Standards of Legitimacy in Criminal Negotiations

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ABSTRACT

Scholarship on negotiation theory and practice is rich and well-developed. Almost no work has been done, however, to translate to the criminal context the lessons learned about negotiation from extensive empirical study using the disciplines of economics, game theory, and psychology. This Article suggests that defense lawyers in criminal negotiations can employ tools frequently useful to negotiators in other arenas: neutral criteria as a standard of legitimacy. Judges sometimes exercise a type of discretion analogous to prosecutorial discretion. When they do so, they offer an independent, reasoned, and publicly available assessment of the factors that a prosecutor ought to consider in deciding whether to grant leniency. In negotiations, defense lawyers can use these guidelines offered by judges as a soft limitation on the largely unchecked power of prosecutors. Judges have been reluctant, however, to exercise the power clearly assigned to them, and defense lawyers have been slow to recognize the value of the guidance that judges have provided.

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I. Introduction

Prosecutorial discretion is, almost by definition, unmoored from any legal rule or principle.[1] Prosecutors have all but unfettered discretion to charge all, some, or no perpetrators of crime.[2] Given the

1. The extraordinary role of discretion in determining outcomes in legal systems has long been recognized. *See generally* Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry (Univ. of Ill. Press, 1971). By contrast, judges tend to limit themselves to matters that Richard Fallon has described as capable of being regulated by "judicially manageable standards." Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 Harv. L. Rev. 1275, 1287–93 (2006) (observing that the Supreme Court seeks rules or standards that produce predictability and consistent results).

2. *See* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 Iowa L. Rev. 393, 397 (2001) (observing that "prosecutors daily exercise practically unlimited discretion."); *see also* United States v. Batchelder, 442 U.S. 114, 123–24 (1979) (recognizing the discretion of prosecutors to choose which of many applicable statutes to charge); Inmates of Attica v. Rockefeller, 477 F.2d 375, 380 (2d Cir. 1973) ("the problems inherent in the task of supervising prosecutorial decisions do not lend themselves to resolution by the judiciary"). *Inmates of Attica*

consequences that flow from prosecutors' decisions, this unreviewable power renders the individual assistant district attorney, who is sometimes fresh out of law school, one of the most powerful officials at any level of government.

It is frequently argued that there ought to be some sort of check on prosecutors' ability to decide which charges to bring and which plea deals to make, but these proposals often fail due to separation of powers concerns.[3] Soft limitations on prosecutorial power, however, are possible without any modification to the basic division of labor between prosecutors and judges. Courts are often reluctant to exercise even expressly-given powers that resemble prosecutorial decision-making, but when they do, courts provide important guidance to subsequent parties attempting to resolve criminal cases outside of the formal judicial process.

As courts begin to acknowledge long-standing academic concerns about unregulated prosecutorial power,[4] judicial opinions that offer guidance on the exercise of prosecutorial discretion, without directly imposing limits on charging or bargaining, may provide a politically palatable means of soft regulation. Defense attorneys can and should look to how courts have exercised their prosecutorial-like powers as persuasive authority on how courts believe prosecutors should consider the equities of a particular case.

It is certainly not a new concept that judges should be a part of the discussion about the exercise of prosecutorial discretion. Most commentators who call for a judicial role in the plea bargaining and charging process envision judges deferentially overseeing the work of prosecutors, much as appellate courts review the fact finding of trial

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established that not only is there no obligation on prosecutors to bring charges, there is no requirement that prosecutors or police investigate any crime. 477 F.2d at 381. Interestingly, the European Court of Human Rights has concluded that courts can require authorities to conduct an adequate investigation before declining to bring a prosecution. Finucane v. United Kingdom, 37 Eur. Ct. H.R. at 375 (2003).

3. *See* note 6 *infra*.

4. *See* Missouri v. Frye, 132 S.Ct. 1399, 1407 (2011) (requiring constitutionally adequate performance by defense counsel as the plea bargaining process "*is* the criminal justice system.") (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1912 (1992) and citing Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006)); *see, e.g.*, Lafler v. Cooper, 132 S.Ct. 1376, 1392 (2011) (Scalia, A., dissenting) (contending that the rationale of the majority in *Missouri v. Frye* will lead to regulation of prosecutorial conduct).

courts.[5] These proposals are frequently criticized as creating separation of powers concerns.[6] We propose that courts should have an advisory role, which courts are already exercising in varying degrees of frequency. Courts should be neither rubber stamps, passively approving of prosecutors' decisions, nor dictatorial judicial activists. Rather, courts should use opportunities to exercise pseudo-prosecutorial discretion for the purpose of guiding the charging and plea bargaining process.

When courts make these charging and bargaining decisions, they create standards of legitimacy for subsequent negotiations between prosecutors and defense lawyers. Borrowing from the scholarship on negotiation, we propose that defense counsel in the criminal justice system use these standards to check the exercise of prosecutorial discretion.[7]

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5. *See, e.g.*, ABRAHAM S. GOLDSTEIN, THE PASSIVE JUDICIARY 5–8 (Louisiana State Univ. Press, 1981); *see also* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 907–08 (2009); Barkow, *Separation of Powers*, *supra* note 5, 1035–40 (2006); Frank F. Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473, 491–92, 494 (1973); Ronald F. Wright, *Sentencing Commissions as Provocateurs of Self Regulation of Prosecutorial Self Regulation*, 105 COLUM. L. REV. 1010 (2005) (describing potential role of sentencing commissions in providing standards for exercise of prosecutorial discretion).

6. *But see* Barkow, *Separation of Powers*, *supra* note 5, at 1012–20 (observing that separation of powers concerns do not justify the degree of judicial deference given to prosecutors as there is judicial review of other executive agents); Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1336 (2008).

7. The implications of the vast scholarship of negotiation have not been considered for criminal cases. *See, e.g.*, Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163, 182 (2007) ("[T]he rich literature on biases and heuristics is a tremendous resource for those studying negotiations between prosecutors and defense lawyers."). In the civil context, studies in economics, game theory, and psychology have all proven useful to those studying negotiations. *See* J. KEITH MURNIGHAN, BARGAINING GAMES: A NEW APPROACH TO STRATEGIC THINKING IN NEGOTIATIONS (1993) (applying game theory to negotiation situations); Deepak Malhotra & Max H. Bazerman, *Psychological Influence in Negotiation: An Introduction Long Overdue*, 34 J. MGMT. 509 (2008); *see also, e.g.*, Robert J. Condlin, *Legal Bargaining Theory's New 'Prospecting' Agenda: It May Be Social Science, But Is It New?*, 10 PEPP. DISP. RES. L. J. 215, 220 n.30 (2010) (observing that "[j]ournals in social psychology, economics, organization theory, and related fields published articles on bargaining long before law journals, but little of this work made its way into legal bargaining scholarship."). This diverse array of scholarship suggests many ways for defense counsel to increase their bargaining power: using psychological factors such as anchoring, improving their relationships with prosecutors, collecting good information from their clients, and so on. *See* Rebecca Hollander-Blumoff, *Getting to "Guilty:" Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115, 122–23, 135–40 (1997). In this Article, we will focus on introducing standards of legitimacy into the negotiation process.

Standards of legitimacy, as we explain below, have many positive impacts on a negotiation and the parties. These standards can change a negotiation partner's perception of his or her alternatives, leverage the psychological pressure of justification, provide justification to supervisors and other third parties, and appeal to rational bases of analysis. Perhaps most importantly in criminal negotiations, standards of legitimacy allow prosecutors to better consider their dual role as both advocates and quasi-judicial actors. While there are many different standards to be considered, this Article focuses specifically on areas where third parties to the plea bargain negotiation — namely judges — are empowered to create legitimate standards for prosecutorial discretion.

In deciding a variety of issues, courts are permitted to exercise the type of discretion believed to be uniquely entrusted to prosecutors.[8] Only the vaguest legal standards govern application of *de minimis* statutes, proportionality review in capital cases, the application of California's three-strikes law, or the denial of pretrial diversion. Courts in these types of cases essentially are left to decide whether the prosecutor's charging decision was appropriate. Likewise, courts must make similar decisions when they sentence defendants who were — or, if charged differently, would have been — subject to mandatory guidelines or minimums. Reduction of sentences in such situations reveal judicial disagreement with the charging decision, while sentences imposed above an uncharged mandatory minimum suggest judicial approval of a charge requiring the minimum sentence. Finally, judges fashioning remedies for defendants who receive ineffective assistance of counsel during the plea bargaining process must look at the motivations of prosecutors in making plea offers. As they do, courts identify how a prosecutor could have arrived at the offered plea, and how the defendant lost that plea due to ineffectiveness of counsel. Because the remedy may not give defendants a windfall, courts must determine which portion of the leniency offered was motivated by the equities of the case, rather than utilitarian motivations such as cooperation, risk aversion, and

8. In civil contexts, such standards are easier to identify. When cars are sold, for instance, Kelly's Bluebook provides an independent source providing its value. *See, e.g.*, ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 81–92 (1992) (describing use of standards of legitimacy). Examples, as described below, include dismissing cases under *de minimis* statutes, finding three-strikes provisions inapplicable, rejecting prosecutorial denials of pre-trial diversion, sentencing decisions where mandatory minimums are not sought, departures from federal sentencing guidelines, and providing remedies for defendants who have received ineffective assistance of counsel in the negotiation phase of a trial.

preservation of resources, none of which remain to be traded after a case has been resolved.

Courts have been reluctant to robustly exercise their discretion to provide guidance on the appropriate exercise of prosecutorial discretion — a somewhat surprising fact, given that mandatory minimum sentences and sentencing guidelines originally vested power in judges, as opposed to prosecutors.[9] As their power shifts to prosecutors, judges could conceivably wish to participate in the exercise of the discretion previously entrusted to them, yet they have not done so as robustly as they are clearly entitled to do. Judges are often troubled by the virtually absolute power of prosecutors,[10] but separation of powers and expertise concerns have discouraged judges from using their powers to establish persuasive criteria for the exercise of prosecutorial discretion.[11]

Courts often refuse to reconsider charging decisions made by prosecutors, not only because of separation of powers concerns, but also because courts feel they lack the expertise to make decisions that may not be reduced to legal standards. For similar reasons, courts are loathe to create standards that they have not been authorized by the legislature to create.[12] Legislatures have, however, empowered courts to render decisions in criminal cases — allowing them to dismiss cases, reject plea offers, and ignore sentencing guidelines — for reasons that defy explanation by legal rules. In essence, judges occasionally engage in the same sort of multi-factored equitable considerations that define what is believed to be the exclusive domain of prosecutors. Judges are reluctant to venture into such waters, but when they do, they provide guidance to prosecutors and defense lawyers on the appropriate use of prosecutorial discretion.

Given its rarity, instances of judges exercising prosecutorial discretion are likely useful to defense counsel only for the purpose of

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9. A number of judges resigned rather than be forced to apply the previously mandatory Federal Sentencing Guidelines. *See* Susan R. Klein, *DOJ's Attack on Federal Judicial "Leniency," the Supreme Court's Response, and the Failure of Criminal Sentencing*, 44 TULSA L. REV. 519, 523 (2009). Others have been sharply critical of the Guidelines. *See* Gregory C. Sisk, Michael Heise & Andrew Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1413 nn.1362–64 (1998). Therefore, it would seem that judges would take opportunities given to them to shape the way prosecutors exercise their discretion. Yet, as will be illustrated below, they have been quite reluctant to do so.

10. *See* KATE STITH & JOSE CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 130–42 (1998); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).

11. *See, e.g.*, GOLDSTEIN, *supra* note 5, at 53–58.

12. *See* Inmates of Attica v. Rockefeller, 477 F.2d 375, 380 (2d Cir. 1973).

demonstrating in general terms the types of factors that prosecutors ought to consider in exercising leniency. Even this degree of guidance, however, would be helpful to, and has long been overlooked by, counsel entering negotiations in which they have a distinct disadvantage. For their part, judges concerned about the unchecked power of prosecutors should recognize that their guidance helps place soft limits on prosecutors.

This Article first addresses how judicially fashioned standards of legitimacy can be useful to defense counsel in the course of plea bargaining negotiations and then considers the avenues available to courts for providing such criteria for the exercise of prosecutorial discretion.

II. The Value of Judicially Created Criteria for Defense Counsel

A. *Cabining Unlimited Prosecutorial Discretion*

Prosecutors possess extraordinary power to charge defendants.[13] Prosecutors decide what charges to file, which essentially defines each case.[14] In addition, prosecutors are free to add additional charges and enhancements without limit after the case has been filed.[15] The prosecutor chooses whether to make a plea offer. As one judge has described it, "the prosecutor has the information; he has all the chips . . . ."[16] This discretion can lead to abuses of power,[17] false confessions or false accusations,[18] and even a lack of trust in the entire criminal justice system.[19]

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13. *See, e.g.*, William J. Stuntz, The Collapse of American Criminal Justice 257–61 (2011).

14. Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of* Lafler *and* Frye, 41 Hastings Const. L.Q. 561, 598 (2014).

15. *Id.*; *see also* Michelle Alexander, The New Jim Crow: Mass Incarceration in the age of Colorblindness 87–89 (2012).

16. Gilien Silsby, *Why Innocent People Plead Guilty*, USC News (Apr. 18, 2014), http://news.usc.edu/61662/why-innocent-people-plead-guilty/ (quoting the Hon. Jed Rakoff, US District Judge).

17. *See The Kings of the Courtroom: How Prosecutors Came to Dominate the Criminal-Justice System*, Economist (Oct. 2, 2014), http://www.economist.com/news/united-states/21621799-how-prosecutors-came-dominate-criminal-justice-system-kings-courtroom.

18. *A Plea for Change: American Prosecutors Have too much Power. Hand Some of it to Judges*, Economist (Oct. 4, 2014), http://www.economist.com/news/leaders/21621784-american-prosecutors-have-too-much-power-hand-some-it-judges-plea-change.

19. Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 Geo. L. Rev. 407, 420–25 (2008).

Negotiation of a plea bargain is both incredibly important and difficult for defense counsel and their clients. Both judges, who often lament the power of prosecutors, and defense lawyers, who have obvious institutional reasons to limit the power of prosecutors, profit from an understanding of the literature on negotiation. The criteria that judges fashion when they exercise pseudo-prosecutorial discretion can prove extraordinarily helpful to defense lawyers in the course of negotiations.

One can conceive of the defense counsel as a negotiator and the plea bargain as a negotiation.[20] Indeed, courts consider a plea to be a bargain struck by two independent parties, treat the plea agreement as a contract, and see the bargaining process as a type of contractual transaction.[21] Legal scholars also view plea agreements as a form of negotiated dispute resolution.[22] As two scholars have described the issue, "the typical plea bargain is strikingly similar to the simple dickered bargain — my used car for $500 — that is the staple example of enforceable exchange . . . ."[23]

There are many ways that defense counsel may use the lessons of negotiation theory to positively influence the plea bargain. In particular, defense counsel can work on creating a good relationship with their negotiation counterparts,[24] being well prepared at the negotiation table,[25] and maintaining an aspirational frame of mind.[26] Another very important technique that they can use is researching and using *criteria*, and in particular, criteria that is consistent with the exercise of judicial guidance in curbing prosecutorial discretion. While judicial involvement is not the only possible criteria to use,[27] as we will see in Part III, using this information can allow defense counsel to cabin prosecutorial discretion, and provides better guidance than the status quo.

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20. *See* Hollander-Blumoff, *Getting to "Guilty," supra* note 7, at 118.

21. *Id.* at 119.

22. *Id.*; *see also* Douglas Maynard, Inside Plea Bargaining: The Language of Negotiation (1984); Albert Alschuler, *The Changing Plea-bargaining Debate*, 69 Cal. L. Rev. 652, 683 (1981); Rishi Batra, Lafler & Frye*: A New Constitutional Standard for Negotiation*, 14 Cardozo J. Conflict Resol. 310, 323 (2013).

23. Robert Scott & William Stuntz, *Plea-Bargaining as Contract*, 101 Yale L.J. 1909, 1922 (1992).

24. *See generally* Max H. Bazerman & Margaret A. Neale, *The Role of Fairness Considerations and Relationships in a Judgmental Perspective of Negotiation*, *in* Barriers to Conflict Resolution (Kenneth Arrow, et. al, eds., 1999).

25. Deepak Malhotra & Max Bazerman, Negotiation Genius, 19–24 (2007).

26. *Id.* at 36.

27. *See infra* Part III.

B. *Using Standards of Legitimacy in Negotiation*

Legitimacy is one of the core concepts in the "Seven Elements" framework of negotiation.[28] The "Seven Elements" framework is a comprehensive way to understand and analyze the terrain of any negotiation,[29] and legitimacy is one of the important elements of this terrain. As Bruce Patton explains, "legitimacy is a powerful motivating force in human relationships." For a negotiation settlement to be seen as fair, and for both sides to accept the agreement, parties must perceive the outcome and process as legitimate.[30] Negotiations often fail if there is an absence of legitimacy.[31] With this principle in mind, negotiation texts have recommended that in order to promote a sense of legitimacy or fairness in the negotiation process, negotiators should research and propose external, neutral criteria to justify any offers they make to the other side.[32]

Fisher and Ury, in their now classic text *Getting to Yes,* recommend what they call "objective criteria" to bring a sense of legitimacy to the proceedings.[33] They define criteria as either a fair standard or fair procedure that forms a basis independent of the will of the other side for making a decision.[34] There is often more than one fair standard that can be used in any negotiation, but Fisher and Ury suggest using considerations such as "what a court would decide," "precedent," "scientific judgment," or "professional standards" to develop such objective criteria.[35] Similarly, Patton suggests asking what standards a judge may apply and what "ought" to govern an agreement but also encourages negotiators to prepare information on what criteria the other side will argue for.[36]

After developing these criteria, negotiators can use them in a negotiation to accomplish several aims. First, criteria can justify a

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28. Bruce Patton, *Negotiation*, *in* THE HANDBOOK OF DISPUTE RESOLUTION 281 (Michael L. Moffitt & Robert C. Bordone, eds., 2005) ("The seven-elements framework for understanding and analyzing negotiation . . . is one way to define comprehensively the terrain of negotiation that needs to be understood and managed (whatever procedural tactics or strategies a negotiator might adopt)").

29. *Id.*

30. *Id.*

31. *Id.*

32. *See, e.g.*, MALHOTRA & BAZERMAN, *supra* note 25, at 34–36.

33. FISHER & URY, *supra* note 8, at 85. This Article will use the term "legitimate criteria" instead, as there can be multiple criteria seen as objective.

34. *Id.*

35. *Id.*

36. Patton, *supra* note 28, at 287 (listing questions for each of the Seven Elements).

presented offer.[37] Armed with criteria, negotiators can finish the statement, "I would like to propose X because . . ." and it will be difficult for the other party to dismiss these offers out of hand as illegitimate or unfair.[38] Second, negotiating over criteria can help negotiators choose among outcome options that have been proposed in a fair manner.[39]

The use of legitimate criteria as outlined above can have several positive impacts on the negotiation. As Fisher and Ury suggest, focusing on legitimacy and criteria can produce more "wise agreement . . . efficiently."[40] Negotiators using such criteria benefit from past experience by referring to precedent and community practice.[41] They also spend less time making and then unmaking commitments.[42] Most importantly, using criteria can help avoid a constant battle for dominance and can protect the relationship between the negotiating parties.[43] Using criteria can bring a sense of fairness to the process and ultimately to the outcome.

C. *Using Standards to Persuade*

Defense counsel would be more interested in using criteria during negotiation if, in addition to producing wise agreements more efficiently and preserving the relationship, using criteria is helpful in persuading prosecutors to accept defense counsel's positions or at least come closer to a more advantageous outcome for the defense. While there has been some criticism of the idea of using criteria as a negotiation strategy to reduce conflict,[44] there is good reason to think that bringing criteria to the negotiation table will be helpful for defense counsel. It is true that prosecutors, in general, are perceived as having more power than defense counsel in plea bargaining,[45] but using criteria to create legitimacy in a negotiation can help address this imbalance and be effective in changing the prosecutor's level of

37. MALHOTRA & BAZERMAN, *supra* note 25, at 34–36.

38. *Id.*

39. FISHER & URY, *supra* note 8, at 86–87 (discussing how criteria such as fair procedures can be used to have a third-party pick an outcome for the negotiation).

40. *Id.* at 83.

41. *Id.*

42. *Id.*

43. *Id.*

44. J. White, *The Pros and Cons of "Getting to YES,"* 34 J. LEGAL EDUC. 115, 117, 121 (1984) (suggesting that there are no truly "objective" criteria, that use of criteria is "persuasive rationalization," and indicating that in the context of plea bargaining, criteria should be used persuasively).

45. *See generally* Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992).

bargaining power.[46] Several of the reasons criteria can be used for persuasion are addressed below.

1. *Changing the Perception of Prosecutors' BATNA*

Standards impact prosecutors' perception of their best alternative to negotiated agreement ("BATNA"). Evidence of judicial standards for plea bargaining can influence prosecutors to change their bargaining power by changing how they perceive a particular judge would rule in the case.[47] Attorneys on both sides regularly evaluate the "bargaining chips" that are derived from "the outcome that the law will impose if no agreement is reached."[48] Each attorney evaluates his or her client's alternatives if no plea deal is reached.[49] This analysis impacts how an attorney approaches a plea negotiation. The worse the potential alternatives, the more one would expect a party to pursue a negotiated bargain.[50]

In the case of plea bargaining, a trial on the merits of the case is the most obvious alternative to a guilty plea.[51] Prosecutors will modify their offers based on their perception of factors impacting likelihood of success at trial, including the impact of legal rules on evidentiary issues, the strengths or weaknesses of their case, and potential jury attitudes or tendencies in a given location, among others.[52] They will also consider the qualities of the judge in the particular case.[53] If a judge is or has been known to exercise prosecutorial discretion in this area, this will impact the prosecutor's evaluation of what may happen to the case if taken to trial. If a particular judge is known to "overrule" prosecutors' charging decisions using the standards we outline below,[54] prosecutors take this into account and modify their plea demands accordingly. If the prosecutor perceives her case to be less "triable," she will offer more favorable

46. Negotiation texts recommend strategies of using criteria, particularly against more powerful opponents, in order to persuade. *See, e.g.*, PETER D. JOHNSTON, NEGOTIATING WITH GIANTS, 69–79 (2012).

47. FISHER & URY, *supra* note 8, at 99–100.

48. Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 968 (1979) (discussing negotiation in the divorce context).

49. Hollander-Blumoff, *Getting to "Guilty," supra* note 7, at 121.

50. MALHOTRA & BAZERMAN, *supra* note 25, at 22–23.

51. Hollander-Blumoff, *Getting to "Guilty," supra* note 7, at 121.

52. *Id.* at 121.

53. *Id.* at 123.

54. *See infra* Part III.

plea deals[55] and may even be persuaded, in rare cases, to drop the charges altogether.[56]

Of course, it is true that many plea bargain agreements have no chance of being overruled by the judge and will be approved as a matter of course by trial judges.[57] Even in these cases, however, the typical defense attorney will still benefit from using the criteria provided by judges for the reasons below.

2. *Leveraging the Power of Justification*

One less obvious advantage of raising criteria to justify offers is simply that raising criteria provides a justification for defense counsel to make a demand. Research has shown that the simple step of providing a justification for a demand, even a frivolous one, has the power to induce compliance.[58] In a fascinating study, researchers shut down all but one of the copy machines in a library, causing long lines to form at the remaining one. The experimenters compared two types of asking when students were trying to convince people to allow them to cut in front of them in the line. In one condition, the experimenter simply said, "Excuse me, I have five pages. May I use the Xerox machine?" Sixty percent of those approached this way allowed the experimenter to cut in front of them. In the other condition, the experimenter said, "Excuse me, I have five pages. May I use the Xerox machine *because I have to make some copies?*" Even though the second approach added an entirely inane justification (as the purpose of cutting in line at a copy machine is to make copies), providing a reason induced compliance in ninety-three percent of subjects.[59]

The researchers for this study suggest that this technique is effective because humans are hardwired to accommodate the seemingly legitimate demands of others, as doing so allows us to build mutually rewarding relationships.[60] People tend to resist demands imposed on

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55. Hollander-Blumoff, *Getting to "Guilty," supra* note 7, at 124.

56. *Id.* at 125.

57. *See, e.g.*, Turner v. Tennessee, 858 F.2d 1201, 1207 (6th Cir. 1988) (recognizing most plea bargains are accepted by the trial judge); *see also* Commonwealth v. Napper, 385 A.2d 521, 524 (Pa. Super. Ct. 1978) (noting that rejection of plea bargains is so rare that burden should be on State to prove that it would have been rejected in the case of erroneous plea bargaining).

58. Ellen Langer, et al., *The Mindlessness of Ostensibly Thoughtful Action: The Role of "Placebic" Information in Interpersonal Interaction*, 36 J. PERSONALITY & SOC. PSYCHOL. 635, 638 (1978).

59. *Id.* at 637–38.

60. *See also* MALHOTRA & BAZERMAN, *supra* note 25, at 167–69

them but will consider them if the asker thinks the demands are justified, because the asker may then be obligated to them in the future.[61] In order to make judgments about what demands are legitimate, the authors suggest that humans use rules of thumb rather than performing a full analysis, and the very existence of the word "because" is often sufficient to gain compliance.[62]

Defense counsel, then, may find themselves at an advantage by using norms for judicial exercise of prosecutorial discretion. They will be able to better justify their offer and thus increase the likelihood that prosecutors will not reject the offer out of hand. By saying, "I think this offer is acceptable because . . .,"[63] defense attorneys can bolster their bargaining position and induce the same psychological effect on their negotiation partners — prosecutors — as in any other negotiation context. Much of what happens in a plea bargain also depends on the chemistry between specific prosecutors and defense attorneys,[64] who are often in repeat relationships with each other. Defense counsels' use of justification can persuade prosecutors to grant legitimized demands and build a mutually rewarding relationship for future plea bargains.

3. *Allowing Them to Justify Decisions to Others*

As Nicholas Herman notes in *Plea Bargaining*, prosecutors are often motivated by considerations apart from the circumstances of the plea bargain itself.[65] Prosecutors may be motivated by political considerations, such as attaining higher office, or personal considerations such as whether their family members have been victims of a similar crime.[66] One other non-legal consideration that prosecutors must take into account is their duty as employees to report their results to their supervisors.[67] While this reporting is more salient for more junior prosecutors, who may be evaluated on length of negotiated sentences, it is also important for senior prosecutors who are either elected or appointed by those subject to political pressures. When negotiating with an agent in a principal-agent relationship, it is important to understand the incentives created by that relationship.[68] In this case, the agency relationship will cause prosecutors

61. *Id.*
62. *Id.* (summarizing the research and extending advice to negotiators).
63. *See infra* Part II.B.
64. Michael Estrin, *Pleading for Justice*, CAL. LAWYER, Apr. 2014, at 20.
65. G. NICHOLAS HERMAN, PLEA BARGAINING § 2.02 (3d ed. 2012).
66. *Id.* at § 2.02(8).
67. Hollander-Blumoff, *Getting to "Guilty," supra* note 7, at 134.
68. ROBERT MNOOKIN, ET. AL., BEYOND WINNING 90 (2000).

who are worried about their performance to consider how their supervisors will evaluate any agreed-upon settlements. By using criteria to justify offers, skilled defense counsel can help prosecutors with the "behind the table" negotiation that prosecutors have with their own supervisors,[69] by arming prosecutors with reasons for why a particular sentence is justified.

4. *Making an Appeal to Rational Analysis*

Perhaps more importantly than the strategic factors addressed above, prosecutors are more likely than lay negotiators to be persuaded by criteria based on judicial guidance because of their role as a lawyer. Experienced lawyers temper their psychological biases with knowledge of applicable law and legal standards.[70] Using legal standards can appeal to lawyers' abilities to apply a rational analysis to determine whether a proposed settlement is consistent with outcomes in similar cases.[71] By raising the specter of how judges have ruled on prosecutorial decisions, even where prosecutors have the freedom to make their own decisions, defense lawyers can use the mere existence of a legal standard or precedent to convince prosecutors to adopt the persuasive authority of prior judicial opinions.

5. *Encouraging Consideration of Their Judicial Role*

The use of legal criteria — particularly when judges use criteria typically considered only by prosecutors — will be particularly effective in influencing prosecutors, given their unique role in the justice system. As Professor Albert Alschuler notes, one of the roles that prosecutors take on is that of judge, because prosecutors must determine the "right thing" for the defendant in light of the defendant's particular circumstances.[72] In this way, prosecutors differ from typical negotiation adversaries in a civil suit, in that prosecutors are motivated by and tasked with a quasi-judicial role, as well as that of an advocate.[73]

Influencing prosecutors to consider not only their advocacy role but also their judicial role will have a beneficial impact on the plea-

69. *Id.* at 178.

70. Nancy Welch, *Perceptions on Fairness*, *in* THE NEGOTIATORS FIELDBOOK 169 (Andrea Schnieder & Christopher Honeyman, eds., 2006).

71. Russell Korobkin & Chris Guthrie, *Psychology, Economics & Settlement,* 76 TEX. L. REV. 77, 122 (1997).

72. Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 53 (1968).

73. *Id.* at 54; *see also* Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 193 (2007).

bargaining negotiation for defense counsel. As noted in psychological literature, negotiators tend to be motivated by self-interest, in which their sense of fairness in the outcome is directly tied to their own "egocentric bias."[74] People tend to look at facts from a self-serving perspective.[75] In one experiment studying the impact of egocentric bias, subjects in a research study learned all the facts involved in a personal injury accident in which a motorcyclist was hit by a car and injured. If subjects were first told the role that they would play (either cyclist or driver) and then asked to evaluate what a "fair" settlement would be given the facts, each side evaluated the identical facts in ways that served their own role, i.e., the drivers thought a low settlement was appropriate, and cyclists felt a high one was more fair.[76]

Unsurprisingly, subjects in this condition had a difficult time reaching settlement when the negotiation was conducted. If subjects were given the facts before being told their role, however, and then asked to evaluate a fair settlement, they were more likely to come to a settlement figure closer to others, and subsequent negotiations were more successful.[77] This outcome suggests that negotiators generally dealing with egocentric bias may be more successful by helping the other side think more like a neutral party, such as a judge.

This principle is significant for defense counsel in particular. By raising issues of what judges would feel is the right thing for a defendant in similar circumstances, defense counsel can push prosecutors to consider their quasi-judicial role rather than their role as advocate. Prosecutors considering themselves in their quasi-judicial role are more likely to evaluate the facts in a neutral fashion, as research has shown that role-based considerations exert a strong influence on decision-making.[78] This is especially true for how judges are influenced to evaluate facts and consider outcomes in a more neutral fashion given the role conception of a judge as neutral.[79]

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74. Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109, 110 (1997); Welch, *supra* note 70, at 168.

75. Babcock & Loewenstein, *supra* note 74, at 111.

76. *Id.*

77. *Id.* at 113–14.

78. *See generally* BRUCE J. BIDDLE, ROLE THEORY: EXPECTATIONS, IDENTITIES, AND BEHAVIORS (1979).

79. For a discussion on the influence of the judicial role-conception on judging, see Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 312 (1990); James L. Gibson, *The Role Concept in Judicial Research*, 3 L. & POL'Y Q. 291 (1981); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 521 (1986).

By explicitly bringing to light judicial involvement in the prosecutorial role, defense counsel can encourage prosecutors to consider the "judicial" way of exercising their discretion, and thereby moderate the self-serving biases of an advocacy role.

III. Typical Plea Bargaining Standards

Thus far, we have argued for the use of criteria as a good negotiation strategy for defense counsel in the plea bargaining context.[80] Judicial exercise of prosecutorial discretion serves as a promising source of objective criteria. Before we elaborate on the areas where judges have exercised this type of discretion, it is important to evaluate two existing criteria that one typically considers in the context of plea bargaining: (1) what the sentence outcome would be if the case went to trial and (2) what sentence other defendants have received for similar crimes. Contrary to popular belief, these two criteria may not actually provide a useful or helpful standard of legitimacy in the plea bargaining context.

A. *What the Sentence Would Be at Trial*

One common conception of the standard by which to judge plea bargains is the sentence to which the accused would be subjected to at trial if convicted of the crime. This standard seems to comport with the idea of using "what a court would decide" or "precedent" to legitimize offers that one would make during the negotiation.[81]

Under this view, plea bargains are a way for defendants to reap a discount off the sentencing guidelines for a particular crime in exchange for a guilty plea,[82] in the same way that legal entitlements in civil cases are used to guide settlement outcomes.[83] While the potential sentence at trial is obviously an important piece of information that defense counsel should gather before negotiating a plea bargain, it may not provide a strategic advantage if used in the negotiation as a criteria. Using the sentence at trial as criteria in the negotiation can be disadvantageous because a concrete sentence can anchor the

80. Of course, criteria are not the only type of arguments that will persuade at the bargaining table. Herman gives examples of other types of arguments that can and do persuade at the bargaining table, including importantly, the evidentiary weakness of the prosecutor's case. Herman, *supra* note 65, at § 7.11.

81. This is further bolstered by the idea of sentencing guidelines, which seem to provide clear outcomes for trials with results of guilty.

82. Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L.J. 1969, 1975 (1992); Scott & William J. Stuntz, *supra* note 23, 1913–17 (1992).

83. *See generally* Mnookin & Kornhauser, *supra* note 48.

negotiation at a point that is unfavorable for the defendant. An anchor is a number or outcome that focuses the other negotiator's attention and expectation.[84] The power of anchors is substantial and affects even those with negotiation experience and expertise.[85] Presuming that the plea negotiation is a discount from a the expected sentence at trial, starting from this point may anchor the negotiation at a high point and force the defense counsel to argue for downward leniency, rather than starting from a lower point and encouraging the prosecutor to bargain upwards.

In addition, as Professor Stephanos Bibas has shown, there are many structural distortions and psychological pitfalls that make the shadow of trial assumption in plea bargaining very questionable.[86] In particular, the "lumpiness" of statutory guidelines and existence of mandatory statutory penalties make calibrating plea bargains against this type of criteria very difficult.[87] Because mandatory penalties and statutory sentencing guidelines provide maxima and minima for crimes based on the severity of the offense and the criminal background of the defendant, rather than the strength of the evidence or actual chance of conviction at trial, the particular outcome at trial for a particular crime might not provide a guideline for a plea in the case at hand.[88]

Furthermore, as many scholars have argued, trial sentences are a form of coercive punishment rather than outcomes on which to base sentencing. Trial sentences are not fair outcomes from which post-plea sentences are discounted, based on the defendants' willingness to plead. Instead, the use of trial sentences as criteria serves as a form of coercive punishment by extracting a penalty for those who would exercise their right to trial.[89] Viewed in this way, the trial outcome is not a legitimate or fair criterion in the plea negotiation.

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84. MALHOTRA & BAZERMAN, *supra* note 25, at 27–28.

85. Gregory B. Northcraft & Margaret A. Neale, *Experts, Amateurs, and Real Estate: An Anchoring-and-Adjustment Perspective on Property Pricing Decisions*, 39 ORGANIZATIONAL BEHAVIOR & HUM. DECISION PROCESSES 84, 90 (1987).

86. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2546 (2004).

87. *Id.* at 2486–91.

88. *Id.*

89. *See* Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of* Lafler *and* Frye, 41 HASTINGS CONST. L.Q. 561, 603–05 (2014); *see also* Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 992 (2005) (finding trial penalties ranging from thirteen percent to four hundred sixty-one percent, depending on the state and offense); *see generally* HUMAN RIGHTS WATCH, AN OFFER YOU CAN'T REFUSE: HOW U.S. FEDERAL PROSECUTORS

Rather, the threat of possible trial outcomes is merely an overly harsh measure that forces defendants to forgo trial rights.

B. *What Other Defendants Have Received for the Same Crime*

One other piece of information that would seem to be useful as a legitimate criterion is the sentence that is usually offered in a plea bargain for the type of crime or crimes of which that defendant is being accused. Scholars have referred to this criterion as the going "price" of the crime, and both scholars[90] and practitioner guides[91] suggest that it is a key piece of information defense counsel needs to acquire before entering plea bargain negotiations.

Clearly, defense counsel should try to acquire this information. As noted by many scholars, however, the going "price" of a crime varies by jurisdiction[92] and may not be readily available.[93] Because the negotiation of plea bargains is hidden from public view, it is difficult to acquire information on the factors that go into an individual plea bargain outcome.[94] Even so, more experienced defense counsel may have access to better information in this area,[95] and aggregate information about the "going rate" can help moderate a particular prosecutor's personal biases, including the prosecutor's passion for the case, type of crime[96] or the prosecutor's current workload.[97]

Because the going rate may be hard to acquire, defense counsel should also explore other worthwhile sources that can provide standards of legitimacy. Judges occasionally exercise their powers to offer standards that defense lawyers can use in negotiations as criteria created by respected third-party commentators on the appropriate exercise of prosecutorial discretion.[98]

FORCE DRUG DEFENDANTS TO PLEAD GUILTY (2013), *available at* http://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0_0_0.pdf.

90. Scott & Stuntz, *supra* note 23, at 1959–60; *see also* Batra et al., *supra* note 22, at 326.

91. HERMAN, *supra* note 65, at § 7.09.

92. *Id.*

93. Bibas, *supra* note 86, at 2481.

94. *Id.* at 2475. Scholars have proposed increasing transparency in plea bargaining negotiation by creating a database of plea bargaining outcomes. *See id.* at 2532; Batra et. al, *supra* note 22 at 333–35.

95. *Id.*; *see also* Batra et al., *supra* note 22 at 333 (suggesting that defense counsel from public defenders' offices have access to shared information and that lawyers also share this information over group email lists).

96. HERMAN, *supra* note 65, at § 2.02(8).

97. *See generally* Burke, *supra* note 73.

98. *See infra* Part IV.

IV. Exercises of Judicial Discretion Inform the Appropriate Use of Prosecutorial Discretion

When judges exercise the type of discretion typically assigned to prosecutors, they, as neutral and informed contributors to the legal discourse, provide insight on the way prosecutors do and should go about exercising their discretion. Judges do exercise broad discretion, but more often, statutory or common law provides standards that explain how discretion should be exercised. There are, however, times when judges temper the rigidity of the criminal law in ways that are not governed by any sort of pre-existing rule or norm. When judges do so, they engage in the same type of discretion prosecutors routinely exercise. Defense lawyers should look to the reasoning of courts when they exercise this type of discretion as a respected source on the appropriate exercise of prosecutorial discretion.

In explaining their decisions when they have power resembling prosecutors, judges provide guidance for subsequent exercises of prosecutorial power. Courts can fashion soft constraints on prosecutors by being more forward in taking opportunities to explain how they are exercising their prosecutorial-style powers.

Existing laws provide limited opportunities for judges to exercise prosecutorial-style discretion, but the opportunities do exist. *De minimis* statutes permit judges in some states to dismiss charges alleging minor infractions of laws. Judges occasionally may review a prosecutor's rationale in denying pretrial diversion. In each of these circumstances, judges have an opportunity to second-guess the decision of a prosecutor to force a citizen to answer a charge, especially where there is reason to believe that the law has not been violated.

Some judicial sentencing decisions similarly involve consideration of issues typically left to prosecutors. Under California's three-strikes law, judges may consider whether a defendant's present or past crimes were appropriately charged as felonies rather than misdemeanors. In the past, when courts departed from the Federal Sentencing Guidelines, they were required to find circumstances in the case that were unaccounted for by the broad scope of those Guidelines. In many capital sentencing schemes, appellate courts are asked whether a death sentence is proportionate to the crime, even though the aggravating factors supporting the sentence have been appropriately found. In each of these situations, courts must contemplate questions that are typically outside judicial consideration, ungoverned by legal standards, and typically left to the discretion of prosecutors.

Judges further venture into the sphere of prosecutorial discretion when they review proposed plea bargains and craft remedies for situations in which defendants have received ineffective assistance of counsel during plea bargaining. In extreme cases where judges believe prosecutors have extended too much leniency, judges may second-guess agreements crafted by the prosecutors. When judges create remedies for ineffective plea bargaining, they are forbidden to grant the defendant anything that would amount to a windfall. When defendants reject offers and go to trial because of constitutionally unreasonable advice, courts must determine which portion of the rejected plea constituted a windfall and thus must decide the extent to which instrumental and equitable decisions were part of the lost offer. To make these decisions, courts must reconstruct the motivations behind plea offers. In doing so, courts provide guidance to prosecutors regarding appropriate amounts of leniency.

The rarity of such decisions certainly limits their use as standards of legitimacy, but there is an unrealized potential for these decisions to inform negotiations. In rendering these decisions, courts offer categories of equitable factors that prosecutors ought to consider in deciding whether to grant leniency. Of course in doing so, judges are helping to define only one justification for plea offers. Prosecutors offer leniency in criminal negotiations for a variety of reasons: to hedge the risk of losing,[99] to preserve prosecutorial and judicial resources,[100] to spare victims the time and toll of testifying,[101] to obtain cooperation from the defendant,[102] and to provide a just result.[103] Judges no doubt have instrumental views in mind as they exercise

99. *See* Frank H. Easterbrook, *Plea Bargaining as a Shadow Market*, 51 DUQ. L. REV. 551, 556 (2013).

100. *See* Lucian E. Dervan, *The Surprising Lessons from Plea Bargaining in the Shadow of Terror*, 27 GA. ST. L. REV. 239, 279 (2011) (noting that "plea deals necessarily permit the government to preserve resources that may then be utilized in other cases").

101. *See* Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY, 643, 687 (2010) (observing that a district attorney indicated that her decision to accept a plea in a capital case was motivated in part to spare the victims "years of suffering"); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 80 (2005) (noting that "some crime victims sound relieved that the plea bargain spares them from the prolonged ordeal of a trial").

102. Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 1 (1992).

103. *See* Alschuler, *supra* note 72, at 53.

this discretion[104] but, by the nature of the judicial role, their decisions to grant mercy will more often be driven by equitable than instrumental considerations. Judges have no occasion to discount sentences for fear of acquittal or to prevent the toll of a trial on victims.[105] They may reward guilty pleas in order to encourage more of them as they have an interest in conserving resources,[106] but when they exercise their discretion in a way typically limited to prosecutors, their role places them in a better institutional position to evaluate the equities of a defendant's case than as an advocate against the defendant.[107]

Prosecutors are entrusted with a difficult dual role of judge and advocate in the American criminal justice system.[108] On the one hand, they are to seek results that are just, but as advocates against

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104. Federal judges, for instance, determine how much of a reduction will be granted for cooperation under U.S.S.G. § 5K1.1; *see* Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 167 (1994).

105. *See, e.g.*, Frazier v. State, 467 So. 2d 447, 449 n.5 (Fla. Dist. Ct. App. 1985) (Florida did not prohibit judges from making plea offers but "the practice . . . of 'discounting' an appropriate sentence in light of the weaknesses of the state's case or the likelihood of its losing—is one which is uniquely prosecutorial in nature and, very arguably, ought not to be engaged in by a judicial officer, who must be seen to be an objective arbiter between the two sides, with no apparent interest in the outcome of the case or, more specifically, in whether a particular defendant is convicted."). Florida and Connecticut are unique in permitting judicial participation in plea bargaining and the case law in these jurisdictions thus offers unique insights into the ways prosecutors and judges view the goals of negotiated settlements. *See generally* Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199 (2006).

106. *See The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L. J. 204, 209 (1956) (observing that judges discounted a defendant's punishment when he pled "because of the aid of his plea in the efficient administration of justice").

107. *See, e.g.*, Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2124 (1998) ("Most commonly, in all likelihood, the prosecutor simply accepts the results of the police investigation . . . ."). Judges, thus, because of their institutional position are less partial to either side. *See* Turner, *supra* note 105 at 256–66 (arguing that judicial involvement in plea bargaining can make the process more fair and accurate).

108. *See, e.g.*, Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 46 (1991) (describing dual role of prosecutors as advocates and ministers of justice). *But see*, Amie N. Ely, *Prosecutorial Discretion as an Ethical Necessity: The Ashcroft Memorandum's Curtailment of the Prosecutor's Duty to "Seek Justice,"* 90 CORN. L. REV. 237 (2004) (describing John Ashcroft's requirement that federal prosecutors pursue the "most serious, readily provable offense"); Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 TEX. L. REV. 2055, 2067–68 (2006) (observing that Ashcroft memorandum appears to have had little effect on actual charging practices of United States Attorneys' Offices).

the accused, their natural tendency is to see the defendant in the worst possible light.[109] Prosecutors may not, therefore, have the best perspective of the unique circumstances of the defendant's crime, or of facts in the defendant's background, that call for leniency. Of the reasons for granting leniency in exchange for a plea, these equitable considerations are the most important, as they relate to how the defendant should be punished.

We offer below examples of scenarios when judges have opportunities to exercise this sort of discretion, even though practically these vehicles are seldom used. Ideally, judges will increasingly exercise their authority in these areas as they recognize that their role in rendering such decisions will provide advisory criteria to the essentially unregulated power of prosecutors to charge and negotiate. Even a small number of prosecutorial-type decisions provides a basis for beginning to discuss the appropriate equitable factors to be considered in charging and bargaining decisions.

A. *De Minimis Statutes*

A substantial minority of states have statutes permitting courts to decide that a minor infraction of the law should not be prosecuted at all. Fifteen states have statutes that permit judges to dismiss prosecutions if the acts committed amount to *de minimis* infractions of the law or if dismissal would be "in the interests of justice."[110] Neither the term "*de minimis*" nor its counterpart, "interests of justice," lends itself to an obvious meaning. At least in principle, however, *de minimis* statutes give judges very broad power to dismiss a criminal prosecution when he or she deems it inequitable to proceed with the action, even though the evidence in this case is sufficient for a conviction.[111] Judges in these jurisdictions, however, rarely exercise the authority they are given under these statutes.[112]

No traditional legal standards govern a judge's ability to dismiss under these statutes. Of course, the notion of a traditional legal standard is antithetical to the idea of a *de minimis* statute. If *de minimis*

109. *See* DANIEL MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 2–3 (2012).

110. *See* James L. Buchwalder, *Dismissal of State Criminal Charges in Furtherance of, or in the Interest of, Justice,* 71 A.L.R. 5th 1 (1999); Kent Greenawalt, *Conflicts of Law and Morality—Institutions of Amelioration*, 67 VA. L. REV. 177, 231 n.118 (1981).

111. *See* Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 211 (1982) (describing *de minimis* statutes).

112. *See* People v. Schellenbach, 888 N.Y.S.2d 153, 154 (N.Y. App. Div. 2009) (observing that dismissals in the interest of justice should be rare).

statutes created rules that could be readily applied to a range of cases, then the statute would essentially redefine the meaning of criminal statutes. Courts generally dismiss cases under this statute only after considering all of the facts of the crime alleged as well as the circumstances of the defendant's life more generally.[113] In that way, legislatures direct judges to engage in precisely the sort of considerations assigned to prosecutors.[114] As two commentators have described, "*De minimis* or 'interests of justice' statutes reflect a legislative will to recognize judicial authority to oversee executive prosecutorial discretion — one example of a checks-and-balances framework with which to achieve ultimate justice."[115] Unlike prosecutors, however, judges dismissing cases under *de minimis* statutes must provide reasons for their actions and their decisions are often made public.[116] Many states expressly require judges dismissing cases under *de minimis* statutes, or under analogous rules or statutes permitting dismissals "in the interests of justice" to provide their reasons in writing.[117]

Some legislatures have shown reluctance to give judges broad discretion to dismiss *de minimis* cases. Only fifteen states have adopted *de minimis*-style statutes. Five adopted the version first developed with the American Law Institute's Model Penal Code ("MPC") in 1962.[118] Ten other states have since enacted vaguely-

113. *See* Stanislaw Pomorski, *On Multiculturalism, Concepts of Crimes and the "*De Minimis*" Defense*, 1997 BYU L. REV. 51, 53–60 (1997).

114. One Connecticut case illustrates this well. In *State v. Jimenez-Jaramill*, 38 A.3d 239 (Conn. App. 2012), the Court concluded that a trial court's decision to dismiss a prosecution in which the prosecution could obtain at most a $75.00 fine during the direct testimony of the witness violated separation of powers concerns. The trial court concluded that the minor potential fine did not justify the time and expense of a trial. The appellate court reasoned that this was an inappropriate intrusion into the province of the prosecutor as the trial court did not conclude that it was dismissing on the basis of Connecticut's *de minimis* statute and in the absence of such authority, respect for separation of powers prevented the Court from dismissing on this ground.

115. Nancy A. Wanderer & Catherine R. Connors, Kargar *and the Existing Framework for a Cultural Defense*, 47 BUFF. L. REV. 829, 846 (1999).

116. As judges are reluctant to dismiss under *de minimis* statutes, because such statutes are frequently seen as interfering with the prerogative of the prosecutor, when they choose to do so, they are likely to provide more-thorough-than-usual reasoning. *See id*. at 850 ("One judge's proper exercise of discretion is another judge's impermissible arbitrary act.").

117. Pomorski*, supra*, note 113 at 82–83; People v. Hatch, 991 P.2d 165, 171 (Cal, App. 2000); *see also* MODEL PENAL CODE § 2.12(3); ME. REV. STAT. ANN. tit. 17A, § 12(2); 18 PA. CONS. STAT. ANN. § 312(b) (West 2014). Courts have recognized that the statement of reasons need not be formalistic, but reasons must be provided. People v. Rickert, 446 N.E.2d 419, 421 (N.Y. 1983).

118. *See* Buchwalder, *supra* note 110; Kent Greenawalt, *Conflicts of Law and Morality — Institutions of Amelioration*, 67 VA. L. REV. 177, 231 n.118 (1981).

worded statutes that permit trial court judges to dismiss a prosecution "in the interests of justice."[119]

The MPC's version of the statute demonstrates the lack of traditional legal standards:

> The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:
>
> (1) was within a customary license or tolerance, neither expressly negatived by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense; or
>
> (2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
>
> (3) presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.
>
> The Court shall not dismiss a prosecution under Subsection (3) of this Section without filing a written statement of its reasons.[120]

Even the drafters of these provisions were unsure exactly how to describe the appropriate operation of the terms they had drafted. In the MPC commentary, the drafters of the *de minimis* statute concluded that the first provision is essentially a variation of the defense of consent.[121] Professor Wechsler offered two examples of circumstances to which this defense would apply: trespassing on land where the owners traditionally permitted strangers to pass and picking up a newspaper from a stand lacking the ability to pay with the intention of paying the following day.[122] As Professor Staislaw Pomorski recognized, however, the defense of consent is provided in another provision of the Model Penal Code and provides all that is needed to provide a defense for the acts described by Professor Wechsler.[123]

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119. *See* Buchwalder, *supra* note 110; *see also, e.g.*, CAL. PENAL CODE § 1385 (West 2015) ("The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in the furtherance of justice, order an action to be dismissed.")

120. MODEL PENAL CODE § 2.12.

121. MODEL PENAL CODE AND COMMENTARIES, § 2.12 cmt. 2 at 402 (1985).

122. MODEL PENAL CODE AND COMMENTARIES, § 2.12 cmt. 2 at 402 (1985); *see also* PAUL H. ROBINSON, CRIMINAL LAW DEFENSES, § 67(b), at 323 (1984).

123. *See* Stanislaw Pomorski, *On Multiculturalism, Concepts of Crimes and the "*De Minimis*" Defense,* 1997 BYU L. Rev. 51, 54–55.

Professor Pomorski concluded that this defense must be described as society's willingness to tolerate the defendant's conduct, not the victim's.[124]

While the drafters of the statute were unclear about the meaning of the model statute they created, they were much clearer about the purpose of the statute. Herbert Wechsler, the principal author of the Model Penal Code, described the *de minimis* statute as giving judges an opportunity to engage in the prosecutorial function of deciding that even though a prosecution *may* be brought, it *should* not be brought:

> Nothing is more common in criminal law enforcement, of course, than the exercise on the part of the prosecutor — and grand juries, where they exist — of a kind of unarticulated authority to mitigate the general provisions of the criminal law to prevent absurd applications. Currently, this decision occurs in *in camera* or an out-of-court process. Although this general practice is generally accepted as necessary to criminal law administration, it has been a general purpose of the Code to bring this practice somewhat further into the open. The only way to do that seems to be to vest in the court a kind of power analogous to the general dispensing power which is now exercised in practice by the organs of administration.[125]

Certainly the Model Penal Code did not transfer power to judges to exclusively determine whether a prosecution should be declined. In what sense, then, did the power of a judge to decide that a particular case should not be brought bring prosecutorial discretion "out in the open"? It is possible that Wechsler meant for the provision to serve a public relations function alone. In dismissing cases under the *de minimis* statute, perhaps he meant for courts to explain what prosecutors do in most cases, but chose not to do in this particular case. It seems more likely, however, that Wechsler intended this statute to provide a public forum to publicly discuss the appropriate exercise of discretion by prosecutors when they consider declining a particular case. The effect of such a statute is to provide a venue for judges to discuss when prosecutors should and should not bring charges.

With similar effect to the MPC's *de minimis statute*, ten states have provisions that permit criminal prosecutions to be dismissed "in the interests of justice."[126] New York's provision, for instance, is

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124. *Id.*

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

126. *See* MINN. STAT. ANN. § 631.21 (West 2015); MONT. STAT. ANN. § 46-13-401 (West 2013); WASH. REV. CODE tit. 10, § 8.3 (2008); OR. REV. STAT. tit. 14 § 135.755 (2015); CAL. PENAL CODE § 1385 (West 2015); ALASKA R. CRIM. P. 43(c) (2014); IDAHO

multi-faceted, resembling the judicial interpretation of the *de minimis* statute in other states. In New York, a prosecution can be dismissed in the interests of justice after a consideration of:

> (1) the seriousness and circumstances of the offense;
> (2) the extent of harm caused by the offense;
> (3) the evidence of guilt, whether admissible or inadmissible at trial;
> (4) the history, character and condition of the defendant;
> (5) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;
> (6) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
> (7) the impact of a dismissal on the safety or welfare of the community;
> (8) the impact of a dismissal upon the confidence of the public in the criminal justice system;
> (9) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;
> (10) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.[127]

As with *de minimis* statutes, there have been few cases of dismissing charges in the interests of justice. Entire cases, however, have been dismissed "in the interests of justice." When crimes are relatively minor, courts have demonstrated (an admittedly rare) willingness to dismiss cases where: (1) defendants lack criminal history;[128] (2) the defendant nearly missed having a defense;[129] (3) the defendant was suffering from a terminal disease;[130] (4) the defendant

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R. CRIM. P. 48(a)(2) (1979); N.Y. CRIM. PRO. § 210.40 (1986); UTAH R. CRIM. P. 25 (2014); VT. R. CRIM. P. 48(b)(2) (2014); Wanderer & Connors, *supra* note 115 at 829 n.67.

127. McKinney's Crim. P. L. § 210.40 (N.Y.)

128. *See* People v. James, 415 N.Y.S.2d 342 (N.Y. Crim. Ct. 1979) (prostitution case); People v. Ben Levi, 595 N.Y.S.2d 404 (N.Y. Crim. Ct. 1990) (protestors causing no harm).

129. People v. AT, 589 N.Y.S.2d 980 (N.Y. Crim. Ct. 1992) (defendant distributed hypodermic needles without drugs in them to prevent the spread of disease).

130. People v. Herman L., 639 N.E.2d 404 (N.Y. 1994) (sale of controlled substance by HIV-positive defendant); People v. Camargo, 516 N.Y.S.2d 1004 (N.Y. Sup. Ct. 1986) (sale of drugs by now-bedridden HIV-positive defendant). *But see* People v. Sherman, 825 N.Y.S.2d 770 (N.Y. App. Div. 2006) (no evidence that defendant's serious medical condition was deteriorating and defendant had extensive criminal record); People v. Pender, 593 N.Y.S.2d 447 (N.Y. Sup. Ct. 1992) (felony charges should not be dismissed as a result of even terminal illness as this would provide a license for terminally ill to commit crimes); People v. Sierra, 566 N.Y.S.2d 818 (N.Y. Sup. Ct. 1990) (fact that defendant resumed drug sales after being diagnosed with AIDS virus

suffered from a medical condition that offered some explanation for the crime;[131] (5) the defendant's medical condition rendered the trial of the case difficult;[132] (6) the parties have reconciled;[133] (7) the facts of the case did fit the crime as traditionally understood.[134] Despite the claimed effects that a conviction would have on an otherwise successful career, courts have, with some frequency, considered but rejected requests to dismiss less-than-serious crimes in the interests of justice in these situations.[135]

The difficulty in defining a standard for dismissing less-than-serious infractions of the law certainly does not mean that there are not cases that judges should dismiss — and reasonable prosecutors should not charge in the first place. Rather, the difficulty in creating a legal standard to identify these cases merely demonstrates that *de mimimis* statutes entrust courts with the same sort of difficult-to-define discretion given to prosecutors. Easy cases for dismissal, however, are not hard to imagine. Historically, prosecutions of unmarried adults under the Mann Act for crossing state lines to have sex could have been appropriately dismissed under the *de minimis* statute as society has long tolerated this conduct.[136]

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suggested that he would not be able to restrain himself from criminal conduct in the future); People v. Murray, 634 N.Y.S.2d 985 (N.Y. Sup. Ct. 1985) (defendant was not in advanced stage of the disease).

131. People v. Doe, 602 N.Y.S.2d 507 (N.Y. Crim. Ct. 1993) (defendant had impaired hearing and severe learning disability that caused her to believe she needed to defend her sister).

132. People v. Reets, 597 N.Y.S.2d 577 (N.Y. Sup. Ct. 1993) (defendant's impaired hearing would have made it difficult to try this non-serious case).

133. State v. Busch, 669 N.E.2d 1125 (Ohio 1996); Commonwealth v. Hatfield, 593 A.2d 1275 (Pa. Super. Ct. 1991).

134. People v. Sales, 563 N.Y.S.2d 825 (N.Y. App. Div. 1991) (defendant, charged with robbery, took small amount of food from officer undercover as delivery man and made obscene gesture); People v. Felderman, 852 N.Y.S.2d 748 (N.Y. Crim. Ct. 2008) (principal interfered with officer trying to arrest student to get officer to take student out back door of school to avoid disruption to school and embarrassment of student); People v. Schaker, 670 N.Y.S.2d 308 (N.Y. Dist. Ct. 1998) (injury in "no checking" hockey game after buzzer).

135. People v. Crespo, 665 N.Y.S.2d 676 (N.Y. App. Div. 1997) (defendant accused of robbery had recently joined Marine Corps); People v. Figueroa, 625 N.Y.S.2d 839 (N.Y. Crim. Ct. 1995); People v. Kelley, 529 N.Y.S.2d 855 (N.Y. App. Div. 1988) (police officer charged with driving while intoxicated); People v. Stern, 372 N.Y.S.2d 932 (N.Y. Crim. Ct. 1975) (successful real estate broker claimed he had much to lose in a criminal conviction); State v. Stough, 939 P.2d 652 (Or. Ct. App. 1997) (holding that trial court improperly dismissed heroin charge in the interests of justice based on defendant's status as Vietnam veteran).

136. 36 Stat. 825 (1910); 18 U.S.C. § 397–404; *see also* Note, *Interstate Immorality: The Mann Act and the Supreme Court*, 56 YALE L.J. 718 (1947) (describing act).

Although the statute was clearly intended to prevent trafficking of prostitutes, the plain language of the statute covered conduct that was hardly criminal at the time of drafting and is certainly not criminal today.[137] Indeed, prosecutions of consenting adults under this statute were extraordinarily rare even in the early days of the statute and are non-existent in the past few decades.[138] A modern example of a case that could be dismissed under this provision is a child pornography prosecution for sexting (sending nude images via text) by an underage person to an underage romantic partner.[139] Possession of such images carries substantial penalties under the strict letter of

137. *See* Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 33 (1996) ("A principal motive for passage of the Mann Act, for example, was not simply that white women were being tricked, drugged, and kidnapped into prostitution, as anti-white slavery activists contended, but also that they were being forced into prostitution where they would be used for the benefit of at least some black men.").

138. One of the rare prosecutions of consenting adults under the Mann Act reveals that the statute was used as a pretext to enforce other societal mores. Jack Johnson was a prominent and wealthy African-American boxer who, well before interracial relationships were accepted, had relationships with Caucasian women. He was successfully prosecuted under the Mann Act for taking a trip to Florida with his fiancée, a woman he later married. *See generally* THOMAS R. HIETALA, THE FIGHT OF THE CENTURY: JACK JOHNSON, JOE LOUIS AND THE STRUGGLE FOR RACIAL EQUALITY (2002); Denise C. Morgan, *Jack Johnson: Reluctant Hero of the Black Community*, 32 AKRON L. REV. 529 (1999). This story is the subject of a wonderful documentary by Ken Burns entitled *Unforgiveable Blackness: The Rise and Fall of Jack Johnson*, and Sen. John McCain has lead an effort to have Johnson pardoned. *See* Barak Y. Orbach, *The Johnson-Jeffries Fight 100 Years Thence: The Johnson-Jeffries Fight and Censorship of Black Supremacy*, 5 NYU J.L. & LIBERTY 270, 272–73 n.7 (2010).

When constitutional rights are implicated by the state's decision to punish, courts have looked at the rarity of enforcement as a factor suggesting the illegitimacy of the punishment. *See, e.g.*, Graham v. Florida, 560 U.S. 48 (2010) (life without parole for juveniles violates Eighth Amendment); Roper v. Simmons, 543 U.S. 551 (2005) (execution of juveniles contrary to Eighth Amendment); Atkins v. Virginia, 536 U.S. 304 (2002) (execution of mentally retarded contrary to Eighth Amendment); Lawrence v. Texas, 539 U.S. 558 (2003) (rarity of enforcement of sodomy laws factor in concluding punishing private conduct is unlawful); Coker v. Georgia, 433 U.S. 584 (1977) (death penalty for rape violates the Eighth Amendment as only two states have retained it).

139. *See* W. Jesse Weins & Todd C. Hiestand, *Sexting, Statutes, and Saved By the Bell: Introducing a Lesser Juvenile Charge With an "Aggravating Factors" Framework*, 77 TENN. L. REV. 1, 4–16 (2009). In a particularly egregious case, prosecutors in Manassas, Virginia charged a seventeen year old with possession of child pornography for sending a naked video of himself to his fifteen year old girlfriend after she sent similar pictures to him. While there have been a handful of cases charged this way throughout the country, this case was particularly outrageous because prosecutors obtained a warrant to take a picture of the young man's erect penis and, to ensure the erection, the court order they successfully sought permitted him to be injected with a substance to guarantee the arousal desired for the photo comparison. *See* Tom Jackman, *In 'Sexting' Case Manassas City Police Want to Photograph Teen in Sexually Explicit Manner, Lawyers Say*, WASH. POST, July 9, 2014.

the law, and despite the pervasiveness of the conduct, a few prosecutors have actually sought felony charges for child pornography for the sender and/or receiver of these images.[140]

Courts considering requests to dismiss under *de minimis* statutes often consider the totality of the circumstances, precisely the sort of analysis that typifies prosecutorial charging and plea bargaining decisions. Even though the second prong of the *de minimis* statute considers only the seriousness of threatened or actual harm related to the offense, courts applying this provision frequently look to every aspect of the crime as well as the defendant's general background.[141] A New Jersey Superior Court concluded that "[e]very surrounding fact is entitled to consideration, not for its sympathetic import, but for such legitimate influence it may have in honoring legislative intent."[142] The Hawaii Supreme Court reversed a trial court's decision to dismiss a case under the *de minimis* statute because the lower court had not considered all of the factors that must be considered.[143] Those factors, developed by Court to interpret the vague Hawaii law, included:

> (1) the defendant's background, experience, and character as indications of whether he or she knew or should have known the law was being violated,
> (2) the defendant's knowledge of the consequences of the act,
> (3) the circumstances surrounding the offense,
> (4) the harm or evil caused or threatened,
> (5) the probable impact on the community,
> (6) the seriousness of the punishment,
> (7) possible improper motives of the prosecutor, and
> (8) any other information that may reveal the nature and degree of culpability.[144]

The vague language of the *de minimis* statute has left courts to consider this wide variety of factors, which certainly do not form the sort of legal test that a court typically considers outside the context of

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140. Interestingly, some of these prosecutions were initiated in Pennsylvania that has a *de minimis* statute, but none of the cases appear to have been dismissed on this ground. *See generally* Weins & Hiestand, *supra* note 139.

141. Two other approaches are also used. One approach looks only to the harm caused, or potentially caused, by the crime. The other looks at the harm caused, or potentially harmed, and the defendant's *mens rea*. *See* Pomorski, *supra* note 121 at 98.

142. State v. Smith, 480 A.2d 236, 239 (N.J. Super. Ct. Law Div. 1984).

143. State v. Park, 525 P.2d 586, 591 (Haw. 1974).

144. *Id.*

sentencing.[145] Instead, these are precisely the sort of factors that prosecutors consider in deciding whether to bring charges, how serious the charges should be, and what sort of plea bargain to offer.

The limited universe of cases dealing with *de minimis* statutes has produced little consistency, but a number of equitable principles have seemed to emerge. Thus far, courts have used these vague standards to dismiss less-than-serious cases where: (1) there is a debatable question as to whether the facts constitute a crime at all;[146] (2) the effect conviction for a minor crime would have on the life of a productive citizen;[147] (3) the role the victim played in the minor offense;[148] (4) the appropriateness of handling this matter in criminal, as opposed to civil court;[149] (5) non-criminal consequences a

145. *See* Fallon, *supra* note 1, at 1287–93. Capital sentencing juries are required to consider such a broad range of factors in mitigation. *See* Emily Hughes, *Arbitrary Death: An Empirical Study of Mitigation*, 89 WASH. U. L. REV. 581, 590 (2012) (describing *Lockett v. Ohio*, 438 U.S. 586 (1978) which permits defendants to present any evidence in mitigation of capital sentencing).

146. State of New Jersey v. Bazin, 912 F. Supp. 106 (D.N.J. 1995) (defendant verbally harassed victim); Commonwealth v. Houck, 335 A.2d 389 (Pa. Super. Ct. 1975) (charge of using "lewd, lascivious, or indecent words or language" for saying in a phone call that alleged victim was "lower than dirt," "morally rotten," and ought to be kicked out of his church and the Masons).

147. State v. Zarilli, 523 A.2d 284 (N.J. Super. Ct. Law Div. 1987) (defendant shoplifted bubble gum; court should consider "the value to society of a citizen who is not tainted with a conviction of criminal or disorderly conduct"); State v. Smith, 480 A.2d 236, 239 (N.J. Super. Ct. Law Div. 1984).

148. State v. Nevens, 485 A.2d 345 (N.J. Super. Ct. Law Div. 1984) (casino employees rushed customer in all you-can-eat buffet to leave, prompting him to take a piece of fruit); Commonwealth v. Moll, 543 A.2d 1221 (Pa. Super. Ct. 1988) (noting feud between defendant and local township over drain pipe that defendant had to puncture to prevent flooding of his property).

149. Moll, 543 A.2d at 1225 (observing that this matter would be best handled in civil court). There is another explanation to the *Moll* case. In *Moll*, the defendant intentionally cut a hole in a poorly functioning drain pipe that the city installed on his property to prevent flooding on his own property. The defendant argued that he did not cut the pipe with malice, meaning that he committed the act to preserve his own property, not to injure city's property. The court observed that there is no accepted definition of malice and that the statute required only an intentional or reckless act and the defendant admitted cutting a drain pipe he knew to have been installed by the city. In essence, the defendant was arguing that something like the necessity defense negated malice. Professor William Stuntz has suggested that vague terms such as malice gave judges and juries discretion that they lack under the Model Penal Code to balance the harshness of the law. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF THE AMERICAN CRIMINAL JUSTICE SYSTEM 266–67 (2011). The defendant unsuccessfully made a similar claim in *State v. Forrest*, 362 S.E.2d 252 (N.C. 1987), that his intentional shooting of his dying father in the hospital was not done with malice. In the limited context of minor cases, the *Moll* case seems to stand for the proposition that malice does provide judges' discretion to take individual circumstances into consideration.

defendant would otherwise suffer;[150] (6) the absence of threatened or actual physical harm; (7) necessity due to financial hardship;[151] or (8) the defendant's criminal activity was related to his drug use.[152] These cases can be used by defense lawyers to identify grounds for encouraging prosecutorial leniency.

Not surprisingly, courts have reached very different conclusions on whether similar cases should be dismissed.[153] Even when rules provide substantial guidance, reasonable jurists can do disagree on the proper outcome.[154] The presence of inconsistent judicial opinions obviously undermines the persuasive authority of these opinions for prosecutors. However, there is still real value to having inconsistent opinions. Dissenting voices in the law are not without significance. Often appellate courts contain dissenting opinions that resonate despite majority opinions to the contrary. A judicially-announced opinion describing an appropriate basis for prosecutorial leniency, even if other judges have a different view, provides grounding for a defense lawyer's argument for mercy.

B. *Three-Strikes Laws*

While courts have rarely considered the application of *de minimis* statutes, or statutes permitting dismissal in the interests of justice, California courts have frequently considered whether one of the defendant's felonies ought to count toward his sentencing under

150. Commonwealth v. Jackson, 510 A.2d 1389 (Pa. Super. Ct. 1986) (inmates who obstructed the ability of correctional officers to respond to a stabbing could be adequately addressed by discipline within the prison).

151. People v. Perez, 553 N.Y.S.2d 659 (N.Y. App. Div. 1990).

152. People v. Ortiz, 544 N.Y.S.2d 204 (N.Y. App. Div. 1989); People v. Anderson, 612 N.Y.S.2d 21 (N.Y. App Div. 1994).

153. *See* Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. LEGIS. 393, 431–32 (1988) (observing that courts have arrived at polar opposite conclusions in evaluating the *de minimis* statute).

154. The United States Supreme Court, for instance, typically agrees to hear cases only after a circuit conflict has developed, meaning that judges, who have been appointed by the President and approved by the Senate, to occupy the second-highest judicial positions in the nation, have arrived at different conclusions about the law. *See* Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 TEX. L. REV. 1251, 1253 (1989) (observing that "the existence of a conflict remains the key factor in the certiorari decision.").

its three-strikes law.[155] While California's three-strikes law has gotten the most attention, at least three other states have adopted provisions that give trial judges similar discretion to determine whether mandatory minimums apply.[156]

Three-strikes provisions, which mandate substantial minimum penalties for a defendant's third felony conviction, have existed in the United States since the 1960s, long before California's three-strikes law began attracting national attention.[157] Predecessors to California's law were in fact much more draconian and afforded sentencing judges no discretion to give the defendant anything other than life in prison once the third felony had been charged and proven beyond a reasonable doubt.[158]

Despite being less draconian than its predecessors, California's three-strikes law is perhaps the best known. This notoriety may stem from the Golden State's high-profile crime policy and the Eighth Amendment challenge of the law before the Supreme Court.[159] Before *Ewing v. California*, the Supreme Court twice considered far less forgiving three-strikes statutes: *Oyler v. Boles*[160] and *Bordenkircher v. Hayes*.[161] In *Oyler*, the Court determined that a three-strikes law was

155. One commentator has concluded that California courts have rarely found one of the strikes should not count toward sentencing. *See generally* Alex Ricciardulli, *The Broken Safety Valve: Judicial Discretion's Failure to Ameliorate Punishment Under California's Three Strikes Law*, 41 DUQ. L. REV. 1 (2002). The universe of cases, even in this single jurisdiction, however, seems considerably greater than the number of cases nationally dismissing cases in the interests of justice, or under analogous *de minimis* statutes.

156. *See* Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 465–68 (1997); CONN. GEN. STAT. ANN. § 53a–40 (West 2008); FLA. STAT. ANN. § 775.084 (West 2012).

157. *See* Austin Sarat & Conor Clarke, *Beyond Discretion, Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 396–97 (2008) (describing the *Oyler* case).

158. *See* STUNTZ, *supra* note 13 at 257–58.

159. *See* Michael Vitiello, *California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?*, 37 U.C. DAVIS L. REV. 1025, 1026 (2004) (observing that "[f]rom its inception California's Three Strikes Law has gained national attention."); John E. Pfaff, *The Continued Validity of Structured Sentencing Following* Blakely: *The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235, 245 (2006) (noting high profile of three strikes laws generally but observing that California is the only state to regularly apply this law). There are other reasons why California's law has received so much notice. Some 40,000 inmates in California have had their sentences enhanced as a result of this law. Justice Anthony Kennedy has described the political process that led to the three-strikes law as "sick." *See* Michael A. Romano, *Divining the Spirit of the Three Strikes Law,* 22 FED. SENT'G. REP. 171, 172 (2010).

160. Oyler v. Boles, 368 U.S. 448 (1962).

161. Bordenkircher v. Hayes, 434 U.S. 357 (1978).

constitutional even though the facts presented to the Court suggested that only a small minority of eligible defendants received third-strike enhancements and the defendant's case seemed less aggravated than those not receiving enhancement.[162] In *Bordenkircher*, the Supreme Court found it constitutional for a prosecutor to threaten a third-strike enhancement if a defendant did not accept five years of hard-labor for a relatively minor third offense.[163] Under the statutes at issue in *Oyler* and *Bordenkircher*, judges had no discretion to decide that a defendant who had three felony convictions should receive anything other than a life sentence.[164]

In contrast, the Supreme Court explained in *Ewing v. California* that under California's three-strikes law, judges have extraordinary discretion to determine whether the current offense, or any of the prior offenses, should count toward the three strikes.[165] In *Ewing,* the trial court did not exercise its discretion to reduce the felony charge for theft of $1200 worth of golf clubs to a misdemeanor, which would have avoided the twenty-five year mandatory minimum sentence slated for this offense.[166]

Under California's three-strikes law, if a defendant has prior "serious" or "violent" felony convictions, then the defendant is sentenced to twice the penalty he or she would have otherwise received.[167] If a defendant has two or more of such prior convictions, then the defendant is sentenced to "an indeterminate term of life imprisonment," with parole eligibility after the greater of: (1) three times the term provided for the current offense, (2) twenty-five years, or (3) the length of time determined by the court based on certain statutory enhancements.[168] Prosecutors are required to allege these prior convictions in the charging document in order for these sentencing enhancements to apply.[169]

But California judges are not required to sentence defendants under the enhanced penalties provided by the three-strikes law. A sentencing judge may conclude that "in light of the nature and circumstances of [the defendant's] present felonies and prior serious

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162. *See* Ted Sampsell-Jones, *Detention, Character Evidence, and the New Criminal Law*, 2010 UTAH L. REV. 723, 741 (2010) (observing that California Legislature was aware of *Oyler* at the time it enacted its Three Strikes law).

163. *See* Bordenkircher, 434 U.S. at 364.

164. *See* Oyler, 368 U.S. at 456; Bordenkircher, 434 U.S. at 364–65.

165. Ewing v. California, 538 U.S. 11, 28–29 (2003).

166. *Id.* at 16.

167. *Id.*

168. *Id.*

169. *Id.*

and/or violent prior felonies, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [three-strike'] scheme's spirit, in whole or in part."[170] Unlike the other types of judicially-exercised prosecutorial discretion, such as the power to dismiss under *de minimis* statutes or the power to review death sentences for proportionality, the California legislature did not expressly grant judges the power to discount one of the strikes leading to a stringent mandatory minimum penalty. Instead, the California Supreme Court inferred that it had such power from another, *de minimis* type statute that allowed a court to dismiss a criminal action "in the furtherance of justice" on its own motion.[171] The California court reasoned that if a court had the power to dismiss a case, it had the "lesser power" to not consider a previous conviction for the purpose of sentencing.[172]

Trial court opinions provide the best source for informing the appropriate use of prosecutorial discretion. While there has been criticism of the California courts for frequently allowing all prior and current convictions to count toward the three strikes required to trigger draconian mandatory minimums, trial courts have certainly exercised their discretion to strike priors more readily than they have dismissed cases under *de minimis* statutes. Appellate courts in California have concluded that trial courts have abused their discretion by not counting prior strikes, thus eliminating the mandatory minimum penalties.[173] Interestingly, the appellate courts have yet to conclude that a trial court abused its discretion in finding that all three strikes appropriately applied to a defendant.[174]

Even though the power to not consider one or more of a defendant's priors derives from a trial court's power to dismiss a case in the interests of justice, California courts do not base this decision on whether the prosecution leading to the strike should have been thwarted. Instead, the California Supreme Court in *Williams* instructed lower courts that they were not to consider one or more of the strikes if the defendant's "character, background, and prospects" place him "outside the spirit of the three strike law."[175]

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170. *Id.* at 17.

171. People v. Superior Court (Romero), 917 P.2d 628, 629–30 (Cal. 1996) (quoting CAL. PENAL CODE § 1385).

172. *Id.*

173. *But see* People v. Garcia, 976 P.2d 831, 835 (Cal. 1999).

174. Romano, *supra* note 159, at 171.

175. People v. Williams, 948 P.2d 429 (Cal. 1998).

While California is the most well-known of the states to have three-strikes legislation, many states gives courts this kind of discretion. Twenty-three states have two-, three-, or four-strike provisions, more commonly known as habitual offender laws.[176] Just as in California, these states proscribe sentencing based not only on the seriousness of the charged offense but also on an offender's criminal history. Like California, courts in these states have taken on a degree of discretion regarding how these statutes should be applied. For example, in Florida and Connecticut, courts will not impose a sentence enhancement for a third strike if it does not serve the public interest.[177] In Louisiana, the courts will not apply the three strikes provision if it would violate the constitutional protection against excessive punishment.[178]

This standard resembles the traditional exercise of prosecutorial power. The court evaluates whether the circumstances of the offense warrant a non-felony charge, or something is so redemptive about the defendant that the prosecution should not have sought the enhanced punishment for the second or third strike. Professor Michael Romano, commenting on the three-strikes sentencing scheme, has observed "the startling breadth of discretion it bestows on trial judges."[179] "Standards for wielding this discretion," he noted, "are astonishingly vague."[180] Precisely because of this lack of standards, the trial court's discretion in three-strike laws is like the type of discretion wielded by prosecutors.

Predictably, such vague standards produce inconsistent results. In *State v. Alvarez*, the trial court did not consider the defendant's four prior convictions for residential burglary when sentencing him for possession of less than one-half a gram of methamphetamine.[181] The trial court's rationale largely turned on the inappropriateness of a twenty-five year sentence for this crime.[182] Absent the three-strikes law, the trial judge was able to sentence the defendant to one year in prison followed by three years unsupervised probation.[183]

However, the trial court in *Foroutan* did not dismiss any of the defendant's prior strikes in a very similar case. Ali Foroutan had

176. Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 463 (1997) (see appendix A).
177. *Id.* at 463–80.
178. *Id.* at 468.
179. Romano, *supra* note 159, at 171.
180. *Id.*
181. People v. Superior Court (Alvarez), 928 P.2d 1171, 1177–78 (Cal. 1997).
182. *Id.*
183. *Id.* at 1174.

committed three non-violent residential burglaries and was arrested in a motel room on suspicion of having just burglarized his friend. He was found in possession of 0.03 grams of methamphetamine. The jury convicted Foroutan on the possession charge but not the burglary charge. Refusing to dismiss the defendant's prior strikes, or regard his current crime as a misdemeanor for sentencing purposes, the judge sentenced Ali Foroutan to life.[184]

California trial courts, which have the final say on whether the enhanced penalties under the three-strikes law ought to apply, have looked to a variety of considerations including: (1) the defendants degree of involvement in the current and previous crimes;[185] (2) the nature of the current and previous offenses;[186] (3) whether priors suggest isolated episodes or a pattern of recidivism;[187] (4) in drug cases, the amount of drugs involved;[188] (5) the defendant's performance on parole;[189] and (6) contrition.[190] These sorts of considerations are, of course, relevant to how defendants should be charged for all sorts of crimes. Thus, in deciding whether a crime should be considered a strike, judges provide guidance on the equitable issues involved in the challenged offense. Prosecutors should consider this

184. Understandably, Professor Romano decries the inconsistency of these results. From a larger perspective, however, the situation could be far worse (though we don't deny the comparative injustice done to Ali Foroutan). The interpretive gloss California courts have placed on the three-strikes law obviously gives judges the power to second-guess the decision of prosecutors seeking very serious mandatory minimums. These decisions are publicly announced, as are their reasons. The inconsistent results in *Alvarez* and *Foroutan* have no doubt prompted a public conversation about which result was correct. This public discourse itself creates a standard of legitimacy for prosecutors on how to handle future cases involving small amounts of drugs. Under a scheme where judges lack discretion, as was the case in *Oyler v. Boles,* the prosecutor was not required to provide any reasoning for the decision to request a mandatory life sentence. Michael Romano, *Striking Back: Using Death Penalty Cases to Fight Disproportionate Sentences Under California's Three Strikes Laws*, 21 STAN. L. & POL'Y REV. 311, 344–45 (2010).

185. People v. Rivers, No. H024161, 2003 WL 1685754, at *1 (Cal. Ct. App. Mar. 28, 2003) (embezzlement of $3500 was minor relative to typical embezzlement cases). The Tennessee Supreme Court considered a similar argument in reviewing a denial of pretrial diversion. State v. Curry, 988 S.W.2d 153 (Tenn. 1999).

186. People v. Williams, 948 P.2d 429, 433–34 (Cal. 1998).

187. People v. Garcia, 976 P.2d 831 (Cal. 1999).

188. People v. Crabb, No. F037855, 2002 WL 31013805, at *1 (Cal. Ct. App. Sept. 9, 2002) (trial court observed that a small amount of drugs, especially when for personal consumption, should not be consider as a strike).

189. People v. Anzaldua, No. H022568, 2002 WL 1723989, at *8 (Cal. Ct. App. July 25, 2002) (observing that defendant was married and had done well on parole).

190. People v. Webster, 2004 WL 1354258 at *3 (Cal. App. June 17, 2004) (observing that other trial judges could find defendant's contrition sufficient to strike felony).

guidance when charging defendants and in plea bargaining negotiations.

More recently, California courts have provided guidance to prosecutors in interpreting the three-strikes law in another way. The California high court softened the three-strikes law by clarifying that each "strike" must occur as part of a different offense.[191] In a case where a woman had been charged with two felonies — carjacking and robbery — for the same offense of stealing a car, the court found that she could only be charged with a single "strike."[192] As the court explained, "[t]he public . . . would have understood that no one can be called for two strikes on just one swing."[193] This opinion provides one possible view of how prosecutors ought to charge. At a general level, prosecutors should not charge two crimes that allege the same facts even if double jeopardy does not prohibit both charges. As a specific application to this rule, this decision strongly suggests that prosecutors should not charge both robbery and carjacking. Rather than imposing such a limitation via the inflexible and heavy-handed double jeopardy clause, this decision offers an advisory opinion on the appropriateness of such charges.

Three-strikes laws thus vest courts with this sort of discretion invite courts to use the same sort of reasoning prosecutors use in deciding how to charge, providing a basis for courts to comment on the appropriate use of prosecutorial discretion — and an opportunity for negotiators to point to a neutral authority on charging decisions.

C. *Review of Denials of Pretrial Diversion*

When judges exercise prosecutorial-like discretion, they generally do so to limit the power of prosecutors. In the handful of jurisdictions that permit judicial review of prosecutorial denials of pre-trial diversion, courts are not looking so much at the substance of these decisions as much as the process.[194] Pretrial diversion is a procedure

191. Sharon Bernstein, *California High Court Softens 'Three Strikes' Law*, REUTERS, July 15, 2014, http://www.reuters.com/article/2014/07/15/us-usa-california-crime-idUSKBN0FK2NZ20140715.

192. *Id.*

193. *Id.*

194. A few states have expressly recognized the power of courts to review at least some aspect of a prosecutor's denial of pretrial diversion. *See* Flynt v. Commonwealth, 105 S.W.3d 415 (Ky. 2003); State v. Foss, 556 N.W.2d 540 (Minn. 1996); Commonwealth v. Stranger, 575 A.2d 930 (Pa. Super. Ct. 1990). The bulk of the cases on this issue, however, have come from two states, New Jersey and Tennessee. *See* Debra T. Landis, Annotation, *Statute or Court Rule Authorizing Suspension or Dismissal of Criminal Prosecution on Defendant's Consent to Non-Criminal Alternative*, 4 A.L.R.4th 147 (1981).

by which a defendant is placed on a period of probation, after which the charges against him are dismissed and his record expunged.[195] These courts ensure that prosecutors have considered all the appropriate factors, and, to a lesser extent, gave these factors due weight before rejecting a requested diversion. Courts in these jurisdictions require prosecutors to consider these factors in writing. Prosecutors are thus required by courts to establish their own criteria for how their discretion ought to be exercised.

New Jersey, for instance, explains that its diversion program is designed to provide an alternative to traditional prosecution in "victimless" crimes, where the defendant would be harmed by the imposition of criminal sanctions, and the alternative to traditional punishment would not undermine deterrence of the crime.[196] Even though prosecutors generally have an absolute right to bring, or not bring, a case supported by probable cause,[197] courts have accepted legislative invitations to supervise the manner in which prosecutors choose to exercise their discretion to deny requests for pretrial diversion.

Courts reviewing a prosecutor's decision to deny a defendant pretrial diversion ensure that prosecutors have examined a variety of factors in arriving at this decision and, to a lesser extent, ensure that the prosecutor's conclusions based on these factors are not unreasonable. The primary result of this particular type of judicial oversight has been to compel prosecutors to act more like judges. To provide a sufficient record for review, courts require prosecutors to put their decisions into writing. When prosecutors draft these decisions, they record their reasoning in writing, much as judges do.[198] Judicial oversight in this context therefore forces prosecutors to define the standards of legitimacy that judges define in other contexts when they exercise prosecutorial-type discretion.

Unlike when they apply *de minimis* statutes, courts generally do not conclude that a prosecutor reached the incorrect decision when they reject the decisions of prosecutors to deny pretrial diversion.

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195. *See* Note, *Pretrial Diversion from the Criminal Process*, 83 YALE L. J. 827, 827 (1974).

196. N.J.S.A. 2C: 43–12 (2014).

197. *See* Bennett L. Gershman, *Prosecutorial Decisionmaking and Discretion in the Charging Function*, 62 HASTINGS L. J. 1259, 1261, 270 (2011) (describing ABA ethics standard).

198. An applicant who is denied diversion is entitled to an adequate written explanation by the prosecutor for the prosecutor's refusal to consent to diversion. *See, e.g.*, Sledge v. Superior Court of San Diego County, 520 P.2d 412 (Court 1974); State v. Leonardis, 363 A.2d 321 (Court 1976).

Courts rarely second guess the substantive determinations of prosecutors when they review their decisions to deny diversion. They do, however, review *how* prosecutors arrived at their decision, and they review the considerations used by prosecutors.

The basis for judicial oversight of a prosecutor's decisions on pretrial diversion rests upon the notion that prosecutors are in essence engaging in a type of sentencing when granting diversions.[199] The defendant's probationary period occurs under judicial supervision and operates essentially as a suspended sentence — if the defendant violates the terms of the diversionary program, a conviction will be entered and the defendant punished under it.[200] Of course, absent a statute of limitations, a prosecutor could achieve the same result by dismissing a case with the threat that the case would be reinitiated if the defendant failed to maintain a certain standard of conduct. The court's involvement in the decision process does not compel judicial oversight of a prosecutor's diversion.

Legislatures have not been clear in assigning courts the task of overseeing the work of prosecutors in this context.[201] Nevertheless, courts have used largely vague statutory authority to require prosecutors to explain the reasons for denying diversions. In some cases, courts have required prosecutors to show that they have considered all the factors supporting an application for diversion. As the New Jersey Supreme Court has explained:

The decision to divert an offender from prosecution is analogous to the prosecutor's charging function and involves the implicit exercise of judicial power; therefore, judicial review is permitted.[202]

The New Jersey Supreme Court concluded that written reasons for denials (1) facilitate judicial review; (2) assist in evaluating the success of the diversion program; and (3) dispel suspicions of arbitrariness.[203] Of course, all of these benefits would equally apply to a prosecutor's explanation of why he or she elected to bring a particular set of charges, or declined charges. However, courts have only chosen to require such an explanation when prosecutors are denying pretrial diversion.

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199. *See* Note, *supra* note 195, at 843 (describing pretrial diversion as "sentencing activity by nonjudicial personnel").

200. *See* Vincent P. Wyatt, *Crime and Punishment . . . and Punishment*, 46 TENN. BAR J. 12, 12 n.2 (2010) ("Under judicial diversion, a conviction is not entered and is never entered if the individual successfully completes the probationary supervision.").

201. *See* State v. Curry, 988 S.W.2d 153, 162 (Tenn. 1999) (Holder, J., dissenting).

202. State v. Caliguiri, 726 A.2d 912, 917 (N.J. 1999).

203. *See* State v. Nwobu, 652 A.2d 1209, 1215 (N.J. 1995).

Prosecutors consider criteria derived both from factors described by legislatures and those developed by courts considering appeals from denials by prosecutors. The New Jersey statute demonstrates the difficulty of specifically identifying how prosecutors ought to exercise discretion. The multiple factors offered in the statute resemble multi-factor constitutional law standards but have little predictive value. Nevertheless, the statute provides a process; the decision-maker must take into account a list of factors too long and vague to provide any meaningful guidance:[204]

> (1) The nature of the offense;
> (2) The facts of the case;
> (3) The motivation and age of the defendant;
> (4) The desire of the complainant or victim to forego prosecution;
> (5) The existence of personal problems and character traits which may be related to the applicant's crime and for which services are unavailable within the criminal justice system, or which may be provided more effectively through supervisory treatment and the probability that the causes of criminal behavior can be controlled by proper treatment;
> (6) The likelihood that the applicant's crime is related to a condition or situation that would be conducive to change through his participation in supervisory treatment;
> (7) The needs and interests of the victim and society;
> (8) The extent to which the applicant's crime constitutes part of a continuing pattern of anti-social behavior;
> (9) The applicant's record of criminal and penal violations and the extent to which he may present a substantial danger to others;
> (10) Whether or not the crime is of an assaultive or violent nature, whether in the criminal act itself or in the possible injurious consequences of such behavior;
> (11) Consideration of whether or not prosecution would exacerbate the social problem that led to the applicant's criminal act;
> (12) The history of the use of physical violence toward others;
> (13) Any involvement of the applicant with organized crime;
> (14) Whether or not the crime is of such a nature that the value of supervisory treatment would be outweighed by the public need for prosecution;

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204. As Josh Bowers has observed, prosecutors consider exactly these sorts of factors in their charging and bargaining decisions. *See* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1706–07 (2010) ("Prosecutors base discretionary bargaining decisions on prior record, employment, familial and educational status and history; the defendant's character; and his perceived motives for his criminal acts.").

> (15) Whether or not the applicant's involvement with other people in the crime charged or in other crime is such that the interest of the State would be best served by processing his case through traditional criminal justice system procedures;
> (16) Whether or not the applicant's participation in pretrial intervention will adversely affect the prosecution of codefendants; and
> (17) Whether or not the harm done to society by abandoning criminal prosecution would outweigh the benefits to society from channeling an offender into a supervisory treatment program.[205]

In Tennessee, by contrast, judges alone have developed the criteria that prosecutors must consider. The Tennessee Legislature provided defendants the right to appeal a prosecutor's denial of diversion to the trial court under an abuse of discretion standard.[206] The statute did not, however, describe the criteria by which prosecutors were to consider requests for pretrial diversion. Instead, Tennessee courts established their own criteria to evaluate whether prosecutors had abused their discretion. Under the common law created by these courts, prosecutors must consider "the defendant's criminal record, social history, the physical and mental condition of the defendant where appropriate, and the best interest of both the public and the defendant."[207]

Similarly, in other states, courts have used a variety of criteria to recommend pretrial diversion over the prosecutor's objection. In Connecticut, courts have considered the lack of prior offenses, opportunities for the defendant, and rehabilitation potential in granting pretrial diversion.[208] In Pennsylvania, prosecutors were instructed not to consider prior expunged criminal convictions when the denial of pretrial diversion was based solely on defendant's failure to acknowledge these convictions, and where a statute rendered such matters confidential.[209] The decision-making process of prosecutors in cases involving pretrial diversion — or similarly named devices for avoiding prosecution — are unique in that they are disclosed to the court and the defendant permitting judicial assessment of the decision and use of such decisions as persuasive authority by subsequent defendants in negotiating with prosecutors.

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205. N.J. STAT. ANN. 2C: 43-12(e).
206. TENN. CODE ANN. § 40-15-105(b)(3) (2014).
207. State v. Hammersly, 650 S.W.2d 352, 355 (Tenn. 1983).
208. State v. Tucker, 595 A.2d. 832 (Conn. 1991).
209. Commonwealth v. Benn, 675 A.2d 261, 263 (Pa. 1996).

In all of these cases, the defendant is granted a written description of the reasons for or against pretrial diversion. As the New Jersey Supreme Court explained, a prosecutor denying a request for diversion is not permitted to simply "parrot" the language of the relevant statutes, but must explain why the facts of the defendant's case justify the result.[210] Requiring this written explanation is important as it gives courts reasoning for review. Courts review these decisions for abuse of discretion and may reverse if the prosecutor failed to consider all relevant factors, or weighed the factors in such an unreasonable manner as to constitute a "patent and gross abuse of discretion."[211]

Defense lawyers thus have two sources of legitimacy in judicial oversight of pretrial diversion decisions. First, the written decisions of prosecutors approving or rejecting diversion provide a unique public record of prosecutorial reasoning. Second, judicial opinions reviewing these decisions add another layer of analysis, affirming, reversing, or criticizing the reasoning.

Even in decisions where a prosecutor denies diversion, that prosecutor may find some factors that weigh in favor of the defendants. Even if a subsequent defendant does not seek pretrial diversion, the written decision provides a standard of legitimacy to use in a negotiation with that prosecutor or another when the same mitigating factors are at issue. To the extent judicial opinions find the conclusions of prosecutors unreasonable, which occurs much less often, the judicial decisions provide another source of appropriate criteria for prosecutors to consider in deciding whether leniency ought to be granted.

D. *Proportionality Review in Capital Cases*

In rare situations, appellate courts find that death sentences are disproportionate to the crime charged. These decisions provide insight for prosecutors on whether a death sentence is appropriate in subsequent cases with similar facts. By engaging in a more thorough analysis of proportionality review, judges have an opportunity to contribute more meaningfully to the plea and charging decisions in capital cases.

Many state legislatures in the 1970s began requiring appellate courts to consider whether a death sentence was disproportionate, even though a jury had correctly found that the aggravating factors

210. State v. Caliguiri, 726 A.2d 912, 916 (N.J. 1999); State v. Sutton, 402 A.2d. 230 (N.J. 1979).

211. Caliguiri, 726 A.2d at 917.

supporting capital punishment outweighed the mitigating factors.[212] These legislatures were responding to the Supreme Court's invalidation of the existing system of capital punishment under which juries, with virtually no guidance, determined whether death-eligible defendants lived or died.[213] In *Furman v. Georgia*, the United States Supreme Court concluded that the death penalty violated the Eighth Amendment because of the arbitrariness of its application.[214] The Court did not suggest a mechanism for states to use to constitutionally determine who was susceptible to the ultimate punishment, but merely concluded that the system then in place, which left juries virtually limitless discretion in choosing between death and some term of years, produced results that could not be reasonably reconciled.[215]

Following *Furman*, states attempted to draft statutes that would permit them to retain capital punishment. Most states sought to guide jurors' discretion and include a mechanism to correct for aberrational juries following the decision. Most states that retained the death penalty after *Furman* required appellate courts to review all death sentences to ensure they were not disproportionate to other such sentences. Under the post-*Furman* schemes developed in virtually all states, once a defendant was found guilty of a form of murder that made him eligible for the death penalty,[216] juries were to determine whether any aggravating circumstances existed that justified the imposition of the penalty.[217] Against any aggravating circumstances, jurors in these jurisdictions were to weigh any mitigating

212. *See* Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (With Lessons from New Jersey)*, 64 ALB. L. REV. 1161, 1168, n.29 (2001).

213. Steven M. Sprenger, *A Critical Evaluation of State Supreme Court Proportionality Review in Capital Cases*, 73 IOWA L. REV. 719, 726–28 (1988) (describing proportionality review as a response to Supreme Court's invalidation of death penalty); Leigh B. Bienan, *The Proportionality Review of Capital Cases by State High Courts After* Gregg*: Only "The Appearance of Justice,"* 87 J. CRIM. L. & CRIMINOLOGY 130, 135 (1996) (same).

214. Furman v. Georgia, 408 U.S. 238 (1972).

215. *See id.*

216. Following *Furman*, two states, Georgia and Louisiana, retained the possibility of the death penalty for rape. The Supreme Court in *Coker v. Georgia*, 433 U.S. 584, 592–60 (1977) concluded that the death penalty for rape of an adult was disproportionate to the offense. More recently, the Supreme Court has concluded that a Louisiana statute that provided the death penalty for rape of a child violated the Eighth Amendment. Kennedy v. Louisiana, 554 U.S. 407, 446 (2008). For a criticism of the conclusions drawn in the opinion, see Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 NW. U. L. REV. COLLOQUY 355, 362 (2008), and for a view supporting the Court's conclusions, *see* Susan A. Bandes, *Child Rape, Moral Outrage, and the Death Penalty*, 103 NW. U. L. REV. COLLOQUY 17 (2008).

217. Aggravating circumstances ranged from very clear factors, such as the existence of a prior felony that may have little relevance to whether a defendant should be

circumstances suggesting that the death penalty ought not be imposed. Proportionality review was an additional requirement: appellate courts were asked to determine whether the death sentence was appropriate even though aggravating factors had been found to outweigh the mitigating factors.

Proportionality review in the capital context provides a rare moment of judicial oversight of the decision-making typically performed by prosecutors. Capital and non-capital cases involve an extraordinary amount of discretion in charging, plea bargaining, and the deliberations of the jury. When defendant's counsel Anthony Amsterdam contended in argument against one of the post-*Furman* efforts to reinstate the death penalty that too much discretion was left in the system to determine who lives and who dies, Justice Stewart observed, "Mr. Amsterdam . . . [d]oesn't your argument prove too much? Our entire system of justice is rife with discretion, nullification, grace, and capriciousness. Is it all unconstitutional?"[218]

Indeed, every criminal case involves the type of discretion Amsterdam found objectionable, but Georgia and a number of other jurisdictions created a mechanism to help ensure that the discretion inherent in the system did not produce inconsistent results. The legislature instructed the Supreme Court of Georgia by statute, just as the high courts of many states were instructed, to examine the facts of capital convictions to determine whether the death sentence was disproportionate to the defendant's crime and criminal history. In other words, the legislature subjected appropriateness of a death sentence, a question not readily reducible to a legal standard, to judicial assessment.[219]

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given a life or death sentence, *see, e.g.*, TENN. CODE. ANN. § 39-13-204(i)(2) (2014), to factors that seem to capture, at least in principle, the justifications for a death sentence, but are quite vague and difficult to consistently apply. Defendants in Florida, for example, are eligible for execution if their homicidal acts were "heinous, atrocious, or cruel," *see* Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases — The Standardless Standard*, 64 N.C. L. REV. 941 (1986) or in Virginia if their crimes constituted demonstrated "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." Smith v. Commonwealth, 248 S.E.2d 135, 149 (Va. 1978); *see also* Melissa A. Ray, *"Meaningful Guidance:" Reforming Virginia's Model Jury Instructions on Vileness and Future Dangerousness*, 13 CAP. DEF. J. 85, 91–92 (2000).

218. *See* Romano, *supra* note 184, at 312 (quoting Transcript of Oral Argument at 21, *Jurek,* 428 U.S. 262 (1976) (No. 75-5394), *Roberts,* 428 U.S. 325 (1976) (No. 75-5844).

219. Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (With Lessons from New Jersey)*, 64 ALB. L. REV. 1161, 1209 (2001) (describing proportionality review as "implicitly second-guessing the state's prosecutors.").

Judicial consideration of the proportionality of death sentences should therefore provide at least a starting point for discussing how factors beyond the statutory aggravating and mitigating factors should be considered in making capital charging and plea bargaining decisions. It has frequently been observed that state courts have rarely been vigorous in their role of reviewing the proportionality of death sentences.[220] As one appellate court judge observed, the process of proportionality review in his state "does not . . . demonstrate that the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases."[221]

There is extraordinary intuitive appeal in the idea that similar cases, especially capital cases, should be treated similarly. Professor Penny White's review of the case law illustrates the stark inconsistencies in the application of the death penalty in the same jurisdiction, or even the same case.[222] Professor White offered an example from Alabama, where two low-functioning defendants were in a conspiracy to kill. One of the men had an IQ between 58 and 70, and the other with an IQ of 68, conspired to kill one of their wives. The defendant who contracted for his wife's killing received life while the triggerman received death. By contrast, she offers a case from Georgia where two men, Smith and Hall, robbed a liquor store. Smith began firing as he entered, prompting the clerk to return fire and shoot Hall. Smith continued to shoot until the clerk died. Smith received a life sentence, Hall a death sentence.[223]

Individual and unique cases with nearly identical facts but different results may present easy answers, but the role of appellate courts in conducting proportionality review is considerably more difficult outside this limited context. If triggermen in murder-for-hire cases often receive death sentences, or (less likely) if accomplices in fatal robberies frequently are condemned to die, then it is unclear whether a death sentence is disproportionate even in the cases cited by Professor White. The life sentences could simply be aberrational examples of jury mercy, the very sort of occurrence Justice Stewart observed to be a ubiquitous characteristic of the entire criminal justice system.

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220. *See* Donald H. Wallace & Jonathon R. Sorensen, *Missouri Proportionality Review: An Assessment of a State Supreme Court's Procedures in Capital Cases*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281, 285, 311 (1994).

221. *See* State v. LaRette, 648 S.W.2d 96, 107 (Mo. 1983) (Seiler, J., dissenting in part).

222. Penny White, *Can Lightning Strike Twice? Obligations of State Courts After* Pulley v. Harris, 70 U. COLO. L. REV. 813, 813–14 (1999).

223. *Id.* at 813.

Understandably, courts have been unable to develop a mechanism to compare cases. One state supreme court has attempted to define particular circumstances of capital murders and determine the frequency with which death sentences are returned for murders in that category, viewing with greatest scrutiny those types of cases in which death sentences are most rare.[224] Still, most state appellate courts appear to inquire only whether other juries have sentenced defendants to die for crimes involving similar levels of culpability.[225] Using this method, appellate courts find death sentences proportionate to the crime in an overwhelming percentage of cases.[226]

When courts labor with these decisions, if they do so conscientiously, they offer guidance for prosecutors considering how to exercise discretion in the most serious of cases. Especially when courts find death sentences disproportionate, they tend to provide substantial reasoning because they are acting contrary to the will of the (often) elected prosecutor and the jury in a very high profile manner.

The lack of meaningful standards for judges in making these decisions renders their jobs difficult, but as illustrated throughout this Article, judges in other contexts are often entrusted with similar judgment calls that cannot be reduced to legal standards. As in these other contexts, judges are reluctant to use this power. It is precisely when they act in this role, however, that they offer guidance to prosecutors who routinely exercise this sort of judgment. When they conclude that a sentence of death is disproportionate because there was

224. *See* Judge David S. Baime, *Comparative Proportionality Review: The New Jersey Experience*, 41 CRIM. L. BULL., Art. 6, Issue 2 (Spring 2005). *But see* Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (With Lessons from New Jersey)*, 64 ALB. L. REV. 1161, 1162 (2001) (contending that "comparative proportionality review is constitutionally unwarranted, methodologically unsound, and theoretically incoherent").

225. William W. Berry, III, *Practicing Proportionality*, 64 FLA. L. REV. 687, 707 (2012) (criticizing this "precedent-seeking" approach as providing "no useful barometers to evaluate the relative proportionality of a given case").

226. *See, e.g.*, Timothy V. Kaufman-Osborn, *Capital Punishment, Proportionality Review, and Claims of Fairness (With Lessons from Washington State)*, 79 WASH. L. REV. 775, 836 (2004) (observing that there were no reversals in Washington on the basis of proportionality from 1981 to 2003).

insufficient evidence of substantial deliberation,[227] was not the triggerman,[228] had no substantial criminal history,[229] acted under mental or emotional anguish,[230] demonstrated potential for rehabilitation,[231] played a limited role in the crimes leading to the death,[232] had a history of drug or alcohol abuse,[233] had low intelligence,[234] suffered brain damage or mental illness,[235] experienced a particularly bad childhood,[236] was young at the time of the offense,[237] cooperated with the police,[238] or showed particular remorse,[239] they suggest

227. State v. Watson, 628 P.2d 943, 946 (Ariz. 1981) (robbery gone bad); Caruthers v. State, 465 So. 2d 496, 498 (Fla. 1985) (same); Terry v. State, 668 So. 2d 954, 965 (Fla. 1996); Deangelo v. State, 616 So. 2d 440, 443 (Fla. 1993) (ongoing quarrel that escalated); McKinney v. State, 579 So. 2d 80, 83 (Fla. 1991); State v. Sonnier, 380 So. 2d 1, 8 (La. 1979); Reddix v. State, 547 So. 2d 792, 795 (Miss. 1989); Biondi v. State, 699 P.2d 1062, 1066 (Nev. 1985); Harvey v. State, 682 P.2d 1384, 1386 (Nev. 1984) (robbery gone bad).

228. Sumlin v. State, 617 S.W.2d 372, 375 (Ark. 1981); Curtis v. State, 685 So. 2d 1234, 1237 (Fla. 1996); Hall v. State, 244 S.E.2d 833, 839 (Ga. 1978); State v. Windsor, 716 P.2d 1182, 1193 (Idaho 1985); State v. Scroggins, 716 P.2d 1152, 1159 (Idaho 1985); Reddix v. State, 547 So. 2d 792, 794 (Miss. 1989).

229. Besaraba v. State, 656 So. 2d 441 (Fla. 1995); Morgan v. State, 639 So. 2d 6 (Fla. 1994); Santos v. State, 629 So. 2d 838 (Fla. 1994); Lloyd v. State, 524 So. 2d 396 (Fla. 1988); Proffitt v. State, 510 So. 2d 896 (Fla. 1987); Blair v. State, 406 So. 2d 1103 (Fla. 1981); State v. Pratt, 873 P.2d 800 (Idaho 1993); State v. Windsor, 716 P.2d 1182, 1194 (Idaho 1985); People v. Glecker, 411 N.E.2d 849 (Ill. 1980); State v. Sonnier, 380 So. 2d 1, 8 (La. 1979); State v. McIlvoy, 629 S.W.2d 333 (Mo. 1982).

230. Besaraba v. State, 656 So. 2d 441 (Fla. 1995); White v. State, 616 So. 2d 21 (Fla. 1993) (jealously regarding relationship); Farinas v. State, 569 So. 2d 425 (Fla. 1990) (defendant thought victim was romantically involved with another man); Blakely v. State, 561 So. 2d 560 (Fla. 1990) (ongoing domestic dispute grew increasingly heated).

231. Curtis v. State, 685 So. 2d 1234 (Fla. 1996); Nibert v. State, 574 So. 2d 1059 (Fla. 1990); State v. Watson, 628 P.2d 943, 946–78 (Ariz. 1981); State v. Windsor, 716 P.2d 1182, 1194 (Idaho 1985).

232. People v. Glecker, 411 N.E.2d 849 (Ill. 1980); State v. Sonnier, 380 So. 2d 1, 8 (La. 1979).

233. Besaraba v. State, 656 So. 2d 441 (Fla. 1995); Morgan v. State, 639 So. 2d 6 (Fla. 1994); Nibert v. State, 574 So. 2d 1059 (Fla. 1990); People v. Glecker, 411 N.E.2d 849 (Ill. 1980); State v. McIlvoy, 629 S.W.2d 333 (Mo. 1982).

234. Sinclair v. State, 657 So. 2d 1138 (Fla. 1995); Morgan v. State, 639 So. 2d 6 (Fla. 1994); McKinney v. State, 579 So. 2d 80, 85 (Fla. 1991).

235. Morgan v. State, 639 So. 2d 6 (Fla. 1994); Deangelo v. State, 616 So. 2d 440, 443 (Fla. 1993); Reddix v. State, 547 So. 2d 792, 794 (Miss. 1989); Haynes v. State, 739 P.2d 497 (Nev. 1987); Biondi v. State, 699 P.2d 1062 (Nev. 1985).

236. Urbin v. State, 714 So. 2d 411 (Fla. 1998); Sinclair v. State, 657 So. 2d 1138 (Fla. 1995); Besaraba v. State, 656 So. 2d 441 (Fla. 1995).

237. Urbin v. State, 714 So. 2d 411 (Fla. 1998); Curtis v. State, 685 So. 2d 1234 (Fla. 1996); Morgan v. State, 639 So. 2d 6 (Fla. 1994); State v. Scroggins, 716 P.2d 1152 (Idaho 1985); Harvey v. State, 682 P.2d 1384 (Nev. 1984).

238. Sinclair v. State, 657 So. 2d 1138 (Fla. 1995); State v. McIlvoy, 629 S.W.2d 333 (Mo. 1982).

239. Nibert v. State, 574 So. 2d 1059 (Fla. 1990).

prosecutors ought to view these factors favorably in deciding whether, and how much leniency is appropriate in charging and plea bargaining decisions.

E. *Rejection of Guilty Pleas*

In each of the other examples so far considered, judges exercise prosecutorial-type discretion to impose upper boundaries on prosecutors. When judges review guilty pleas, however, they exercise prosecutorial-type discretion to set lower boundaries.[240] This exercise of judicial authority provides prosecutors an opportunity to explain the legitimacy of *their* offers. Under Federal Rule of Criminal Procedure 11 and its state analogues, trial courts have discretion to reject plea bargains. Similar to the broad language used to define the judicial role in setting upper boundaries, Rule 11 "provides that a trial court 'may refuse to accept a guilty plea,' [but] it fails to delineate the circumstances under which it may do so."[241] The leading case on the power of the trial judge to reject a plea, *United States v. Ammidown*, recognized that a plea to a lesser charge may be rejected only if the offer of a reduced charge was not "related to a prosecutorial purpose."[242] The court explained that these purposes include "an insufficiency of evidence, a doubt as to the admissibility of certain evidence under the exclusionary rules, a need for evidence to bring another felon to justice, or other similar considerations."

In *Ammidown*, the D.C. Circuit held that if the reduction of the sentence in a proposed plea bargain is based on one of these purposes, then the reduction does not intrude on judicial sentencing discretion. When prosecutorial discretion to reduce is not, however, based on one of those utilitarian prosecutorial factors, judges are permitted in "extreme cases" to reject a prosecutor's leniency on the basis of the judges' own views of the equities.[243] Judges and prosecutors both have the ability to determine the sentence in a criminal case based on their individual views of the circumstances. The prosecutor frames the range of sentencing options through the charging decision and any recommendations made in the course of sentencing. In issuing

240. As one commentator observed, "separation of powers questions arise from judicial rejection of a negotiated plea." Lowell B. Miller, *Judicial Discretion to Reject Negotiated Pleas*, 63 GEO. L.J. 241, 251 (1974). Of course this is true, but as illustrated throughout this Article, there are a host of exceptions to the separation of powers concerns that are traditionally viewed as limiting a judge's ability to second-guess prosecutorial charging and plea-bargaining decisions.

241. United States v. Ammidown, 497 F.2d 615, 619 (D.C. Cir. 1973).

242. *Id.* at 623.

243. *Id.*

the sentence, a judge determines how the facts of the particular case should map onto the range of punishment provided for a particular crime. Prosecutors and judges each consider the equities of a particular case and, according to *Ammidown*, when those considerations form the basis for a guilty plea, a trial court may reject that plea in extreme cases.

Courts under Federal Rule of Evidence 48(a) play a similar role in supervising the prosecution's dismissal of criminal charges.[244] As with all of these exercises of prosecutorial-like discretion by judges, disagreement among judges is inevitable, but their reasoning grounds the conversations that occur during negotiations between prosecutors and defense counsel. In *United States v. Armstrong*, for instance, a United States District Court in Massachusetts found a plea bargain inappropriate in a situation in which a charge was dismissed to avoid immigration consequences.[245] Justice Stevens' majority opinion in *Padilla v. Kentucky* contains a contrary view — that a defense lawyer who was aware of the immigration consequences of a conviction would be in a position to negotiate with the prosecutor for an offense that would not trigger deportation.[246] Obviously implicit in Stevens' opinion is the premise that prosecutors may appropriately consider the possibility of deportation in deciding how to charge and plea bargain.

The judicial role in rejecting plea bargains, as well as dismissals, however, is narrower than the equitable factors considered by prosecutors. While *Ammidown* and its progeny permit a judge, in extreme cases, to exercise his or her discretion, a judge cannot engage in the *quid pro quo* exchanges that prosecutors make during plea bargaining to ensure cooperation, certainty of conviction, or presumably even conservation of resources. These factors are uniquely in the ken of prosecutors — prosecutors are best able to assess the need to obtain evidence against other suspects, the weaknesses in their own case, and the pressing need to allocate resources to other cases.

Prosecutors in the *Ammidown* case appeared to have been driven to offer leniency solely on the basis of cooperation, not on their view that leniency was equitably justified. The defendant was charged with the first degree murder of his wife and the conspiracy to commit

244. According to the Supreme Court, Rule 48(a) was enacted "to protect a defendant against prosecutorial harassment, e.g., charging, dismissing, and recharging, when the Government moves to dismiss an indictment over the defendant's objection." Rinaldi v. United States, 434 U.S. 22, 29 n.15 (1977).

245. United States v. Armstrong, 652 F. Supp.2d 136 (D. Mass. 2009).

246. Padilla v. Kentucky, 559 U.S. 356, 373 (2010).

that murder. According to his confession, he had arranged to have her murdered in the parking lot of a department store so that he could inherit her considerable fortune and open a night club.[247] He changed his mind because he did not want his young son to see his mother murdered.[248] He therefore arranged with his partner in crime, Richard Anthony Lee, to have his wife kidnapped and to use the ransom money to start the club.

As planned, Mr. Ammidown took his wife to dinner some time later and at a prearranged location, Lee jumped in the car, abducted Mrs. Ammidown and raped her to "impress Mrs. Ammidown 'with the seriousness of the threat.'"[249] Though Mr. Ammidown claimed in his confession this was not part of the plan, Lee also killed Mrs. Ammidown.[250]

In exchange for a plea of guilty to second-degree murder, Mr. Ammidown agreed to testify against Lee.[251] Without Mr. Ammidown's testimony, the prosecution was afraid that it would be unable to obtain a conviction against Lee.[252] In exchange, the government offered Mr. Ammidown a plea to second-degree murder and recommended nothing less than a life sentence, without the possibility of parole for fifteen years. Given Mr. Ammidown's age, he would not have been eligible for parole until he was sixty-four.[253] This is precisely the type of decision-making that we, as a society, have entrusted to prosecutors. There is little argument that mitigating circumstances of the crime, or something redeeming in Ammidown's life called for an indictment of crime less than first-degree murder.

The D.C. Circuit's opinion in *Ammidown* recognized that a court could, in extreme cases, second-guess a prosecutor's decision about how a plea is justified by the equities of a case. It was not, however, the equities of the *Ammidown* case that prompted this plea offer. The plea was motivated by the prosecutor's view that such a deal was necessary to obtain another conviction — a rationale for plea bargaining that the D.C. Circuit regarded to be beyond judicial oversight.

Courts have generally accepted the *Ammidown* rule that prosecutorial decisions on the basis of excessive leniency are subject

247. United States v. Ammidown, 497 F.2d 615, 618 (D.C. Cir. 1973).
248. Ammidown, 497 F.2d at 617–18.
249. *Id.* at 618.
250. *Id.*
251. *Id.*
252. *See id.* at 622–23 ("we are scared to death that unless there is a successful way to prosecute [Lee,] someone . . . will die . . . .").
253. *Id.* at 618.

to rejection by judges, but leniency driven by *quid pro quo* exchanges to preserve resources, achieve cooperation, or ensure a conviction are not.[254] When leniency is offered for these reasons, prosecutors are foregoing punishment they believe the defendant deserves to achieve another worthy goal.

Courts have accepted *Ammidown*'s invitation to set lower-boundaries on prosecutorial leniency. Courts have rejected pleas that were considered too lenient.[255] But the fear *Ammidown* addresses — that prosecutors offer too much leniency based on equitable considerations — seems backwards.

The institutional role of prosecutors may well cause them to under-value equitable considerations calling for mercy. Prosecutors work with the victims of the crime and the detectives who built the cases against the defendants — their perspective is necessarily tilted from this viewpoint. This same institutional role, however, may cause prosecutors to over-reward cooperation and conservation of resources. *Ammidown* does, however, meaningfully contribute to the creation of standards of legitimacy. The existence of this power legitimates judicial entry into the prosecutorial sphere. Judges are given the opportunity to not only prevent excesses by over-zealous prosecutors, but also to rein in leniency by overly merciful prosecutors. *Ammidown,* along with other opportunities for judicial contributions to standards of legitimacy, fashions a system in which judges contribute, through upward and downward checks, to a set of standards for viewing equities in criminal cases.

F. *Sentencing in Cases that Could Have Been Charged as Mandatory Minimums*

In some sense, all sentencing decisions reflect judicial judgments about prosecutorial charging decisions. An unusually light sentence for a fairly serious charge can be read as a criticism of seeking a charge that serious. Crimes implicating mandatory minimums, however, provide an easier basis of comparison between charging decisions and the judge's view of the case. Whether a judge exceeds the

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254. *See* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 683–84 (2014); Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 774 (1980).

255. *See* People v. McCartney, 250 N.W.2d 135, 137–38 (Mich. App. 1976) (dictum); State v. Belton, 226 A.2d 425, 429 (N.J. 1977) (dictum); People v. Portanova, 56 A.D.2d 265, 274–75 (N.Y. 1977) (dictum); Schulhofer*, supra* note 254, at 775 n.172 (*citing* United States v. Bean, 564 F.2d 700 (5th Cir. 1977); Sarah N. Welling, *Victim Participation in Plea Bargaining*, 65 WASH. U. L.Q. 301, 318–32 (1987).

sentence required for an uncharged mandatory minimum is as an easy measure of the judge's view of whether the mandatory minimum could have appropriately been charged.

With mandatory minimums, judges do not have the discretion to go below certain terms of years when certain facts are present. If a prosecutor seeks a mandatory minimum sentence, and establishes the requisite triggering facts, then a judge has no choice but to sentence the defendant to a term greater than the minimum. In rendering these decisions, judges are providing guidance on how prosecutors ought to exercise their discretion to seek the mandatory minimum sentence.

Under some statutes, facts not required for a conviction can force a judge to sentence a defendant above a certain prescribed number of years. These facts include prior convictions, amount of drugs, and as in *Pennsylvania v. McMillan*, possession of a weapon.[256] In *McMillan*, the trial judge ruled that Pennsylvania's new mandatory minimum law was unconstitutional and refused to sentence the defendant to the five-year minimum.[257]

Mandatory minimums are something of a misnomer. Defendants do not necessarily have to serve a minimum amount of time merely because they have a certain number of convictions, or possessed a firearm during the commission of a crime. Instead, mandatory minimums transfer from the judge to the prosecutor the power to determine the lowest term of incarceration a defendant must serve. If a prosecutor elects not to seek an enhancement for the third felony, or the weapon possession, then the judge is free to consider a penalty anywhere within the otherwise applicable range. Having found that the defendant is a recidivist, or brandished a weapon, a judge may well be inclined to sentence a defendant to a term greater than the applicable mandatory minimum, but is not required to if the prosecutor does not file notice that he is seeking an enhanced sentence on this basis.[258]

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256. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 530 (2001) (describing political popularity of three-strikes laws and mandatory minimums for guns and drugs).

257. Pennsylvania v. McMillan, 477 U.S. 79, 82 (1986). The United States Supreme Court recently reversed the conclusion in *McMillan* that a jury was not required to find a factor justifying a mandatory minimum beyond a reasonable doubt. Alleyne v. United States, 133 S.Ct. 2151, 2153 (2013).

258. While a defendant is entitled to notice of a factor that will trigger a mandatory minimum sentence, if the mandatory minimum sentence is within the range of the judge's discretion, the judge is obviously entitled to sentence the defendant to that penalty.

When prosecutors choose not to seek mandatory minimum punishments, the sentencing decisions of judges provides a source of guidance in subsequent cases on whether it is appropriate to seek the minimum sentence. The facts involved in the *McMillan* decision illustrate this point nicely. As Justice Stevens described in his dissent, James Dennison, one of the three defendants in this consolidated case, was a seventy-three-year-old man who shot a teenager from his neighborhood that he suspected was stealing from his house.[259]

The trial judge in *McMillan* did not regard himself to be bound by the mandatory five year minimum and gave the defendant, in light of all the circumstances, an 11½–23 months sentence.[260] While the trial court's decision to disregard the minimum is unlikely to be repeated, as such laws have been held to be constitutional, the case provides a basis for arguing that a minimum sentence would be inappropriate in a similar case. In subsequent cases where a prosecutor does not seek the mandatory minimum, a judge's decision to sentence above or below the uncharged minimum serves as a suggestion about the appropriateness of the mandatory sentence.

In Philadelphia, a custom has developed among many trial court judges when prosecutors seek mandatory minimums judges deem inappropriate. In bench trials, judges acquit defendants of the portion of the crime requiring the minimum sentence, a throwback to the English practice known as pious perjury where judges would find a theft to be less than the actual amount taken to avoid the death penalty. When judges engage in such acts, these are also clear signals about their view of the appropriateness of seeking a mandatory minimum.

As judges consider the unique circumstances of the cases in which prosecutors could have sought a mandatory minimum sentence, but chose not to, they provide guidance to prosecutors deciding whether to seek such a sentencing enhancement. While the very point of a mandatory minimum is to bypass a judge's discretion to consider a defendant's individual circumstances, one hopes that prosecutors will be sensitive to these circumstances.[261]

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259. *McMillan*, 477 U.S. at 96 (Stevens, J., dissenting). The majority opinion offers a much less rich description of the facts of Dennison's case, observing only that "Petitioner Dennison seriously wounded an acquaintance." 477 U.S. at 82. Reading the majority's opinion, one is clearly struck by the missing context. The other defendants involved in this case all received much longer sentences.

260. *McMillan*, 477 U.S. at n.2.

261. Mandatory minimums do not become obsolete, or redundant, if prosecutors are encouraged to follow the criteria judges consider in cases where prosecutors do not

G. *Upward and Downward Departures Under the Federal Sentencing Guidelines Prior to* Booker/Fan Fan

Judges exercise discretion in sentencing. However, this discretion does not fit within the Article's model of guidance because judges always have the power to exercise this discretion.[262] Because all negotiations operate in the shadow of predicted outcomes, prosecutors will bargain in light of how a defendant is likely to be sentenced if convicted.[263] The Federal Sentencing Guidelines, at least before they were made advisory by the Supreme Court, substantially limited the sentencing power of judges.[264] The departures judges made during that period had to be justified by extraordinary circumstances. These departures were not part of the ordinary discretion of a judge sentencing a defendant — the explanation had to satisfy an appellate court that unusual circumstances justified the downward departure.[265]

Departures were something of a hybrid between powers assigned to judges to sentence and exercises of discretion resembling those typically available only to prosecutors. Prior to the Federal Sentencing Guidelines, judges were given virtually unfettered discretion to determine how to sentence offenders.[266] Under the Guidelines, departures were permitted only for exceptional circumstances.[267] When judges departed from the Guidelines, they were concluding that the facts fell outside the sentencing rubric that they had been provided. But judges were still evaluating circumstances that they would have traditionally considered in sentencing defendants. Thus, while judges were dealing with facts not identified by legal standards, namely the

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seek the minimum. Prosecutors who take into consideration the range of judicial opinion on the individual circumstances of a case could reasonably seek a mandatory minimum sentence, consistent with the typical judicial view of the mitigating factors involved, when facing a judge known to be particularly lenient.

262. STITH & CABRANES, *supra* note 10, at 9 ("From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion.").

263. *See, e.g.*, Mnookin & Kornhauser, *supra* note 48, at 968–71 (describing negotiations as always occurring in light of likely outcome).

264. *See* STITH & CABRANES, *supra* note 10, at 82–84.

265. *See* Ian Weinstein, *The Discontinuous Tradition of Sentencing Discretion:* Koon*'s Failure to Recognize the Reshaping of Judicial Discretion Under the Guidelines*, 79 B.U. L. REV. 493, 526–49 (1999) (describing variances in federal circuits deference to district courts downward departures prior to *Booker*).

266. *Id.* at 9.

267. *See* Michael S. Gelachak, Ilene H. Nagel & Barry L. Johnson, *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 299, 353 (1996) (observing that departures were reserved for extraordinary cases by the Sentencing Commission but finding that departures were "contrived" in a number of white-collar crime cases).

Guidelines, these were exactly the sort of determinations that were entrusted to judges prior to the Guidelines. This exercise of discretion, even though made extraordinary by the Guidelines, was part of the traditional judicial role.

Upward or downward departures under the Federal Sentencing Guidelines under § 3553, prior to *Booker* and *Fan Fan*, also have characteristics of a judicial act of prosecutorial discretion and therefore may provide some additional bases for fashioning standards of legitimacy. Prior to *Booker* and *Fan Fan*, the Guidelines created hosts of mandatory minimum and maximum penalties. Decisions to step outside these mandatory boundaries certainly resemble the decisions of judges in California not to consider one of the felonies necessary for a third-strike, or conclusions by appellate courts that the death penalty is disproportionate. In each case, using criteria that defy reduction to any sort of meaningful standard,[268] a court is deciding that a legislatively prescribed sentence is inappropriate. This is the essence of prosecutorial discretion, and courts have frequently concluded that they, unlike prosecutors, are unable to make decisions ungoverned by clear standards.[269]

Though departures under § 3553 prior to *Booker* exemplify judicially-exercised prosecutorial discretion and have occurred more often than any of the other examples we offer, there are limits to the information that can be gleaned from departures to fashion standards of legitimacy. Based on the Guidelines, a defendant's socioeconomic background, addiction to drugs, or financial distress could not be considered as a basis for departure while a defendant's family responsibilities could be considered only in extraordinary circumstances.[270]

Upward departures were similarly limited to matters not considered by the Commission, but those aggravating factors considered by the Commission provided for increases in sentences. A defendant's drug addiction, or rehabilitation, thus could not have been considered in sentencing as these were common situations offered in mitigation that the Commissioners ruled out-of-bounds in considering downward departures.[271] The anxiety produced by a protracted chase and

268. *See* Fallon, *supra* note 1, at 1275.

269. *Id.*

270. *See* Michael Goldsmith & Marcus Porter, *Lake Wobegon and the U.S. Sentencing Guidelines: The Problem of Disparate Departures*, 69 GEO. WASH. L. REV. 57, 64–65 (2000).

271. 18 U.S.C. § 3553; U.S.S.G. § 1B1.1.

physical tussle with Rodney King, however, had not been contemplated by the Sentencing Commission, thus a downward departure was justified in sentencing the officers who deprived him of his civil rights by repeatedly battering him once he was subdued.

Notwithstanding these limits on the usefulness of these departures to create standards of legitimacy, the large body of case law has produced some information that can serve as guidance on the exercise of discretion in the absence of standards. A study of 1400 departures prior to *Booker* and *Fan Fan* considered the basis for such departures.[272] Federal courts considered the defendant's lack of youthful guidance,[273] the disparity in the treatment of the co-defendant,[274] his or her family responsibilities,[275] mental and emotional condition,[276] and past military service.[277] Some jurisdictions were particularly sympathetic to drug couriers,[278] suggesting that courts in those jurisdictions were considering the limited degree of culpability of those types of offenders.[279] These departures can thus provide at least some guidance on the equitable considerations prosecutors ought to consider, even though these considerations are limited to those not already taken into account by the Federal Sentencing Guidelines.

H. *Remedies for Decisions of Counsel Ineffectively Advising Rejection of Pleas*

In two recent cases, the Supreme Court appears to have provided another opportunity for courts to shape how prosecutors go about exercising their discretion.[280] Whether or not the Court was aware of the potential impact on charging and bargaining decisions, the Court's decisions occurred in plea bargaining cases, suggesting that

272. Gelachak, Nagel & Johnson, *supra* note 267, at 305.

273. *Id.* at 360.

274. *Id.* This is, of course, precisely the sort of analysis that legislatures following *Furman v. Georgia*, 408 U.S. 238 (1972) anticipated appellate courts performing proportionality review would conduct.

275. *Id.*

276. *Id.* at 361.

277. *Id.*

278. *Id.* at 364.

279. Some jurisdictions have expressly considered the possibility that drug couriers are liable only for the amount of drugs they could have known they possessed. *See* People v. Ryan, 626 N.E.2d 51 (N.Y. 1993) (accepting such a claim, before New York legislature amended law to prevent such claims). *But see* People v. Scheffer, 224 P.3d 279 (Colo.App. 2009) (rejecting such a claim); Whitaker v. People, 48 P.3d 555 (Colo. 2002) (same).

280. Lafler v. Cooper, 132 S.Ct. 1376 (2012); Missouri v. Frye, 132 S.Ct. 1399 (2012).

the Court had in mind the potential for its opinion to reign in prosecutorial discretion in this area.[281]

Until 2012, the United States Supreme Court had not recognized a right to an effective criminal negotiator.[282] When it did so in *Lafler v. Cooper*, it concluded that when a trial court finds that a defendant received unreasonable advice recommending that he or she go to trial, the defendant could obtain a remedy.[283] The Court provided only vague guidance as to what that remedy should be, and gave trial judges extraordinary discretion.[284] The Court concluded that a judge considering the remedy could leave in place the sentence initially imposed, re-sentence the defendant to the amount of time offered in a plea rejected because of counsel's ineffective advice, or a sentence modification anywhere in between.[285]

While the Court appears at first glance to have given lower courts unfettered discretion to fashion a remedy for unreasonable advice to go to trial, closer inspection reveals that trial courts are expected to evaluate the reasoning underlying a prosecutor's offer. First, courts may not categorically deny remedies to defendants whose lawyers unreasonably instructed them to go to trial rather than accept plea offers.[286] Second, that remedy may not provide a windfall to a defendant who has gone to trial and lost.[287]

To apply the Court's instructions, a trial court must therefore determine what plea offers — or what portion of plea offers — would amount to a windfall.[288] To understand that is to understand why a

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281. Justice Scalia thought the Court was opening up the possibility of future regulation of prosecutorial discretion in plea bargaining with these decisions. *See* Lafler v. Cooper, 132 S.Ct. 1376, 1392 (2012) (Scalia, J., dissenting). It is not at all unusual for cases about constitutional criminal procedure to have more of an effort on plea bargaining than on matter expressly sought to be regulated. Donald Dripps, for instance, had concluded that the decision in *Crawford v. Washington*, 541 U.S. 36 (2004), ostensibly about the duty to present live testimony even when the hearsay is reliable and fits within an exception to the rule, has had a far greater impact on plea bargaining than it had on trials themselves. Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN ST. L. REV. 1155, 1162–66 (2005).

282. *See* Wesley MacNeil Oliver, *Toward a Common Law of Plea Bargaining*, 102 KY. L. J. 1, 4 (2013–14) ("Prior to *Lafler* and *Frye*, the Supreme Court regarded plea offers to be a matter of largesse, severely limiting defense counsel's Sixth Amendment obligations in negotiations.").

283. Lafler, 132 S.Ct. 1376, 1388–90 (2012).

284. *See id.*

285. *See id.* at 1290.

286. *Id.* at 1391.

287. *Id.* at 1388.

288. Justice Ginsberg recognized that providing a defendant a remedy for a lost plea that was premised on cooperation would amount to a windfall for the defendant.

prosecutor would have offered the plea in the first place. If a prosecutor offered leniency to account for a risk of acquittal, then restoring the original plea offer would give a defendant an opportunity for acquittal at trial while preserving his bet-hedging offer. Furthermore, the risk of acquittal is not the only basis for a prosecutor to grant leniency that would provide a defendant a windfall if that leniency is re-offered post-trial.[289] A defendant also receives a windfall if the plea was offered to save prosecution resources or contingent on cooperation. Nothing about the risk of acquittal, the need to conserve prosecution resources, or obtain cooperation has anything to do with how a defendant ought to be punished. In a sense, a defendant always receives a windfall when he or she is able to obtain leniency because the prosecution has difficulties of proof, the trial will consume considerable time, or the defendant has information that is valuable to the prosecution.[290] Post-trial, the exchange of leniency for certainty, convenience, or information is no longer possible.

If appellate courts following *Lafler* are to achieve the Supreme Court's stated goal of avoiding a windfall, then they must identify the portion of the plea that was motivated by the prosecutor's instrumental motivations and the portion motivated by the prosecutor's views of the equities of the case. Pre- or post-trial, not all plea offers are windfalls. Prosecutors, in not an insubstantial number of cases, offer a plea deal that the prosecutor believes to reflect the appropriate punishment for a defendant in a particular case. Professor Alschuler's groundbreaking field research of plea bargaining revealed that most prosecutors believe that it is incredibly important to make offers that reflect an appropriate sentence.[291]

When courts describe the motivations of a prosecutor for offers that were rejected, courts will be articulating how they believe reasonable prosecutors view cases. This will provide perhaps the clearest external standard describing how prosecutors ought to exercise their discretion.[292] Cases finding ineffective assistance of counsel during

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Burt v. Titlow, 134 S.Ct. 10, 19–20 (2013) (Ginsberg, J., concurring) (the remedy should not include leniency that was premised on cooperation that is no longer possible).

289. *But see id.* (arguing that remedy following a trial would grant a windfall because a defendant is exchanging risk of acquittal for leniency).

290. *See, e.g.*, Saul Levmore & Ariel Porat, *Assymmetrics and Incentives in Plea Bargaining and Evidence Production*, 122 YALE L.J. 690, 705 (2012) (describing discounts to cooperators as a windfall).

291. *See* Alschuler, *supra* note 72, at 52–53.

292. For a more thorough description of this argument, see Oliver, *supra* note 282 at 19–32.

the plea bargaining phase may well be infrequent — just as all cases finding ineffective assistance of counsel are infrequent — but the guidance courts provide in these cases may be the most useful. Unlike decisions that involve less serious cases (*de minimis* statutes or pretrial diversion) or the most serious cases (proportionality review), decisions regarding remedies for unreasonable advice in the negotiation phase will run the gamut from less serious to quite serious.

V. Conclusion

Prosecutors alone have traditionally defined how their discretion to charge and plea bargain ought to be exercised. In a system that fundamentally rests on the principle of checks and balances,[293] allowing this much power to vest in the hands of one department of the government is, at the very least, anomalous.[294] Judges, however, are part of this conversation, even if their participation in the conversation has not been as robust as it could be and the significance of their contributions has yet to be recognized.

Certainly this is not to say that judges, even in a limited sphere of cases do, or should, have the last authoritative word on how prosecutors exercise their discretion. The way judges make decisions, however, makes their contributions to the discussion about prosecutorial power a particularly useful source for guidance on how particular cases should be charged and resolved. Prosecutorial discretion typically occurs quietly, often with no accompanying explanation. In contrast, written explanations typically accompany judicial orders; the more thorough the analysis, the better respected the opinion.

The genius of the common law is that it makes the reasoning of a decision-maker public and thus subject to criticism, which can place pressure on subsequent courts to distinguish subsequent cases, or simply overrule the previous decision. As court opinions describe how prosecutorial discretion ought to operate, they put their conclusions into the marketplace of ideas where, like any other type of decision, they become subject to critique.[295] Courts are aware of this process

293. *See* James T. Barry, III, *The Council of Revision and the Limits of Judicial Power*, 56 U. Chi. L. Rev. 235, 241, at n.21 (1989) (observing implicit reliance of Framers on Montesquieu's notion of separation of powers); The Federalist No. 51 (James Madison) ("Ambition must be made to counteract ambition.").

294. *See* Barkow, *supra* note 5, at 1012–13.

295. Obviously this criticism can come internally in the form of a dissent. An excellent example of a debate about the appropriate use of which factors are appropriately considered in granting leniency appears in *Commonwealth v. Jackson*, 510 A.2d 1389 (Pa. Super. Ct. 1986). The majority affirmed the trial court's decision to grant a motion to dismiss charges of prison rioting on the grounds that (1) the defendants

before rendering decisions and thus account for possible counter-arguments. Opinions, once released, can become thoroughly discredited even if they are not overruled.[296] The factors that courts find relevant when exercising pseudo-prosecutorial power thus provides insight into what an informed, respected commentator regards as appropriate considerations for one exercising prosecutorial discretion.

The scholarship on negotiation demonstrates how courts are able to act, without infringing upon the separation of powers, to provide guidance on the largely unchecked power of prosecutors. Judges, in their occasional exercise of prosecutorial-type discretion, create standards of legitimacy that can be used by defense counsel in plea negotiations. These standards have the potential to improve by soft regulation the charging and plea bargaining process criticized by commentators as secretive, idiosyncratic, and lacking the attributes of the rule of law.

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were already serving prison sentences; (2) the defendants had already been subject to internal prison discipline; (3) the costs of trial were not justified; and (4) the inmates efforts to prevent guards from seizing an inmate who had just stabbed a man were brief and caused no harm. *Id.* The dissent persuasively contended that none of these were appropriate factors for consideration under the *de minimis* statute. *Id.*

296. *See* Jamal Greene, *The Anticanon,* 125 HARV. L. REV. 379 (2011) (identifying *Dred Scott*, *Korematsu*, and *Plessey v. Ferguson* as erroneous decisions of historic proportions, the error of which were recognized well before they over-ruled).