

“Equal justice under the law” is a phrase that graces the walls of courtrooms across America. Unfortunately, it has become all too common in recent decades for lawyers to place too much attention on superficial equality without paying similar heed to the need to do justice.

A recent example involves provocative public intellectual and blogger Andrew Sullivan. This summer, a Park Ranger issued Sullivan a ticket for smoking pot in Cape Cod National Seashore. The Boston United States Attorney declined to prosecute. When the Magistrate handling the case asked the government to explain its decision, the government cited the possible adverse effect a prosecution might have on Sullivan’s immigration status. (Sullivan, a British citizen, presumably has applied for citizenship or a visa renewal, and a conviction for marijuana possession risks derailing that application.) The Magistrate acquiesced in the government’s decision, but only after expressing his belief that by making the declination decision “the United States Attorney is not being faithful to a cardinal principle of our legal system, i.e., that all persons stand equal before the law and are to be treated equally in a court of justice once judicial processes are invoked.”

But in his focus on horizontal equity, the Magistrate himself ignores another “cardinal precept of our legal system”: that the Executive exercise its discretion to insure that its charging decisions accomplish just ends, rather than apply blindly the power of the State to punish whenever it is possible to do so. Nearly 25 years ago, the Supreme Court observed in *Heckler v. Cheney* that “the decision of a prosecutor in the Executive Branch not to indict ... [is] a decision which has long been regarded as the special province of the Executive Branch.” Reflecting this principle, the Executive’s discretion to charge or not is essentially unreviewable by the Judiciary. Executive discretion *not* to charge, in particular, is vital to the fair functioning of the criminal justice system and is a key mechanism by which punishment is calibrated to fit the characteristics of a specific

offense and offender. As Bill Stuntz has commented, prosecutorial discretion, particularly in favor of leniency, “is widely seen as necessary, and frequently a good thing: It permits mercy, and it avoids flooding the courts with low-level crimes.” Students who read one of the most popular criminal law casebooks are taught that, because “[c]riminal statutes now commonly permit (or purport to require) draconian punishments that no one expects to be imposed in the typical case,” “‘leniency’ has therefore become not merely common but a systemic imperative.”

The consequences that attend collaterally to criminal convictions are often significant and debilitating. They include disenfranchisement, deportation, or the loss of the ability to live in public housing or to work in various professions. Indeed, in the case of low-level crimes such as marijuana possession, the seriousness of collateral consequences often exceeds the punishment that derives directly from the commission of the crime. These consequences often attach without the procedural safeguards that accompany the application of traditional punishment such as incarceration, fines, or probation. And various actors in the criminal justice system apply little or no check to the application of collateral penalties: legislatures frequently enact without debate legislation imposing collateral consequences as riders to large bills, sentencing commissions do not review them, and judges typically have no power to alleviate them on a case-by-case basis.

Thus it was entirely appropriate for the United States Attorney to consider the impact that a prosecution could have had on Sullivan’s pending immigration status, especially given the small quantity of marijuana that Sullivan was accused of possessing and the fact that Massachusetts recently decriminalized the possession of up to an ounce of marijuana. (Sullivan had his marijuana on federal property so did not benefit from the change in Massachusetts state law.)

Justice requires prosecutors to consider the applicability of collateral consequences when making charging decisions, as the United States Attorney did here. The potential severity of these consequences, and the lack of control over their application, makes plain how important it is for prosecutors to consider them when making charging decisions. Prosecutors are the primary gatekeepers on whether and what charges are brought. What's more, because virtually all criminal cases are resolved by plea agreements, once prosecutors bring the power of the state to bear on a criminal defendant, often no other actor in the system has power significantly to mitigate the applicable penalties. Thus prosecutors are often the only shield between potential defendants and homelessness, deportation, and unemployment. And finders-of-fact, the ultimate arbiters of guilt or innocence, generally have no say (and usually have no knowledge) of the penalties to be inflicted upon defendants.

In light of this legal framework, it is not surprising that the United States Attorney's Manual, which was promulgated by the Department of Justice and guides the exercise of federal prosecutorial discretion, permits consideration of collateral consequences in making charging decisions. In its directives regarding charging decisions, the Manual approves the consideration of "whether the penalty yielded ... is proportional to the seriousness of the defendant's conduct" The American Bar Association agrees, observing that "[t]he prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are ... 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."

The Magistrate presiding over Sullivan's case decried what he viewed as differential treatment given to Sullivan compared to others charged with marijuana possession. He pointed out that the Sullivan declination did not reflect a discretionary decision by the United States Attorney's never to prosecute the possession of small amounts of marijuana, noting that such persons "are prosecuted routinely." The Magistrate rejected the idea that prosecutors should consider collateral consequences when making charging decisions, arguing that the United States Attorney should have charged Sullivan and left to immigration authorities the determination of whether Sullivan would be deported or denied citizenship. In doing so, the Magistrate ignored the constitutional and practical role prosecutors play as gatekeepers in the criminal justice system, the obligation of prosecutors only to pursue charges that result in proportional punishment, and the fact that prosecutors' first obligation in all exercises of discretion is to see that *justice* is done.

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