to try to improve the laws and processes relating to criminal justice, drawing on their experience and expertise. This responsibility, which reflects prosecutors' status both as lawyers and as public officials, is expressed in the ABA Criminal Justice Standards, which note:

The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system. The prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, the prosecutor should stimulate and support efforts for remedial action.⁶⁰

In this role, it is not uncommon for prosecutors to testify or otherwise advocate for or against proposed criminal-justice legislation or to submit amicus briefs on criminal justice questions—work undertaken outside the context of individual investigations and prosecutions.⁶¹

As the ABA Standard reflects, the expectation is that prosecutors will not seek to influence the law solely to advantage themselves and their offices—e.g., to expand their power or to make their work easier—but will seek to redress “inadequacies and injustice.”⁶² That is, prosecutors will act in the public interest, consistent with the traditional understanding that their broad responsibility is to seek justice.

⁶⁰ See ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 47, at 3-1.2(f).

⁶¹ See, e.g., Cyrus R. Vance, Jr. & Mike Feuer, *Don't let gun lobbies go on offense: Column*, USA TODAY, Feb. 14, 2017, <http://www.usatoday.com/story/opinion/2017/02/14/gun-lobby-nr-a-mental-illness-ssa-column/97823180/> (discussing a bipartisan coalition advancing prosecutorial and policy solutions); see generally Bruce A. Green, *Gideon's Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?*, 122 YALE L.J. 2336 (2013) (arguing that prosecutors should argue in favor of the defendant when doing so would promote justice).

⁶² See *supra* note 60.

In their law-reform role, New York's district attorneys speak publicly about many issues of criminal law enforcement and weigh in on potential legislation. One might have expected them to voice their concern about the city's stop-and-frisk policy if they thought it was unwise. Of course, one can imagine why the prosecutors might have preferred to keep their concerns to themselves, including that taking a position contrary to the police department might have undermined their relationship with the police and the mayoral administration. But all the same, given the public image of fearlessness that prosecutors conventionally cultivate, one might have expected them to be unafraid to speak their minds.

The district attorneys' silence may have been justified if they concluded that stop-and-frisk practices, when used to deter and control rather than investigate crime, were not relevant to the administration of criminal justice—that even though these police activities sometimes lead to arrests, they are beyond prosecutors' authority and expertise because they are not explicitly intended for investigative purposes. But this seems unlikely. To be sure, the police might maintain that prosecutors do not know what is happening on the street, what is necessary to keep the streets and police safe, and how stop-and-frisk fits in with broader policing policies—that policing is distinct from “criminal justice.” But prosecutors are the chief elected criminal law enforcement officers, and they address issues of policing on a regular basis. In particular, they address the legality of stops and frisks more frequently than any other government lawyers. Just as elected prosecutors would be qualified to advise police privately about the legality of their policing practices, they would be qualified to take a public stance on the efficacy of these practices—at least as well qualified as the mayor, a city council member, or any number of other public officials who weighed in.

C. COMMUNITY PROSECUTING

In recent years, prosecutors have become unapologetic about using their authority to address social problems, based on a conception of their role that goes beyond reactively processing criminal cases that are brought to them. The contemporary approach involves the use of prosecution as just one part of a holistic, collaborative, proactive problem-solving strategy to

address criminal problems that are interconnected with other social problems—for example, working with other social agencies and community institutions to address drug abuse through a combination of drug education, treatment, and prosecution.⁶³ Among the labels given to this conception of prosecuting is “community prosecuting,” based on the analogous concept of “community policing.”⁶⁴

A premise of “community prosecuting” is that using criminal justice authority to achieve objectives that implicate not only criminal justice but other societal interests is not only appropriate but desirable, as long as the authority is used lawfully.

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. 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.⁶⁵

On this conception, considerations of social policy are not simply incidental to prosecutors’ work. Prosecutors can and should take account of a broad range of social policy considerations that bear on their work.⁶⁶ For example, on the most general level,

⁶³ Coles, *supra* note 35, at 188.

⁶⁴ *Id.* at 191–97.

⁶⁵ Bruce A. Green & Alafair S. Burke, *The Community Prosecutor: Questions of Professional Discretion*, 47 WAKE FOREST L. REV. 285, 293 (2012).

⁶⁶ See, e.g., Jeffrey Toobin, *The Milwaukee Experiment*, NEW YORKER, May 11, 2015, at 24, 26 (crediting Milwaukee prosecutor John Chisholm for recognizing “that prosecutors

an urban prosecutor developing charging policies would be expected to take account of considerations of racial and economic justice, no less than criminal justice, given the disproportionate impact of the criminal law on minorities and low-income individuals.⁶⁷

To the extent that a New York City district attorney endorsed the concept of community prosecuting, the prosecutor should have found the police department's stop-and-frisk practices disturbing. The success of community prosecuting depends on building constructive relationships with the community and collaborating with institutions within the community to address criminal-law-related problems. The police department's excessive use of stop-and-frisk to deter, not investigate, crime, would have undermined prosecutors' efforts to engender community trust in, and collaboration with, law enforcement. This is true regardless of how the District Court might ultimately rule on the legal questions before it.

Indeed, prosecutors might have perceived that the policing policy undermined their office's core function of prosecuting serious criminal cases. Community confidence in law enforcement makes it easier for prosecutors to do their job. If witnesses in the community trust law enforcement, they are more likely to come forward to assist in investigations and prosecutions, and community members on the jury are more likely to credit law enforcement witnesses and have confidence in the prosecution's presentations at trial. Prosecutors in New York City might have concluded, as did others, that the prevailing stop-and-frisk practices eroded community trust to the detriment of conventional prosecutions.

For reasons already described, it might have been unproductive or counter-productive for prosecutors to respond by declining to use evidence obtained from stops and frisks or by declining to prosecute cases that arose out of stops and frisks. But the concept of community prosecuting itself suggests at least an initial

should . . . be judged by their success in reducing mass incarceration and achieving racial equality").

⁶⁷ See, e.g., K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 286 (2014) (describing the racial disparities that arise due to policing in poor urban neighborhoods of color).

response: prosecutors could have met with community leaders, expressed their concern about police practices, and sought the community's advice about how best to respond. Suggestions may have arisen for contributions that prosecutors could make in collaboration with other institutions of the community to reduce what the District Court described as "the human toll of unconstitutional stops."⁶⁸ If nothing else, prosecutors' public acknowledgement of their concern and the attempt to find a useful response may have promoted trust in the prosecution, if not in the police, had some influence in the ongoing public debate over stop-and-frisk practices, and perhaps even had some influence over the city's decision whether to continue to defend the policy.

V. CONCLUSION

An elected prosecutor in New York City or any other city in the United States is not just a lawyer performing the ministerial or lawyerly task of prosecuting cases brought to the prosecutor's office by the police. The prosecutor is an important public official. Both Thomas Dewey and Earl Warren, among others, used their position as elected prosecutor as a springboard to the state governorship.

To do their job well in the twenty-first century, prosecutors have to do more than "follow the evidence." Even if one views the job as simply processing criminal cases, prosecutors cannot make decisions in social isolation. They have to take account not only of criminal justice policy but of broader social policy, both because social policy has implications for discretionary decision making about questions of deterrence and retribution in individual criminal cases and because discretionary decisions in individual criminal cases have broader social consequences. But urban prosecutors increasingly, and justifiably, view their work as involving additional functions—advising the police, seeking to improve the law and legal processes relating to criminal justice to make them fairer, and working with the community to address social problems that implicate criminal law.

⁶⁸ See *supra* note 28.

It is important to inject some realism into contemporary discussions about prosecutors and their role. The idea that a lawyer can make important legal decisions mechanically based solely on the facts and the law, without regard to professional views of social policy, is as unrealistic for prosecutors as for judges. While this fiction may sometimes be useful to deflect public criticism or mistrust of prosecutors' decisions, it is not necessary for the legitimacy of prosecution. It may be that, in an ideal world, judges would put aside their own social policy preferences. But we should want prosecutors to take account of social policy, whether or not they choose to function as community prosecutors or solely as case processors. This is not to say that the public will always agree with prosecutors' public policy preferences and how prosecutors implement them. Sometimes, observers will conclude, prosecutors make bad judgments regarding social policy. But it would be worse for prosecutors to attempt or pretend to ignore the larger social context in which they work.

Even so, when it comes to matters that bear only indirectly on prosecutors' work, as is true of stop-and-frisk practices that do not eventuate in arrests, one might ask what prosecutors have to offer. In New York City, for example, the legality of the policing policy was put before a federal court, and the wisdom of the practice was debated by the city, the police department, the police union, civil rights organizations, criminal defense representatives, community groups, and editorialists, among others. Given the multitude of voices raised and views expressed, it may not be immediately obvious why prosecutors should add their own.

A possible answer is that prosecutors could have played a different role—namely, as intermediary, mediator, or “honest broker” among groups and individuals with differing perspectives. The question of how to implement stop-and-frisk implicates a host of interests—the interest in maintaining adherence to the rule of law by both civilians and public officers, the interests in public and police safety, the interests in individual autonomy, privacy and mobility, the interest in nondiscriminatory treatment by public agencies and officers, and maintaining public confidence in government institutions, among others. Precisely because prosecutors' work would not be directly affected by how these interests were resolved, they had the capacity to see the big

picture in a somewhat detached way and to serve as neutral brokers among those who might tend to overvalue particular interests. The resolution of the class action lawsuits in New York City included the appointment of a mediator to bring the stakeholders to the table to seek to craft a new stop-and-frisk policy that would strike an appropriate balance among the various interests.⁶⁹ But the path to mediation was protracted, contentious and expensive. It is conceivable that, at an earlier point, a problem-solving district attorney who had earned the trust of the community and the police might have stepped in and offered to try to broker an agreement between the relevant stakeholders. Perhaps none of the city's elected prosecutors fit the bill at the time. But, as similar criminal process-related questions arise in the future, urban prosecutors might consider whether they can usefully serve this additional function.

⁶⁹ See *supra* note 20 and accompanying text.