

**MAJOR CHARGES, MINOR OFFENDERS**  
**How to Ethically Avoid Charging Minors as Adults in New York**

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## The 13-year-old Murderer

Hugh McEvoy was sitting with his friend, fifteen-year-old Peter Mahar, on a railing at Columbia University at 121st Street and Broadway.<sup>1</sup> Hugh was sixteen-years-old.<sup>2</sup> It was 10 P.M. on a warm summer night in July.<sup>3</sup> Felipe Ovalas, a thirteen-year-old boy who lived in the neighborhood, turned onto 121st street.<sup>4</sup> Felipe heard Hugh laughing and asked what he was laughing at.<sup>5</sup> Peter replied, “we’re not laughing at anything.”<sup>6</sup> Then, Felipe pulled out a revolver, put the muzzle to Hugh’s head, and pulled the trigger.<sup>7</sup> The gun misfired on the first try.<sup>8</sup> Felipe pulled back the gun, adjusted the cylinder, and then fatally shot Hugh in the forehead.<sup>9</sup>

Felipe shot Hugh in cold blood because he objected to Hugh’s laughter.<sup>10</sup> Hugh died at St. Luke’s Hospital where he had been in a coma for four days.<sup>11</sup> In New York State, young offenders who commit an act that would be a crime if committed by an adult are usually considered juvenile delinquents and are charged in Family Court rather than in Criminal Court.<sup>12</sup> However, under the Juvenile Offender Act of 1978 (*hereinafter* “JOA”), Felipe can be charged with Murder in the First Degree, in which he would be classified as a Juvenile Offender, tried in

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<sup>1</sup> *Youth Shot ‘for Laughing’ Dies; 2 Boys, 13 and 16, Are Arraigned*, N.Y. Times, July 7, 1978, at A1.

<sup>2</sup> *Id.*

<sup>3</sup> *See id.*

<sup>4</sup> *See id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *See id.*

<sup>11</sup> *Id.*

<sup>12</sup> NY Family Court Act § 301.2(1).

Criminal Court, and sentenced with adults.<sup>13</sup>

The JOA, which provided New York with one of the harshest juvenile justice systems in the country, introduced mandatory sentencing for adults and created a list of designated felony offenses in which offenders who are fourteen or fifteen years old could be criminally responsible for fourteen different crimes, ranging from Murder in the First Degree to certain sexually motivated felonies.<sup>14</sup> Additionally, thirteen-year-olds could be criminally responsible for Murder in the Second Degree.<sup>15</sup> Under the JOA, young offenders are subject to significantly harsher sentences and punishments; an offender as young as thirteen, like Felipe, could now be sentenced as an adult and face life imprisonment.<sup>16</sup>

What role does a prosecutor have in charging and adjudicating extremely young offenders who commit heinous crimes? Specifically, is there any way a prosecutor, who believes charging a thirteen-year-old as an adult is against the interests of justice, can ethically circumvent the JOA? Would it be considered unethical or a form of prosecutorial misconduct for a prosecutor to undercharge Felipe by charging him with a crime that was not listed in the designated felonies, such as Criminally Negligent Homicide?

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<sup>13</sup> NY Family Court Act § 301.2; N.Y. Penal Law § 125.25(1)(2)(stating that the elements of Murder in the Second Degree are intent to cause the death of another person and causing the death of such person or of a third person or, under circumstances evincing a depraved indifference to human life, one recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person).

<sup>14</sup> NY Family Court Act § 301.2(8)

<sup>15</sup> 1978 N.Y. Laws ch. 481. The bill was introduced on July 14, 1978, passed the State Assembly by a vote of 125-10 and was signed into law six days later; N.Y. Penal Law § 10.00(18)(“juvenile offender” means (1) a person thirteen years old who is criminally responsible for acts constituting Murder in the Second Degree as defined in subdivisions one and two of section 125.25).

<sup>16</sup> N.Y. Fam. Ct. Act § 756(a)(McKinney Supp. 1979)(before 1978, minor offenders convicted of a felony crime were not subject to incarceration in adult prisons but rather were sentenced to “placements” in juvenile facilities run by the Division for Youth).

# Prosecutorial Discretion

Prosecutors are the most powerful officials in the criminal justice system.<sup>17</sup> Prosecutorial charging discretion is broad, powerful, and unreviewable, making it “the most dangerous power of the prosecutor.”<sup>18</sup> Prosecutors’ daily decisions control the direction and the outcome of many criminal cases.<sup>19</sup> This is particularly true for young offenders who end up in criminal court because of the crimes prosecutors charge them with. While often used too broadly, prosecutorial discretion is essential to the function and accountability of our criminal justice system. State legislatures rely on social and moral considerations of what is right and wrong and pass laws to criminalize certain behaviors. Prosecutors are obligated to assist in the process of holding people accountable for these criminal acts.<sup>20</sup> Along with this obligation comes the duty to use discretion when deciding whether a person should be charged and with what the person should be charged with.

In 2015, the American Bar Association revised the Criminal Justice Standards for the Prosecution Function (*hereinafter* “Criminal Justice Standards”), outlining the scope of prosecutorial charging power.<sup>21</sup> According to these standards, a prosecutor should file charges

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<sup>17</sup> Bennett L. Gershman, *The New Prosecutor*, 53 U. Pitt. L. Rev. 393, 448 (1992)(describing the American prosecutor “as the most pervasive and dominant force in criminal justice”).

<sup>18</sup> See *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967)(Burger, J.) (“few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings”); Robert H. Jackson, *The Federal Prosecutor*, 24 Jud. 18 (1940)(delivered at the Second Annual Conference of United States Attorneys).

<sup>19</sup> James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 Harv. L. Rev. 1521, 1555 (1981).

<sup>20</sup> Gershman, *supra* note 53 at 1286.

<sup>21</sup> American Bar Association, *Criminal Justice Standards for the Prosecution Function*, 4 ed. 2015, (*hereinafter* “Criminal Justice Standards”).

that “adequately encompass the accused’s criminal activity and which he or she reasonably believes can be substantiated by admissible evidence at trial.”<sup>22</sup> While the prosecutors’ obligations include enforcing the law while exercising sound judgment, a prosecutor is not obligated to file or maintain all criminal charges which the evidence might support.<sup>23</sup> Given today’s extensive criminal codes, prosecutors will typically have multiple options when choosing how to charge a particular criminal act.<sup>24</sup>

## Applying the Interests of Justice and 3-4.4 to Ethically Circumvent the JOA

Standard 3-4.4 of the Criminal Justice Standards lists factors a prosecutor may consider when deciding to initiate, decline, or dismiss a charge.<sup>25</sup> Generally, a prosecutor has the discretion to decline or dismiss a charge in the interests of justice, regardless of whether the prosecutor reasonably believes that the charges are supported by probable cause or that evidence would lead to a conviction beyond a reasonable doubt.<sup>26</sup> In New York, prosecutors rely on statutory factors to determine what is considered to be in the best interest of justice.<sup>27</sup> The New York factors for determining the best interest of justice and Standard 3-4.4 of the Criminal Justice Standards have several overlapping factors a prosecutor may consider when charging: (1) the characteristics of the offender that are relevant to his blameworthiness or responsibility; (2) changes in law or policy; and (3) whether the authorized or likely punishment or collateral

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909 (1992).

<sup>25</sup> Criminal Justice Standards at 3-4.4.

<sup>26</sup> *Id.*; See also American Bar Association, *Standards for Criminal Justice: Prosecution Function*, 3d ed., 1993.

<sup>27</sup> N.Y. Crim Proc. Law § 210.43; See also Criminal Justice Standards at 3-4.4

consequences are disproportionate in relation to the particular offense or the offender.<sup>28</sup>

While the standards do not specifically outline prosecutorial charging discretion considerations when charging a young offender of a violence crime, the factors listed above can be applied specifically young offenders like Felipe. Further, a prosecutor can use these factors to decide to undercharge, even in the presence of “sufficient evidence to support a conviction.”<sup>29</sup>

*(1) the characteristics of the offender that are relevant to his blameworthiness or responsibility*

In New York, Courts must consider the interests of justice factors set forth in Criminal Procedure Law 210.43(2), in light of recent judicial recognition that “society’s understanding of juvenile brain function and the relationship between youth and unlawful behavior has significantly evolved.”<sup>30</sup> Characteristics such as Felipe’s age and mental maturity are relevant to his blameworthiness. Felipe’s young age renders him an offender of diminished culpability.<sup>31</sup>

Over the past 15 years, scientific research into brain development revealed that portions of our brain, including the region governing impulse control, develop after adolescence.<sup>32</sup> Unlike an adult, thirteen-year-old offenders like Felipe have undeveloped minds, and therefore are categorically unable to self-regulate or to make future oriented decisions.<sup>33</sup> Self-regulation, or the ability to control one’s behavior to achieve long term goals, has been shown to increase

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<sup>28</sup> N.Y. Crim Proc. Law § 210.43.

<sup>29</sup> *Id.*; See also Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. Rev. 105, 159 (1994).

<sup>30</sup> *People v. Rudolph*, 997 N.E.2d 457, 460 (N.Y. 2013)

<sup>31</sup> Steinberg & Scott, *Less Guilty by Reason of Adolescence; Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty*, *American Psychologist*, 58, 1009-119 (2003).

<sup>32</sup> Elizabeth S. Scott and Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 2, 15-33 (2008).

<sup>33</sup> See generally Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Annual Review of Clinical Psychology, 47–73 (2009).

throughout later adolescence and into young adulthood.<sup>34</sup> Impulse control and self-regulation are especially weak for adolescent boys in situations that require them to control their immediate response to any given situation.<sup>35</sup> The inability to control one's impulses is a leading cause of criminal behavior for people of all ages; yet adolescents boys are particularly vulnerable to act impulsively.<sup>36</sup>

The Supreme Court of the United States has relied on this brain development research in three major cases, finding that people under the age of eighteen have diminished culpability and an increased likelihood of being rehabilitated. In 2005, the Court held in *Roper v. Simmons* that sentencing people under the age of eighteen to death violated the Eighth and Fourteenth Amendments.<sup>37</sup> The Supreme Court extending the *Roper* ruling in 2010 in *Graham v. Florida*, which held that the Eighth Amendment prohibits sentencing minors convicted of non-homicide crimes to life in prison without the possibility of parole.<sup>38</sup> In *Graham* and *Roper*, the Court also pointed to the overwhelming national consensus against the harsh punishments against juveniles.<sup>39</sup> While *Graham* does not apply to Felipe, *Miller v. Alabama* does. In *Miller*, the Court established that it is cruel and unusual to sentence young homicide offenders to life without the possibility of parole, arguing that Juvenile Offenders have “diminished culpability, greater

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<sup>34</sup> Elizabeth Cauffman and Laurence Steinberg, *Emerging Findings from Research on Adolescent Development and Juvenile Justice*, 7 *Victims & Offenders* 434 (2012).

<sup>35</sup> Richard J. Bonnie, *Reforming Juvenile Justice: A Developmental Approach*, National Research Council, (2013).

<sup>36</sup> Campaign for Youth Justice, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America*, (2007).

<sup>37</sup> *Roper v. Simmons*, 543 US 551, 558 (2005)(stating that “once juveniles’ diminished culpability is recognized neither of the two penalogical justifications for the death penalty—retribution and deterrence provides adequate justification for imposing that penalty on juveniles”).

<sup>38</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010).

<sup>39</sup> *Graham* at 2028; *Roper* at 560.

prospects for reform, and are more amenable to rehabilitation than adults.”<sup>40</sup>

In the three aforementioned cases, the Supreme Court found that the ongoing development of adolescent brain development makes it “less supportable to conclude that even a heinous crime was evidence of irretrievably depraved character.”<sup>41</sup> Given the extensive research on adolescent brain development, the Supreme Court’s persuasion by such development, Felipe’s extremely young age, and the impulsive nature of his crime, a prosecutor may not find that it is in the interest of justice to charge Felipe with Murder in Second Degree.<sup>42</sup>

## *(2) changes in law or policy*

New York State is one of only two states in the country that have set the age of criminal responsibility to sixteen years old.<sup>42</sup> In forty states, the age of criminal responsibility is eighteen years old and in eight states, the age of criminal responsible is set at seventeen years old.<sup>43</sup> Since 2010, five states passed legislation raising the age of family court jurisdiction, allowing young offenders who were previously automatically tried as an adult, to be tried as a juvenile.<sup>44</sup> Additionally, from 2005 to 2014, twelve states enacted laws limiting the number of juveniles whose cases could be processed in adult court.<sup>45</sup>

While deciding that such harsh punishment was necessary to control violent juvenile crime, the New York Legislature nonetheless relied on the fact that special considerations are

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<sup>40</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2461 (2012).

<sup>41</sup> *Id.* at 2463.

<sup>42</sup> Raise the Age Campaign-NY, *Sensible Solutions to Promote Children’s Well-being and Public Safety* (2017)(New York and North Carolina as the only states with criminal responsibility set at sixteen years old).

<sup>43</sup> Office of Juvenile Justice and Delinquency Prevention, *Statistical Briefing: Juvenile Justice System Structure & Process, Jurisdictional Boundaries* (2012).

<sup>44</sup> Connecticut, Illinois, Massachusetts, Mississippi, and New Hampshire. See Carmen Daugherty, *State Trends: Updates from the 2013–2014 Legislative Session*, Campaign for Youth Justice (2014).

<sup>45</sup> *Id.* (Arizona, Colorado, Connecticut, Delaware, Illinois, Nevada, Indiana, Utah, Virginia, Washington, Ohio, and Nebraska).

sometimes appropriate when dealing with juveniles because juveniles are more easily influenced by their companions and their environment than are adults.<sup>46</sup> A prosecutor can and should look towards legislative considerations when using prosecutorial charging discretion.<sup>47</sup>

New legislation in New York, which will take effect in the fall of 2018, has created a new system consistent with national trends for processing young offenders charged with felonies.<sup>48</sup> The purpose of the new legislation is to raise the age of criminal responsibility so that young offenders may be treated in a more age appropriate manner.<sup>49</sup> The changes implemented in the legislation are a response to evidence that the current system of trying young offenders as adults has not been an effective response to lower crime rates or rehabilitating criminals.<sup>50</sup>

However, under the new legislation, young offenders could be tried in the Criminal Court on a case by case basis when the circumstances warrant.<sup>51</sup> Felony charges involving sixteen and seventeen-year-olds will be adjudicated in a newly established Youth Part of the Criminal Court, presided over by a Family Court judge, where young offenders would have access to additional intervention services.<sup>52</sup> Violent felony charges will remain in the Youth Part of the Criminal Court and will be subject to a three-part test that weighs the seriousness of the offense to determine whether the case will be eligible for removal to Family Court.<sup>53</sup>

All thirteen to fifteen-year-old Juvenile Offenders, including Felipe (if charged with a

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<sup>46</sup> *Vega v. Bell*, 47 N.Y.2d 543, 548 (N.Y.1979)

<sup>47</sup> *Id.* (“the Legislature did specifically provide several opportunities for removal with the consent of the District Attorney. This does not lead us to conclude, however, that this was because the Legislature wished only the local criminal courts to have the power to remove over the objection of the District Attorney, for such a result would be unreasonable, and it is the duty of the courts to interpret statutes so as to reach a reasonable result whenever possible”).

<sup>48</sup> 2017 Legis. Bill Hist. NY S.B. 4121

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

designated felony offense) will have their cases in the Youth Part of the Criminal Court.<sup>54</sup> Even with New York's new legislation following national trends towards juvenile justice, Felipe would still be considered a Juvenile Offender. If charged with Murder in the Second Degree before 2018, Felipe will be tried in a Criminal Court without any of the safeguards of Family Court.<sup>55</sup>

*(3) whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender*

If charged with Murder in the Second Degree, Felipe is subject to a punishment that may be disproportionate to him as a young offender. Murder in the Second Degree, a Class A-1 Felony, carries a sentence of life imprisonment with a minimum of a five-year sentence for a Juvenile Offender.<sup>56</sup> In recent years, New York courts have held that sentencing a thirteen-year-old who commits Murder in the Second Degree to thirteen years to life would not constitute cruel and unusual punishment, regardless of the offender's age at the time of the offense.<sup>57</sup> If charged with Criminally Negligent Homicide, a Class E Felony, Felipe would be sentenced to a maximum of four years.<sup>58</sup> The maximum penalty for Criminally Negligent Homicide committed by an adult is less than the minimum penalty for Murder in the Second Degree committed by a thirteen-year-old.<sup>59</sup>

Interaction with the adult criminal justice system has lasting consequences on young

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<sup>54</sup> *Id.*

<sup>55</sup> N.Y. Fam. Ct. Act § 301.2.

<sup>56</sup> N.Y. Penal Law § 70.05.

<sup>57</sup> *People v. Taylor*, 24 N.Y.S.2d 820 (2016)(holding that an indeterminate term of imprisonment of thirteen years to life was not grossly disproportionate); *People v. Smith*, 635 N.Y.S.2d 824 (1995)(holding that a sentence of nine years to life was not excessive).

<sup>58</sup> N.Y. Penal Law § 70.00.

<sup>59</sup> N.Y. Penal Law § 70.00; N.Y. Penal Law § 70.05.

offenders. Institutional confinement grounded in purely punitive principles has little effect on reducing recidivism rates in young offenders.<sup>60</sup> Rather, in some cases, confinement increases young offender recidivism rates.<sup>61</sup> Young offenders tried in the adult criminal justice system are thirty-four percent more likely to be re-arrested for violent crimes than young offenders sentenced to juvenile detention and rehabilitation centers.<sup>62</sup> Around eighty percent of young offenders released from adult prisons reoffend and often go on to commit more serious crimes.<sup>63</sup> A prosecutor can rely on these facts when analyzing which charging decision is in the interest of justice.

Confinement without therapeutic or developmentally appropriate programs gives young offenders the opportunity to learn new delinquent skills and attitudes.<sup>64</sup> Further, confinement with adults severely and irreparably damages an adolescent's mental health, physical health, and emotional development.<sup>65</sup> Treating young offenders as adults in the criminal justice system is short-sighted and ineffective; young offenders incarcerated in adult facilities are more likely to suffer physical and emotional abuse.<sup>66</sup> Young offenders in adult prisons are twice as likely to

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<sup>60</sup> Mark W. Lipsey, *The Primary Factors that Characterize Effective Interventions with Juvenile Offenders: A Meta-Analytic Overview*, 4 *Victims & Offenders* 2 (2009).

<sup>61</sup> *Ibid.*

<sup>62</sup> New York State Division of Criminal Justice Services, *County Juvenile Justice Profiles* (2016), <http://www.criminaljustice.ny.gov/crimnet/ojsa/jj-reports/newyorkstate.pdf>.

<sup>63</sup> *Id.*

<sup>64</sup> Justice Policy Institute, *The Costs of Confinement: Why Good Juvenile Justice Policies Make Good Fiscal Sense* (2009).

<sup>65</sup> Campaign for Youth Justice, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America*, (2007).

<sup>66</sup> Centers for Disease Control and Prevention, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: Report on Recommendations of the Task Force on Community Preventive Services* (2007), <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm>.

report being beaten by staff and fifty percent more likely to be attacked with a weapon.<sup>67</sup> Further, young offenders in adult prisons face the highest risk of sexual assault of all inmate populations.<sup>68</sup> The risk of emotional, physical, and sexual abuse as well as increased recidivism rates for young offenders in adult prisons suggest that if a prosecutor were to undercharge Felipe it would be better for both the offender and the safety of the community.

## Prosecutorial Misconduct?

Both defense and prosecution can argue as to whether or not undercharging Felipe would be in the best interest of justice. However, the main question is, when looking at all the factors a prosecutor *can* consider, is it still ethical for a prosecutor to charge Felipe with a lesser crime. Even further, would undercharging Felipe be considered an act of prosecutorial misconduct?<sup>69</sup> At the end of the day, determining whether or not undercharging in this case would be prosecutorial misconduct comes down to one issue: motive.<sup>70</sup> The Supreme Court relies on the prosecutor's

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<sup>67</sup> John Fagen, *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 2 *Juvenile and Family Court Journal* (1989)

<sup>68</sup> National Prison Rape Elimination Commission, Report 18 (2009) <https://www.ncjrs.gov/pdffiles1/226680.pdf>.

<sup>69</sup> See generally *Berger v. United States*, 295 U.S. 78, 88 (1935)(describes the duty of prosecutors and how improper actions by prosecutors can be considered prosecutorial misconduct); See Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 *U. Chi. L. Rev.* 246, 246-47 (1980)(arguing that the issue at the charging stage concerns the exercise of the prosecutor's judgment, not whether there is sufficient evidence to support bringing a criminal charge and securing a conviction).

<sup>70</sup> *Oregon v. Kennedy*, 456 U.S. 667, 675 (1982)(a standard that examines the intent of the prosecutor, though certainly not free from practical difficulties, is a manageable standard to apply. It merely calls for the court to make a finding of fact. Inferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system"); See Michael Kades, *Exercising Discretion: A Case Study of Prosecutorial Discretion in the Wisconsin Department of Justice*, 25 *Am. J. Crim. L.* 115, 120 (1997)(“Discretion has two components: accuracy and judgment. Accuracy is the ability to process information, decide what actually happened, and determine what can be proved in court .... Judgment is the ability to prosecute the most important cases”).

intent as one factor in determining whether the prosecutor engaged in prosecutorial misconduct.<sup>71</sup> Further, the Supreme Court has recognized judicial review of prosecutorial charging decisions when the prosecutor's decision was vindictive.<sup>72</sup> Lastly, the Supreme Court has stated that a prosecutor's discretion is subject to constitutional constraints and a prosecution based upon "an unjustifiable standard such as race, religion or other arbitrary classification" cannot be permitted.<sup>73</sup>

As stated earlier, prosecutors enjoy tremendous discretion when deciding what criminal charges to pursue in a given case.<sup>74</sup> Prosecutors are usually criticized for overcharging. In fact, undercharging out of compassion may give a prosecutor the ungainly reputation that she is soft on crime.<sup>75</sup> While this reputation may not bode well with the boss, it is not unethical to undercharge if it is done with good intentions and without arbitrary classification of the defendant. However, strategic undercharging may be considered prosecutorial misconduct. A prosecutor engages in strategic undercharging when she charges someone with a lesser offense than she otherwise could, but does so for reasons that advance her own aims.<sup>76</sup> In other words, prosecutors can sometimes gain more by charging less. For example, prosecutors may undercharge because doing so may result in higher conviction rates.

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<sup>71</sup> Peter Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 Wash. U. L.Q. 713, 714 (1999).

<sup>72</sup> *Blackledge v. Perry*, 417 U.S. 21, 27-28 (1974).

<sup>73</sup> *United States v. Armstrong*, 517 U.S. 456, 464 (1996)

<sup>74</sup> *Wayte v. United States*, 470 U.S. 598, 607 (1985) ("In our criminal justice system, the Government retains broad discretion as to whom to prosecute.").

<sup>75</sup> Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* 31 (2009) ("Prosecutors routinely engage in overcharging, a practice that involves 'tacking on' additional charges that they know they cannot prove beyond a reasonable doubt or that they can technically prove but are inconsistent with legislative intent or otherwise inappropriate").

<sup>76</sup> Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?* 83 Va. L. Rev. 939, 967 (1997).

A prosecutor who undercharges a young offender while considering the offender's age, diminished culpability, subjection to abuse in confinement, and increased likelihood of recidivism, is not abusing her discretion or committing prosecutorial misconduct. First, undercharging a minor, such as Felipe, because placing a child in an adult prison goes against the interest of justice is far from vindictive. Second, while one could argue that charging Felipe with a lesser crime is singling the defendant out through "arbitrary classification," there is nothing arbitrary about the social and emotional impacts of undercharging a child. According to the National Prosecution Standards, a prosecutor is obligated to seek justice for a young offender just as she would for an adult offender.<sup>77</sup> However, a prosecutor is also obligated to give special attention to the interest and needs of a young offender to the extent that doing so does not conflict with the prosecutor's duty to fully and faithfully represent the interests of the state.<sup>78</sup> Further, considering the special circumstances of young offenders should not unduly compromise the safety and welfare of the community.<sup>79</sup>

Examples of prosecutorial misconduct are discovery violations, improper contact with witnesses, defendants, judges or jurors, improper behavior during hearings or trials, prosecuting cases not supported by probable cause, harassing or threatening defendants, defendants' lawyers or witnesses, using improper, false or misleading evidence, displaying a lack of diligence or thoroughness in prosecution, and making improper public statements about a pending criminal matter. One could argue that undercharging is a form of "using improper, false or misleading

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<sup>77</sup> National District Attorneys Association, *National Prosecution Standards*, Std. 1-1.6, 3, 3d. ed. (*hereinafter* "National Prosecution Standards").

<sup>78</sup> *Id.*

<sup>79</sup> See generally Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 Iowa L. Rev. 393, 414–15 (2001).

evidence.”<sup>80</sup> However, by undercharging a young offender, a prosecutor is not changing the elements of the crime or the facts of the case. Rather, the prosecutor is carefully weighing the interests of the community with the interests of justice.

## Conclusion

A prosecutor is the only lawyer in the criminal justice system who is responsible for the presentation of the truth.<sup>81</sup> Unlike other lawyers who are mere advocates for individuals or entities, a prosecutor represents society as a whole. While representing society and the general public, a prosecutor must not just consider the victim in a given case. Rather, the prosecutor must exercise judgement by taking multiple factors into consideration: interests of justice, the particular characteristics of the defendant, changes in public policy or law, and the welfare of the community as a whole. Further, as a representative of the people, a prosecutor should take an active role in the legislative process when proposals regarding the criminal justice system are being considered. As New York is slowly changing its juvenile justice laws to match the national consensus that young offenders are less culpable than adult offenders, it is paramount that prosecutors use their charging discretion in a manner that ensures the best interest of justice.

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<sup>80</sup> Neil Gordon, *Misconduct and Punishment*, Center for Public Integrity (2003).

<sup>81</sup> *Supra* National Prosecution Standards at 1-1.6