Breaking the Faustian Bargain: Using Ethical Norms to Level the Playing Field in Criminal Plea Bargaining

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Abstract

Every day in courthouses throughout the United States, defendants are faced with a Faustian bargain: they can accept a plea deal that minimizes the pain of immediate incarceration, but with potentially devastating long-term consequences. This dilemma is fostered by the asymmetrical power structure in criminal plea bargaining, which enables prosecutors to extract guilty pleas in a manner that undermines the fairness of the court system. The criminal justice reform movement has sought to balance this playing field through reforms like ending mandatory minimums. These efforts will ultimately be insufficient because these initiatives only impact the fundamental problem at the margin and these reforms rest on an insecure foundation of shifting politics. In this Article, career prosecutor and ethics instructor David A. Lord argues that insufficient ethical guidance for prosecutors, specific to plea negotiations, is the core problem that enables this travesty of justice to continue. This Article looks at cases such as Bill Cosby's and examines the Model Rules of Professional Conduct to offer an ethical rubric for criminal plea negotiations that levels the playing field between the prosecution and defense. This ethics rubric aims at fostering a more just culture of prosecution by providing specific questions that a prosecutor should ask before making a plea offer and providing norms that can be used both by supervisors and in legal instruction when discussing plea negotiations and prosecutorial ethics.

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INTRODUCTION

In its ideal state, the American legal system is built on high-quality adversarial confrontation. Two opposing sides work diligently to promote their clients' interests, and that competition is mediated through the prism of the law and the rules of evidence to produce a just result. But when one of the litigants has disproportionate power in establishing the rules of the game, it creates a serious challenge to achieving justice. As a prosecutor, I acknowledge that when I step into the courtroom, it often is not a fair fight. In what game does one team get to decide the playing field and structure in which the competition takes place? In my line of work that happens every day. I decide who gets charged and with which crimes. Those decisions, along with "first mover advantage,"[1] often result in my determining the analytical framework within which the trial itself takes place.

Plea negotiations, much like trials, suffer from a similar asymmetrical power structure. What can a defendant offer a prosecutor in negotiations? The defendant can save me time and effort, which allows me to move on to the next case and focus my resources on other cases. The defendant can save me the embarrassment

1. In the game of chess, for example, research has shown that the player using the white pieces (the first mover) has a discernible advantage over the player using the black pieces, because he or she has the ability to "coax the opening phase of the game toward the system that they prefer." Rob Weir, *First Move Advantage in Chess*, AN ANTIC DISPOSITION (Jan. 27, 2014), https://www.robweir.com/blog/2014/01/first-move-advantage-in-chess.html [https://perma.cc/7QZL-W6PV]. A similar advantage could be argued to exist in litigation because the prosecutor, by addressing the jury first both in *voir dire* and opening statements, can create expectations or put ideas into the minds of the jury that must be responded to by the defense, or it may leave the jury with the impression that the defense has the weaker case. This puts the defense "on the defense" all the time.

and frustration of potential defeat at trial. The defendant can help me reach a resolution that will leave a victim feeling like I did my job because the victim received some measure of justice. But it is really the first of those three items where there is meaningful leverage, because the balance can, more often than not, be accomplished through hard work in the courtroom itself. Consider, however, a defendant's ability to save the prosecution time weighed against what I have to offer that individual. I may be deciding whether the defendant will be labelled a convicted felon or have a conviction of any kind forever on a criminal record. In turn, that decision might impact whether the defendant gets deported, keeps his security clearance, or loses public housing benefits.[2] I may be deciding whether a defendant faces incarceration and is exposed to the trauma of jail or the penitentiary. I may be deciding the daily schedule of that defendant for months and years to come and whether that individual will be obligated to comply with probation and community service. That kind of incentive structure, stacked up against a defendant's mere capacity to save me some time, is like a David versus Goliath battle, where Goliath wins virtually every time.

And if that is not enough, other components of the existing legal structure strengthen my hand as a prosecutor even more. The possibility of charging a crime carrying a lengthy mandatory minimum might easily compel a defendant who is otherwise reluctant to accept any plea offer into a choice as severe as assuming the label of "convicted felon" in order to avoid the immediate pain of incarceration.[3] The inordinate power that society has handed prosecutors gives them the ability to strike Faustian bargains[4] with defendants, who may accept

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2. A criminal conviction can impact a defendant's immigration status and ability to access public housing or other governmental benefits, create restrictions on employment, and lead to political disenfranchisement. These effects are classified as collateral consequences, in that they are consequences beyond the direct penalty imposed by the court. These collateral consequences dramatically expanded in the 1980s and 1990s in a way that has a markedly disproportionate impact on communities of color. *See* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Races and Dignity*, 85 N.Y.U. L. REV. 457, 457 (2010).

3. Numerous articles and studies have highlighted the role that mandatory minimum sentences play in compelling a defendant to plead guilty to a charge. For example, Scott Hechinger wrote about a rare experience he had as a defense attorney where his client was actually willing to challenge police misconduct, thus exposing himself to a three-and-a-half-year mandatory minimum sentence if he was unsuccessful in his legal argument, while the prosecutor offered him probation if he waived taking such a position and pled guilty. Scott Hechinger, *How Mandatory Minimums Enable Police Misconduct*, N.Y. TIMES (Sep. 25, 2019), https://www.nytimes.com/2019/09/25/opinion/mandatory-minimum-sentencing.html [https://perma.cc/Y8MR-TM6A]. Hechinger's client believed he had been illegally stopped and searched and was willing to take the risk of lengthy incarceration, a bargain few of his other clients would have been willing to take, in order to challenge the constitutionality of his arrest. *Id*.

4. A Faustian bargain or pact was popularized in the writings of Goethe, whose main character, Faust, made a pact with the devil. J.W. VON GOETHE, GOETHE'S FAUST (W. Kaufmann trans., Anchor Books 1962). This type of bargain is one in which an individual sells their eternal soul for gain in the mortal life. *See* John Bucher, *The Faustian Bargain: 5 Deals Your Character Might Make*, LA SCREENWRITER (last visited Oct. 8, 2021), https://www.la-screenwriter.com/2018/05/02/the-faustian-bargain-5-deals-your-character-might-make/ [https://perma.cc/9TNC-KWXG]. While a defendant pleading guilty to a crime is hardly selling their soul to the devil, the action frequently involves satisfying a short-term interest–like avoiding incarceration–while creating a much larger long-term problem for oneself like deportation or problems securing employment.

substantial long-term harm to themselves in order to achieve a short-term benefit. It is easy for a defendant to not consider the collateral consequences a conviction may have for their future when they are told that by pleading guilty, they can avoid going to jail today.[5] And it becomes an ethical morass when the prosecutor is the architect of this style of negotiations. Prosecutors are charged by the *Model Rules of Professional Conduct* with being "minister[s] of justice,"[6] yet they have little official guidance as to what actually defines justice within the context of exercising this incredible power.

The criminal justice reform movement has stepped into the middle of this ethical quagmire by advancing numerous measures to try to address this disparate power structure. For example, reducing or eliminating mandatory minimum sentences is one way that reformers have sought to transfer power from the prosecutor to the neutral judge.[7] But these types of reforms offer only limited relief to the basic problem—a system premised on adversarial conflict where one of the adversaries has disproportionate power. There are two primary reasons why these legislative reforms are insufficient for resolving the broader problem. First, eliminating mandatory minimums is reform that occurs at the margins. Yes, the elimination of these provisions takes away one tool by which a prosecutor can extract a plea from an otherwise reluctant defendant. But the simple ability to charge a crime in the first place, not to mention determining which crimes and how many counts to indict, and the authority to effectively set an upward cap on the defendant's sentence through the government's sentencing recommendation, effectively means the prosecutor may still be able to bring so much pressure to bear that a defendant believes he or she has no choice but to plead guilty. Second, we have to acknowledge the very real possibility that these marginal reforms may not reach deeper into the criminal system for a long time. The brutal murder of George Floyd quickly captured the public's attention and brought forth urgent calls for a fairer justice system.[8] But rising crime rates may call into question how committed

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5. *See, e.g.*, Hechinger, *supra* note 3. Hechinger notes how unusual it was for a client to be willing to consider placing themselves at risk of incarceration rather than to simply take a plea deal that avoids the immediate consequence.

6. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2018) [hereinafter MODEL RULES].

7. Senator Dick Durbin (D-IL) has introduced one proposal that would modify mandatory minimums. The Smarter Sentencing Act of 2021, S. 1013, 117th Cong. § 2 (2021). This legislation, in addition to building on earlier sentencing reforms, focuses on reducing the number of mandatory minimum sentences for non-violent conduct. A number of groups are advocating for the passage of this bill including The Prison Fellowship, a nonprofit faith group centered on advocating for the needs of prisoners. *Prison Fellowship: What We Do*, PRISON FELLOWSHIP, http://prisonfellowship.org [https://perma.cc/H7K8-F63Y] (last visited Jul. 25, 2021).

8. Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder [https://perma.cc/4KUX-DT2F]. This article outlines a variety of initiatives that have been pushed since George Floyd's murder, including efforts to restructure law enforcement budgets, replace police response in behavioral calls with crisis response teams, limit law enforcement efforts in low-level traffic stops, reduce the presence of police in schools, and end qualified immunity for police officers.

voters remain to change.[9] The *Washington Post* recently reported how an increase in crime rates are now compelling progressive politicians to distance themselves from once seemingly popular efforts to defund the police and for voters to step back from further systemic reform.[10] The article also noted a difference in the electorate by pointing out that in 2016, Kim Foxx won the Cook County State's Attorney's race on a reform-minded platform, achieving 72 percent of the vote.[11] Four years later, with crime surging in Chicago, Foxx won only 54 percent in her reelection bid.[12]

Similarly, the efforts for more structural reform will collide with the practical realities of our criminal justice system. Currently, over ninety percent of criminal cases are resolved with guilty pleas.[13] As a result, the criminal justice system is spared the expense of preparing for, and conducting, a trial in the overwhelming majority of cases. Plea bargaining has become so ubiquitous that it "is not some adjunct to the criminal justice system; it is the criminal justice system."[14] Adopting reforms that equalize the power between the litigants will have the natural result of also increasing the number of cases that go to trial.[15] Logic suggests

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9. Aaron Chalfin & John MacDonald, *We Don't Know Why Violent Crime is Up. But We Know There's More Than One Cause*, WASH. POST (July 9, 2021), https://www.washingtonpost.com/outlook/we-dont-know-why-violent-crime-is-up-but-we-know-theres-more-than-one-cause/2021/07/09/467dd25c-df9a-11eb-ae31-6b7c5c34f0d6_story.html [https://perma.cc/G5XE-X249]. This piece details a rise in homicide of twenty-five percent between 2019 and 2020 and notes that the increase has been most pronounced in America's largest cities and economically disadvantaged neighborhoods. It should be noted, however, that while much of public discussion focuses on rising crimes, at least one study has concluded that the increase is limited to homicides. Sahil Kapur & Jon Schuppe, *'Overall Crime Decreased in 2020' in the U.S., Report Finds*, NBC NEWS (Sept. 12, 2021), https://www.nbcnews.com/politics/politics-news/overall-crime-decreased-2020-united-states-report-finds-n1278938 [https://perma.cc/RJT8-XQEC]. Some articles note that fears of rising crime have caused some voters to back away from criminal justice reform. *See infra* note 10.

10. Griff Witte & David Weigel, *With Violent Crime Spiking, the Push for Police Reform Collides with Voters' Fears,* WASH. POST (May 15, 2021), https://www.washingtonpost.com/national/police-reform-push-sputters/2021/05/15/5e075848-b426-11eb-a3b5-f994536fe84a_story.html [https://perma.cc/8Q68-YR8F]. One of the examples cited in this article is in New York City, a Democratic stronghold. Shootings in the City are up nearly fifty percent from last year, which brought crime to the forefront of voter's minds and helped bolster the candidacy of Eric Adams, who had served for over two decades as a police officer. In Atlanta, the city council president, and Democratic candidate for mayor, is advocating the hiring of more police officers to address the City's recent crime wave.

11. *Id.*

12. *Id.* It should be noted that Foxx came under criticism for the handling of high-profile cases including that of actor Jussie Smollett and singer R. Kelly. Dan Babwin, *2 (sic) Major Cases Add Up to Big Doubts About Chicago Prosecutor*, AP NEWS (Apr. 2, 2019), https://apnews.com/article/entertainment-donald-trump-ap-top-news-us-news-tv-7559f14bcec846ac9d4fc9f3ea3f42d8 [https://perma.cc/6QRN-ZE8C].

13. Andrea K. Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 NEW CRIM. L. REV. 434, 444 (2019).

14. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992).

15. Virginia, for example, has historically had fewer jury trials on average than the rest of the United States, registering at approximately two percent since 1986. Gracie Brooks, *New Jury Law May Have Unintended Consequences*, GREEN COUNTY REC. (Feb. 11, 2021), https://dailyprogress.com/community/greenenews/news/new-jury-law-may-have-unintended-consequences/article_83f8a2f0-6b10-11eb-93a3-abf9f2fc6959.html [https://perma.cc/UA8U-5C9S]. This downward trend in jury trials was likely the result of juries having the power to sentence the offender, which resulted in unpredictable and frequently extremely long sentences. *Id.* This

that this would mean more money will be needed to build additional courtrooms, to hire additional judges, and to create larger staffs for prosecutors' and public defenders' offices. Fundamental systemic change comes with a big price tag and that means it must compete with other financial priorities for voters.

Does this mean all hope for more equitable plea bargaining is lost? Not at all. But it means that while many of us are waiting anxiously for deep structural change to the criminal justice system, we must also look for how reform can take place within the existing structure in the meantime. If the system is not going to take away substantial power from prosecutors in the near term, how do we get those with authority to use it in a non-coercive, responsible, and fair fashion? Most prosecutors want to do the right thing. As with any profession, there are "bad apples," but from my experience, the vast majority of those who have become prosecutors do so because they want to fight for a safe and just community. Many are serving in these positions at substantial personal cost to their earning potential.[16] While I would acknowledge that there are different factors that could motivate any particular individual to become a prosecutor, it is reasonable to surmise that many who enter a public service position at personal cost to themselves are doing so for benevolent reasons. And prosecutors who are doing their jobs out of an altruistic motive, presumably want to do the right thing in life.

That brings us to ethics. Ethics is fundamentally about making right choices.[17] Because plea offers involve the exercise of significant power over the lives and futures of other people, it is critical that prosecutors know how to make the right choices in this context. For that reason, if we want to offer a structural framework for prosecutors to use when evaluating how to negotiate a plea bargain with the defense, that framework must be based on ethics. This Article offers such a proposal. This Article will look at the *Model Rules of Professional Conduct* that are implicated in plea bargaining and similar compelling secondary sources on the

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uncertainty disfavored jury trials as a choice for defendants and gave a great deal of leverage to prosecutors, who could also demand that the defendant face a jury if plea bargaining faltered. In 2021, legislation went into effect that eliminated jury sentencing without a defendant's consent. *Id*. Because this change eliminates much of the unknown risk that a defendant faced in electing a jury trial, the change is expected to increase costs because more trials will be demanded. *Id*.

16. Many jurisdictions experience a problem with retaining prosecutors. Because of the low wages that are paid to these attorneys, they can earn a far higher salary in the private sector. For example, twenty percent of all prosecutors and public defenders in Florida left public employment in 2017. Andrew Pantazi, *Paying for Justice: Public Defenders and Prosecutors Flee for Better Salaries*, THE FLA. TIMES-UNION (Feb. 25, 2018), https://www.jacksonville.com/news/20180223/paying-for-justice-public-defenders-and-prosecutors-flee-for-better-salaries [https://perma.cc/T7FG-C7A5].

17. Sarah Hunkele, *Professional Ethics: Making the Right Decision,* AUDIOLOGYONLINE (June 26, 2017), https://www.audiologyonline.com/articles/professional-ethics-making-right-decision-20411 [https://perma.cc/AS53-7N6X]

> Within normative ethics, the goal is to arrive at moral standards that regulate right and wrong conduct. The goal is to determine what will lead us to the right decision, and what will lead us to the wrong decision, and the process by which we choose a course of action.

topic, as well as broader normative ethics that a fair-minded prosecutor can use when negotiating. It will conclude with a checklist or rubric that synthesizes the propositions advanced, which prosecutors can use in plea negotiations to ensure that they are satisfying the ends of justice.

I. THE RULES OF PROFESSIONAL CONDUCT AND SECONDARY SOURCES

A. Rules OF PROFESSIONAL CONDUCT

The *Model Rules of Professional Conduct* (the *Rules*) do not offer explicit regulations that speak directly to the issue of criminal plea negotiations. However, the *Rules* can be grouped into three broad categories that have implications for how a prosecutor should approach the ethics of negotiation. The first involves the role of plea bargaining as part of a competent, efficient, and fair judicial system. The second is the importance of truthfulness in plea negotiations. The last deals with special considerations when negotiating with unrepresented persons.

1. PLEA BARGAINING AS PART OF A COMPETENT, EFFICIENT, AND FAIR JUDICIAL SYSTEM

As I write, much of the public attention—as it pertains to the judicial system—is captivated by the recent decision of the Pennsylvania Supreme Court overturning the sexual assault convictions of Bill Cosby.[18] The Court took this action because Cosby's conviction was based in part on statements that he had made during sworn depositions in 2005.[19] The problem was that he undoubtedly made these statements because the District Attorney at the time, concluding that he had inadequate evidence to prosecute a criminal case and feeling like the civil trial offered some measure of justice for the victims, officially declined prosecution, thus forcing Cosby to testify without the shield of the Fifth Amendment's protection against self-incrimination.[20] Fast forward for over a decade and a new

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18. Commonwealth v. Cosby, 252 A.3d 1092 (Pa. 2021). It is important to acknowledge that as of the writing of this article, prosecutors have filed a petition seeking review of this decision by the U.S. Supreme Court. That petition has not been addressed as of this moment. Amy Cheng, *Prosecutors Ask Supreme Court to Review Ruling that Freed Cosby*, WASH. POST (Nov. 30, 2021), https://www.washingtonpost.com/lifestyle/2021/11/30/bill-cosby-appeal-sex-assault-court/ [https://perma.cc/DC76-8Q8G]. https://www.washingtonpost.com/lifestyle/2021/11/30/bill-cosby-appeal-sex-assault-court/ [https://perma.cc/HTE6-KAH9].

19. *Cosby*, 252 A.3d at 1100.

20. *Id.* at 1104.

> The former District Attorney would later testify that it was his precise intent. "[I] made the decision as the sovereign that Mr. Cosby would not be prosecuted no matter what. As a matter of law, that then made it so that he could not take the Fifth Amendment. . . . [I]n my legal opinion, [the decision not to prosecute] meant that Mr. Cosby would not be allowed to take the Fifth Amendment in the subsequent civil suit. . . . [Cosby's Attorney] Phillips agreed with me that that is, in fact, the law of Pennsylvania and of the United States and agreed that if Cosby was subpoenaed, he would be required to testify.

Id. The Pennsylvania Supreme Court stated unequivocally, "Recalling his thought process at the time, the former district attorney further emphasized that it was 'absolutely' his intent to remove 'for all time' the

prosecutor, feeling unbound by these actions, decided to prosecute Cosby.[21] The trial court determined that this was legally permissible, because the former D.A. had never reached a formal agreement with Cosby or made an express commitment that the government would *never* prosecute him and that the purported immunity that he created was "defective, and thus invalid."[22] The Pennsylvania Supreme Court however, noted that the fact that the prosecutor had signed a press release announcing he was not prosecuting Cosby was persuasive evidence in the civil case that he had no Fifth Amendment privilege.[23] The Court went on to hold that, "when a prosecutor makes an unconditional promise of non-prosecution, and when the defendant relies upon the guarantee to the detriment of his constitutional right not to testify, the principle of fundamental fairness that undergirds due process of law in our criminal justice system demands that the promise be enforced."[24] The Court supported its conclusion by using language that points to the prosecutor's role as an administrator of justice that is vested with tremendous discretion and authority, such that their word must be their bond.[25] Even though the prosecutor had not followed the formal statutory procedure for granting transactional immunity, assurances made by a prosecutor must be fulfilled out of fundamental fairness and due process. Thus, the Court determined that only enforcement of the original decision not to prosecute could satisfy these demands.[26]

After the decision was announced, there was much criticism of what had occurred, but most of it was not directed at the Pennsylvania Supreme Court,

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possibility of prosecution, because 'the ability to take the Fifth Amendment is also for all time removed.'" *Id.* at 1105.

21. *Id*. at 1108.

22. *Id*. at 1117. Despite the statements of the former prosecutor, the trial court believed his "characterization of his decision-making and intent to be inconsistent, inasmuch as he testified at times that he intended transactional immunity, while asserting at other times that he intended use and derivative-use immunity." The trial court instead focused on the fact that Cosby's civil attorneys never requested immunity and that they had never agreed to any such offer. *Id*.

23. 23. *Id*. at 1130.

24. *Cosby*, 252 A.3d at 1131.

25. Prosecutors are more than mere participants in our criminal justice system. As we explained in *Commonwealth v. Clancy*, 192 A.3d 44 (Pa. 2018), prosecutors inhabit three distinct and critical roles: they are officers of the court, advocates for victims, and administrators of justice. As the Commonwealth's representatives, prosecutors are duty-bound to pursue 'equal and impartial justice' and 'to serve the public interest.' "Their obligation is 'not merely to convict,' but rather to 'seek justice within the bounds of the law. . . .'As prosecutors are vested with such 'tremendous' discretion and authority, our law has long recognized the special weight that must be accorded to their assurances." *Cosby*, 252 A.3d. at 1131.

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> In our view, specific performance of D.A. Castor's decision, in the form of barring Cosby's prosecution . . . is the only remedy that comports with society's reasonable expectations of its elected prosecutors and our criminal justice system. [U]nder these circumstances, neither our principles of justice, nor society's expectations, nor our sense of fair play and decency, can tolerate anything short of compelling the Montgomery County District Attorney's Office to stand by the decision of its former elected head.

Id. at 1144.

which by all measures appears to have interpreted the law correctly.[27] And yet, the outcome left a distinctively bad taste in the mouth of the public.[28] Where, then, does the fault lie? Was it with the original prosecutor for making the decision to not prosecute in the first place? Was the error his, but instead grounded in not appropriately memorializing the grant of transactional immunity to create a clean record? Or was the current prosecutor at fault for not fulfilling the government's commitment to Mr. Cosby? Wherever the fault lies in this circumstance, few seem to have walked away with the sense that justice was done for the community or the victims in this case.

This story highlights that many of the concepts in legal ethics are not necessarily concerned with regulating behavior that is inherently moral—a clear case of right versus wrong—but in promoting a system of justice that is competent, efficient, and fair. The *Rules of Professional Conduct* have their starting point in competence by requiring in the very first rule that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation."[29] The primacy of the requirement for competence in the *Rules of Professional Conduct* demonstrates that it is a cornerstone in legal ethics and that a prosecutor can be subject to professional discipline for incompetence.[30] How does competence enter plea negotiation from a prosecutor's point of view? The prosecutor must be fully apprised of the evidence in the case in order to make an appropriate evaluation of the likelihood of obtaining a conviction. A prosecutor

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27. *See, e.g.*, Ian Millhiser, *The Court Decision Freeing Bill Cosby, Explained as Best We Can*, VOX (June 30, 2021), https://www.vox.com/22557691/bill-cosby-pennsylvania-released-commonwealth-david-wecht-andrea-constand-metoo-sexual-assault [https://perma.cc/82R7-3M84]. The author of this article calls the opinion long, rambling, badly organized and difficult to follow but, "rooted in basic principles of contract law" and "less ridiculous than it sounds." The author also calls the case a "stunning display of prosecutorial incompetence."

28. *See, e.g.*, Jessica Goldstein, *The Betrayal of Justice That Set Bill Cosby Free*, TNR (July 1, 2021), https://newrepublic.com/article/162894/bill-cosby-free-bruce-castor-injustice [https://perma.cc/Q2XF-BBSH]. This article, for example, notes that:

> [w]e are left with a situation in which a man who has been credibly accused by 60 woman of drugging and sexually assaulting them; who was convicted in a court of law by a jury of his peers; who admitted, on the record, to obtaining drugs, including quaaludes, for the purpose of giving them to women with whom he wanted to have sex is now being released from prison because of some promise Bruce Castor supposedly made, for which no contemporaneous documentation can be found.

This article, unlike some which bemoan what occurred without specifically laying fault at the feet of the Pennsylvania Supreme Court, criticizes the decision utilizing the rationale cited by the trial court in permitting the use of the deposition. However, much of the article is not a legal analysis of the decision, so much as moral outrage at a man the author labels a "serial rapist" being set free.

29. MODEL RULES R. 1.1.

30. *See, e.g.*, Livingston v. Va. State Bar, 744 S.E.2d 220 (Va. 2013) (upholding the Virginia State Bar's disciplinary finding against a prosecutor based on an allegation of incompetence by failing thoroughness and preparation of a case by not making an 'inquiry into and analysis of the factual and legal elements of the problem and use of methods and procedures meeting the standards of competent practitioners.').

must be thoroughly versed in the law to understand whether they will be able to follow up the threat of prosecution and go to trial (which is the threat embedded in all plea negotiations if they fail to produce an agreement).[31] A prosecutor must have done the leg work to consult with the victims to know their perspective on a plea offer. And a prosecutor's diligent provision of discovery to a defense attorney during the plea process is necessary in order for the attorney to meaningfully advise the client on the wisdom of taking a plea. Because plea negotiations represent the overwhelming majority of a prosecutor's cases, it is vital that in approaching this task, the prosecutor places a primary emphasis on thoroughness and getting it right.

But the Cosby case highlights at a more fundamental level the importance of a criminal justice system that is fair and the critical role that plea negotiations hold in that process. After all, in that case, the court reached the conclusion that the only reason Cosby testified in the depositions is that a promise was made by a prosecutor that he would not face criminal liability.[32] That was the intent of the prosecutor who made the promise.[33] If the prosecutor can extract the benefit that he believes he will get for extending the discretion of his office in certain ways (in this case to force answers out of someone who would otherwise remain silent), is it fair for him (or his successors in office) to deny the defendant the benefit of his bargain? The court could not allow the government "to extract incriminating evidence from a defendant who relies upon the elected prosecutor's words, actions, and intent, and then use that evidence against that defendant with impunity."[34] The prosecutor intended to handicap Cosby in a civil lawsuit, and he did just that.[35] He should not receive that benefit and still get to use Cosby's statements in a way neither side ever intended.

Fairness, like competence, has a dimension well rooted in the *Rules of Professional Conduct*. The *Rules* warn parties against bringing a proceeding or controverting an issue, "unless there is a basis in law and fact for doing so that is not frivolous."[36] They call on attorneys to make "reasonable efforts to expedite litigation."[37] And they prohibit lawyers from obstructing the other party's access to evidence, offering false testimony, disobeying court rules, making frivolous discovery requests, alluding at trial to things the lawyer knows cannot be supported by admissible evidence, or telling independent witnesses not to talk to the other side.[38] Considered together, the intent of these rules is to create in the litigation process a zone of fairness, so that disputes can be resolved on their merits,

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31. *Id*. at 224.
32. *Cosby*, 252 A.3d at 1139,1140.
33. *Id*. at 1195.
34. *Id*. at 1145.
35. *See id*. at 1108, 1109, 1146.
36. MODEL RULES R. 3.1.
37. 37. MODEL RULES R. 3.2.
38. 38. MODEL RULES R. 3.4.

not through trickery and technicalities.[39] There will come a point in time when every prosecutor realizes, as may have been the case with Mr. Cosby, that he or she (or a current or former colleague) has made a bad deal—but the deal must be sustained for the system to work the way it is supposed to.[40]

As the *Cosby* case demonstrates, when it comes to plea negotiations, first and foremost, a prosecutor's word must be his or her bond.[41] No commitment should ever be made that cannot be fulfilled. Sometimes, adhering to the plea bargain that was made may be a bitter pill for the prosecutor to swallow, but sustaining a system that is fundamentally fair supports larger values in the long run.[42]

2. TRUTHFULNESS IN PLEA NEGOTIATIONS

Benjamin Franklin once quipped, "God works wonders now and then; Behold! A lawyer, an honest man!"[43] Franklin's quote captures the popular sentiment associating lawyers with dishonesty. And yet, truthfulness is a value that is articulated repeatedly in the *Rules of Professional Conduct*. These rules make it a violation for a lawyer to make a false statement of fact or law to the court or to fail to correct a false statement previously made.[44] The value of honesty is promoted in an even more straight-forward fashion by a rule stating, "[i]n the course of representing a client a lawyer shall not a) knowingly make a false statement of material fact or law to a third person or b) fail to disclose a material fact when disclosure

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39. *See, e.g.,* Bennett v. Commonwealth, 374 S.E.2d 303, 311 (Va. 1988)

> The aim of trials is to find the truth. Uncovering the truth is the paramount goal of the adversary system. All the rules of decorum, ethics, and procedure are meant to aid in the truth-finding process. Ambush, trickery, stealth, gamesmanship, one-upmanship, surprise have no legitimate role to play in a properly conducted trial.

40. *See* Santobello v. New York, 404 U.S. 257, 262 (1971) (overturning a sentence where a new prosecutor in a case, unaware of an earlier prosecutor's agreement not to seek jail time in a plea, failed to uphold the agreement by seeking and securing active incarceration:

> [T]he adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

41. *Cosby*, 252 A.3d at 1134 ("Considered together, these authorities obligate courts to hold prosecutors to their word, to enforce promises . . . Prosecutors can be bound by their assurances or decisions under principles of contract law or by application of the fundamental fairness considerations that inform and undergird the due process of law.").

42. *See, e.g.*, United States v. Carter, 454 F.2d 426, 428 (4th Cir. 1972) (holding that if the government made a promise to the defendant and he relied upon that promise, the government should be held to abide by its terms; "There is more at stake than just the liberty of this defendant. At stake is the honor of the government public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government").

43. Benjamin Franklin, *Poor Richard's*, *1733*, in PAPERS OF BENJAMIN FRANKLIN (Leonard W. Labaree 1959).

44. 44. MODEL RULES R. 3.3 (a)(1).

is necessary to avoid assisting a criminal or fraudulent act by a client . . . ."[45] Quite simply, when acting as a lawyer, you cannot lie.

This seemingly straight-forward principle becomes complicated when dealing with negotiations, because the entire traditional process is built on obfuscating one's true bargaining posture.[46] A buyer must convince a seller that the desired good is worth less to him than it actually is. So long as bargaining is rooted in game theory (how do I extract the most that I can for my client's position?), truthfulness is not treated as a primary value.[47] Deception can become so common that terms like "mere puffery" legitimize routine practices of dishonesty in negotiation.[48]

But while playing loose with the truth appears to go hand in hand with commercial interactions in a capitalist economy, something seems wrong about that approach when we are dealing with the freedom and reputation of individuals. How can a prosecutor advance the value of honesty in plea negotiations? Embracing this value requires a prosecutor to do what appears, on its surface, to be counter to the nature of an advocate. That is, to take deliberate steps that appear at first glance to weaken the prosecutor's bargaining hand but support a much more important objective at the end of the day. I will offer three specific examples.

First, the prosecutor must consciously reject the impulse to engage in game theory, which is often a part of negotiation in an adversarial process. From my

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45. MODEL RULES R. 4.1.

46. *See* THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 23 (1960) ("Bargaining power has also been described as the power to fool and bluff, 'the ability to set the best price for yourself and fool the other man into thinking this was your maximum offer.").

47. Avinash Dixit, *Game Theory Explained,* PBS Am. Experience, https://www.pbs.org/wgbh/americanexperience/features/nash-game/, [https://perma.cc/SX5T-47LA] (last visited Oct. 9, 2021) ("Game theory studies interactive decision-making, where the outcome for each participant . . . depends on the actions of all."). Thus, if you are a player in the game, your strategy must account for the choice of others. *Id.* When game theory is practiced in traditional criminal litigation, each side is attempting to "win" by achieving an outcome that is more favorable for their client than the other side. The prosecutor, for example, would be seeking conviction for the most serious charge and the lengthiest sentence possible, while the defense is aiming for acquittal or the least significant conviction and the least amount of jail time. When negotiating from this posture (attempting to maximize "the win"), the prosecutor will be drawn to focus more on what the defendant will settle for and will be drawn away from examining issues such as the just and appropriate resolution of a case.

48. Vulcan Metals Co., Inc. v. Simmons Mfg. Co., 248 F. 853 (2d Cir. 1918)

> There are some kinds of talk which no sensible man takes seriously, and if he does he suffers from his credulity. If we were all scrupulously honest, it would not be so; but, as it is, neither party usually believes what the seller says about his own opinions, and each knows it. Such statements, like the claims of campaign managers before election, are rather designed to allay the suspicion which would attend their absence than to be understood as having any relation to objective truth. It is quite true that they induce a compliant temper in the buyer, but it is by a much more subtle process than through the acceptance of his claims for his wares.

Every circuit that has considered the issue has determined that "puffery" or "dealer's talk" is not actionable. *See* Robert N. Kravitz, *Room for Optimism: The 'Puffery' Defense under the Federal Securities Laws (Part 1 of 2)*, 19 AM. BAR ASS'N SEC. LITIG. J. 1, 1 (2009).

own experience, many prosecutors' approach to plea bargaining is to look at the evidence, the likelihood of conviction, and necessary resource management, and use these ideas to focus on maximizing "the win" for the prosecutor's side. What are the most serious charges for which the defendant can be convicted? What is the maximum penalty that can be extracted in a plea? In contested cases, prosecutors often look at the outcome they obtained and ask if they "beat their offer." In other words, did the defendant receive a longer sentence or get convicted of more serious charges than he or she would have received if they had only taken the plea deal that was extended? This is an easy mental trap to fall into, and I have done so repeatedly in my career. This is because maximizing the win for my client (i.e., the state), is at the heart of adversarial negotiation. However, this approach fails to account for what really is a "win" in prosecution. Increased incarceration at its core comes at significant cost to the community both financially and in terms of its human toll.[49] What we aim for in life, we often achieve. If a prosecutor is motivated by increasing incarceration, he or she will doubtless accomplish that end given the inordinate power of the office. But will society be better off? As a prosecutor, perhaps the better question to ask is not what is the most punishment I can get from this deal, but rather, what is the least punishment that is needed to accomplish justice, deterrence, and rehabilitation?

A win for a prosecutor is when justice is done. That is not always conviction and incarceration. It also occurs when a charge that is not supported by sufficient evidence or that is built on an investigation rooted in improper investigative techniques gets dismissed. It occurs when a defendant is able to accept a rehabilitative disposition that puts an end to their participation in the revolving door of the criminal justice system. Justice is inherently unique to each situation, but that is what requires a nuanced view from a prosecutor. And it cannot be achieved as

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49. Recent studies have shown that the direct annual cost of policing, combined with America's current incarceration of 2.2 million Americans, totals $300 billion. However, when lost earnings, adverse health effects, and damages to the incarcerated are considered, the loss rises to $1.2 trillion annually. Tara O'Neill Hayes, *The Economic Costs of the U.S. Criminal Justice System*, AM. ACTION F. (July 16, 2020), https://www.americanactionforum.org/print/?url=https://www.americanactionforum.org/research/the-economic-costs-of-the-u-s-criminal-justice-system/, [https://perma.cc/7ZC8-UDAN]. In addition to economic costs, social costs must be considered, particularly on communities of color.

> Measuring harms at the community level is more complex than aggregating prison's collateral consequences for individual inmates. Community harms affect more than the total number of residents who have been incarcerated. Indeed, a central focus of this research is community members other than inmates, including family members, friends, and neighbors of prisoners who suffer adverse consequences that flow beyond the prison gates.
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> Moreover, research examining the processes by which incarceration affects communities reveals that geographic concentration affects social relationships and norms in a way that cannot be captured by aggregating individual effects. Mass imprisonment inflicts harm at the community level . . . . *There is a social dynamic that aggravates and augments the negative consequences to individual inmates when they come from and return to particular neighborhoods in concentrated numbers.*

Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281 (2004) (footnote omitted).

long as the prosecutor remains wedded to game theory and "winning" in a more traditional sense.

The additional problem with the game theory approach to a prosecutor's negotiation is the myopic view it provides as to who the client is.[50] If the prosecution's client is the community writ large, then it necessarily includes the defendant, their family and friends, and their neighborhood. And they certainly might have a significantly different view of whether a win is simply locking their loved one away for the longest period of time possible.

The second thing a prosecutor can do to embrace the value of honesty in plea negotiations is to nurture the value of transparency in dealing with defense counsel. Part of transparency is transparency in the disclosure of evidence. This will be discussed later in this Article as to why it is critical that exculpatory evidence be divulged as part of the plea negotiation process. But simply showing the defense what the evidence is does not demonstrate transparency in its most complete sense. On paper, the state's case may be rock-solid against a defendant. And yet, the prosecutor may have separate knowledge that the evidence can never be effectively presented in court because a key witness is dead or missing. How does the prosecutor respond to that information? One approach is to not disclose the fact to the defense and to reason that the issue of witness availability is not exculpatory because it does not mean the defendant is less likely to have committed the crime.[51] But this is not honesty at its best. What happens to that prosecutor's reputation when it comes out that the prosecutor knew all along that the witness was unavailable and concealed that fact? The prosecutor's credibility is destroyed and the working relationship with defense counsel is harmed.

A third example of how honesty can be advanced is when a prosecutor is willing to be more open in dialogue with a defense attorney about the prosecutor's intentions and perceived strengths and weaknesses in the case. This approach might appear to be anathema to traditional trial advocacy because it divulges

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50. It is important to remember that:

> [t]he prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim. When investigating or prosecuting a criminal matter, the prosecutor does not represent law enforcement personnel who have worked on the matter and such law enforcement personnel are not the prosecutor's clients. The public's interests and views should be determined by the chief prosecutor and designated assistants in the jurisdiction.

STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 3-1.3 (Am. Bar Ass'n 4th ed. 2017).

51. Most courts that have considered this question have not found a *Brady* violation when a prosecutor failed to disclose the death or unavailability of a witness. *See, e.g.*, Commonwealth v. Friedenberger, No. 1054 WDA 2013, 2014 WL 10920398, at *6 (Pa. Super. Ct. May 1, 2014) (opining that it was not exculpatory evidence that three critical witnesses had died between an initial trial and a defendant's subsequent plea); People v. Jones, 375 N.E.2d 41, 42–43 (N.Y. 1978) (holding that the death of a witness was a practical/tactical consideration and "not evidence at all," thus, withholding the information was not a *Brady* violation); *In re* Wayne M., 467 N.Y.S.2d 798, 800 (N.Y. Fam. Ct. 1983) (determining that withholding information about witness availability is a professional ethics violation in the state but does not create an actual *Brady* violation that would undermine a conviction).

strategy. But this kind of dialogue creates a climate of openness, where the parties are more likely to come to a fair resolution.[52]

Without doubt, if prosecutors embrace the principles that promote a culture of honesty, they are giving up tools that enable them to get the longest sentences and harshest convictions out of a case. But what they gain in return is much more valuable. The prosecutor gains a reputation for fairness. The prosecutor does not find him or herself backed into a corner at trial where their lack of transparency led the conflict to come to a head, and now the temptation to engage in ethically lapsed behavior takes on a heightened intensity. The prosecutor, by promoting honesty and openness, is helping the court achieve a resolution where the outcome matches what the evidence in the case truly supports—not what was possible through concealment or false portrayals. And lastly, the prosecutor who promotes a culture of openness can help identify solutions that are a win for their client as understood in its broadest context. Not just more incarceration, but outcomes that promote justice, safety, and rehabilitation.

3. DEALING WITH UNREPRESENTED PERSONS

Speaking from personal experience, no area of ethics makes prosecutors feel more uncomfortable than dealing with unrepresented defendants. This task is filled with ethical landmines. And yet, particularly early in their career, a prosecutor will have to work extensively with *pro se* defendants, because many people charged with misdemeanor traffic and criminal matters are not represented by attorneys.[53] These cases must also move through the criminal justice system, and it would be fundamentally unfair not to extend plea offers to unrepresented

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52. It is also worth noting that when a prosecutor is forthcoming about his or her intentions if an offer is not accepted, it can help avert a motion to dismiss based on prosecutorial vindictiveness where a defendant asserts that the government is seeking to punish them for having exercised a legal right. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978) (holding that, when a state prosecutor carried out his statement made during plea bargaining conferences that the defendant would be indicted on more serious charges if negotiations failed, it was not a due process violation). In *Bordenkircher*, the court noted that plea bargaining flows from the "mutuality of advantage" that each side has in avoiding trial. *Id.* at 363 (quoting Brady v. United States, 397 U. S. 742, 752 (1970)). Plea bargaining as carried out in this fashion is distinct from the scenario of prosecutorial vindictiveness, where the State engaged in a "unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right." *Bordenkircher*, 434 U.S. at 362. The court concluded:

> There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise. We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment.

Id. at 365 (footnote omitted).

53. Each prosecutor's office may be structured in a different manner. From my experience, and in our office, new prosecutors will be assigned to either traffic court or a criminal misdemeanor court so that they can develop their skills before being assigned more serious felony cases.

defendants simply so the prosecutor could avoid interacting with them at all. It is critical, however, when dealing with unrepresented parties that prosecutors follow several simple dictates laid out in the *Rules of Professional Conduct*. First and foremost, they must be clear with the defendant about who they are (what their role in the system is) and that they are not disinterested in the case.[54] Second, under no circumstances may prosecutors advise defendants of anything other than the advisability of obtaining an attorney.[55] Many people would think it would be obvious to a defendant that a prosecutor might not be the best person for them to look to for advice. But over the years I have repeatedly seen *pro se* defendants ask me what they should do, a question I am not allowed to answer.

Lastly, it is worth noting a distinction in how Rule 3.8 (which deals with specific ethical norms for prosecutors) has been modified by the states from its model form, as drafted by the American Bar Association. In the model version, a prosecutor is precluded from "seek[ing] to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing."[56] While doubtlessly well-intended, this rule could preclude a prosecutor from treating a *pro se* defendant the way he or she would a represented party in plea negotiations. Often, the waiver of preliminary hearing is a standard term in a plea offer and defendants who accept responsibility "early in the game" and spare the government any significant litigation expense get the best deal. Is it really best for a person who chooses to represent themselves not to be able to avail themselves of a benefit that would be afforded a represented party? Some states, such as Virginia, have modified this provision to prohibit a prosecutor from knowingly taking advantage of an unrepresented defendant.[57] On its face this modification would seem to require less of a prosecutor when in reality it can require much more. For example, the Virginia State Bar has opined that when a prosecutor knows that he or she is dealing with an unrepresented non-citizen for an offense

54. MODEL RULES R. 4.3.

55. MODEL RULES R. 4.3.

56. MODEL RULES R. 3.8.

57. The American Bar Association's *Model Rules of Professional Responsibility* have two primary expectations specific to prosecutors dealing with unrepresented parties. The first is to "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel." MODEL RULES R. 3.8. This has been broadly adopted by the various state bar associations with the exception of Florida, Hawaii, Maine, New York, Ohio, Oregon, and Virginia. States that have adopted the language with modifications include Tennessee, Texas, Wisconsin and Georgia, the lattermost only requiring that a prosecutor "refrain from making any effort to prevent the accused from exercising a reasonable effort to obtain counsel." VARIATIONS OF THE ABA MODEL RULES OF PROF'L CONDUCT R. 3.8 (2021). The second provision in Rule 3.8 mandates that a prosecutor, dealing with an unrepresented party, "not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing." MODEL RULES R. 3.8. This provision has less broad acceptance. Alaska, Georgia, Hawaii, Kentucky, Maine, New York, Ohio, and Oregon have omitted the rule in its entirety. Virginia, California, Massachusetts, New Jersey, New York, North Dakota, Tennessee, Texas, Vermont, and Wisconsin have all modified the language. VARIATIONS OF THE ABA MODEL RULES OF PROF'L CONDUCT R. 3.8 (2021).

that does not qualify for court-appointed counsel and makes a plea offer that involves what he knows is a deportable offense, the prosecutor is obligated in the offer to include specific language memorializing the need for the defendant to obtain legal advice on the immigration consequences of the plea and is also required to ask the court to colloquy the defendant on whether the defendant has had "opportunity to understand, or to obtain legal advice regarding, the immigration law consequences of the plea."[58]

Regardless of what version of Rule 3.8 has been adopted in a particular state, the norm to not take advantage of an unrepresented party is a good rule of thumb. Offering the same plea offers to those who have attorneys and those who do not is a good way of upholding this principle. Making sure that unrepresented defendants have discovery or know of exculpatory evidence without specifically asking is another. And repeating to the defendant the advisability of obtaining an attorney and providing them the time to do so is critical—rather than trying to quickly force a resolution to the case in order to clear it off the docket, a common practice in my line of work.

B. SECONDARY AUTHORITY

It is unfortunate that given the incredible power vested in prosecutors, the *Rules of Professional Conduct* provide little specialized guidance to prosecutors. However, in the absence of official direction outside of Rule 3.8, it is useful to look at persuasive secondary authority that addresses the topic.

Chief among these is the American Bar Association's *Criminal Justice Standards for the Prosecution Function* (the Standards), a publication that provides extensive, non-binding guidance from a collection of experts to better understand how to exercise the powers of a prosecutor in an ethically sound manner. This document offers three sections related to a prosecutor's conduct in plea negotiations: Standard 3-5.6 "Conduct of Negotiated Disposition Discussions"; Standard 3-5.7 "Establishing and Fulfilling Conditions of Negotiated Dispositions"; and Standard 3-5.8 "Waiver of Rights as Conditions of Disposition Agreement."[59] While much of these Standards involve restated principles from other rules of professional conduct, there are numerous points that deserve independent consideration. The guidance in these documents offers particular insight in four areas: the importance of the prosecutor having a willingness to negotiate in plea bargains in the first place, the prosecutor's consideration of collateral consequences for the defendant when formulating plea offers, the necessity of the prosecutor providing exculpatory evidence as part of the plea negotiation process, and the circumstances under which a prosecutor obtains a waiver of a defendants' rights as part of a plea. Each of these issues will be considered in turn.

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58. Virginia State Bar, Legal Ethics Op. 1876, at 7 (2015).

59. STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function (Am. Bar Ass'n 4th ed. 2017).

1. WILLINGNESS TO PLEA BARGAIN

The ABA opines that "[t]he prosecutor should be open, at every stage of a criminal matter, to discussions with defense counsel concerning disposition of charges by guilty plea or other negotiated disposition."[60] Perhaps that does not sound revolutionary, particularly when presented with the knowledge that about ninety percent of criminal cases are resolved with plea offers.[61] However, being "tough on crime" can be a selling-point to voters when a prosecutor runs for office.[62] If elected in a locale where being "tough on crime" is a compelling argument to voters, refusing to offer defendants anything in exchange for a plea could be a campaign strategy. Certainly, in these jurisdictions, many cases still result in the defendant pleading guilty even without an agreement with the government, in order for the defendant to demonstrate to the sentencing judge an acceptance of responsibility. Regardless, declining to engage in plea negotiation at all would be operating in a manner at odds with the guidance from the American Bar Association that the prosecutor should always be open to resolution and negotiation.[63]

Why would a more ethically solid approach favor a willingness to engage a defense attorney in negotiation? Perhaps, in part, this norm is driven by a desire to reduce inconsistency in the criminal justice system in order to provide more equitable outcomes. If two similarly situated defendants commit the same crime, but one has the misfortune of being assigned a "no-deals" prosecutor or commits the crime in a "no-deals" jurisdiction, he or she can be looking at a vastly different judicial outcome than the counterpart in a different jurisdiction. While the decentralized nature of our criminal justice system means that these types of differences will always exist, lessening the severity of these distinctions takes us a step closer to equal justice under the law. Additionally, comity and professionalism should be goals for any well-functioning legal system. Fostering a legal environment where the parties are open to discussing a negotiated resolution to the dispute, helps reinforce that type of professional relationship.

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60. *Id*. at Standard 3-5.6.

61. *See* Scott & Stuntz, *supra* note 14.

62. David Lat, *How Tough on Crime Prosecutors Contribute to Mass Incarceration*, N.Y. TIMES (Apr. 8, 2019), https://www.nytimes.com/2019/04/08/books/review/emily-bazelon-charged.html [https://perma.cc/HNB3-KXZY]. This review analyzed a book by Emily Bazelon entitled *The New Movement to Transform American Prosecution and End Mass Incarceration*. In the review, the author began by noting that being a prosecutor was often a springboard for higher office, and "[t]he basic recipe for using a prosecutor's post as a springboard into politics required being 'tough on crime,' protecting the public by putting criminals behind bars."

63. Notably, however, there is a growing reform movement that has called for the elimination or close to substantial elimination of plea bargaining. *See, e.g.*, Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2299 (2006). As with many issues, this points to academic tension and disagreement around whether plea bargaining is beneficial or harmful to defendants.

2. CONSIDERATION OF COLLATERAL CONSEQUENCES

The Standards also assert that "[t]he prosecutor should not enter into a disposition agreement before having information sufficient to assess the defendant's actual culpability. The prosecutor should consider collateral consequences of a conviction before entering into a disposition agreement."[64] These two principles urge a prosecutor to individualize their treatment of defendants both by better understanding the person's relative role in the overall crime, but also by individualizing the outcome in the case to match that defendant's life circumstances.[65] The latter concept is not without controversy because it touches the heart of a dispute over what it means to be fair. Is it fair to treat everyone the same way or is it fair to consider the litigant's individual circumstances when structuring a plea offer?[66]

In the office where I practice and in every office with which I have interacted over my career, it is common practice for a prosecutor's office to utilize "standard dispositions" as guideposts for plea offers in frequently committed crimes. These standard dispositions are rooted in the laudable aim of wanting to ensure that bias does not impact the negotiation process and that individuals are treated fairly. Offenses like driving under the influence of alcohol or shoplifting might be approached in largely the same way to avoid a situation where wealthy defendants are able to get better legal outcomes in their cases. But in asking the prosecutor to consider the collateral consequences of a plea, the concept of fairness is broadened to embrace additional principles beyond a lack of bias and comparable treatment. Consider for example two first-time offenders charged with shoplifting, neither of whom has a prior criminal record. Assume that one of the two defendants is a natural-born citizen, and the other is in the country on some type of visa. Assume further that the jurisdiction does not consider collateral consequences and offers a standard disposition of a twelve-month suspended sentence for all first-time defendants charged with this crime. For the natural-born citizen,

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64. STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 3-5.6(c) (Am. Bar Ass'n 4th ed. 2017).

65. *See* Pinard, *supra* note 2.

66. This debate is often understood across disciplines within the context of the difference between equality and equity. Joseph Levitan, *The Difference Between Educational Equality, Equity, and Justice. . . and Why It Matters*. AM. J. EDUC. F. (2015), http://www.ajeforum.com/the-difference-between-educational-equality-equity-and-justice-and-why-it-matters-by-joseph-levitan/ [https://perma.cc/92ZV-X5LV]. As the author notes in this article, "[e]ach concept carries implicit underlying assumptions about what is 'fair. . . .'" *Id.* Equality emphasizes "sameness" in terms of giving all people the same thing while equity focuses on fairness and access to the same opportunities. *Id.* A frequently used image is three children of different heights, standing on one side of an opaque fence, struggling to see a baseball game. If there are three boxes, equality would call for each child to be offered one box, regardless of whether that helped them see over the fence or not. By contrast, equity might call for the smallest child to receive two boxes and the tallest child to receive none, if the outcome was that all were able to see over the fence in this way. *Id.* This same debate can be seen in the context of plea bargaining. Many prosecutors will focus on equality by insisting that every defendant receive the same offer in order to avoid a suggestion of bias by the government. However, the same plea offer can mean vastly different things to different defendants depending on their own personal life consequences.

this outcome may have the impact of the embarrassment of a conviction and harm to future job prospects. For the immigrant, those impacts might also include potential deportation which, depending on the defendant's life circumstances, could be devastating.[67] Perhaps the person is deported to a country torn by conflict. Maybe they will be the subject of oppression. Perhaps they have lived in this country so long that they have no connection to their homeland. Is it fair that for the same minor criminal act, one defendant's life will be turned upside down, along with that of their family?

How then should a prosecutor's office balance the need to prevent bias in its plea offers and simultaneously promote equity in sentencing with an understanding that fair does not always mean same? Standard dispositions and sentencing guidelines, which both aim to advance the principle of equitable treatment of defendants, are great starting points for plea negotiations. But they should not be reflexively applied. The outcome of a criminal case should only be as severe as needed to achieve the retributive and rehabilitative aims of the justice system.[68] If a person steals one time, an outcome in that case which leads to their deportation is excessive. It is not what is needed to either punish the conduct or ensure it does not happen again. In this situation, the prosecutor should consider whether alternate dispositions can arrive at the same outcome. That may be tailoring outcomes to avoid overly harsh collateral consequences. It may be adding alternate forms of punishment like community service that can accomplish the same aim without devastating the defendant's life.

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67. "Crimmigration" is the popular term for the intersection of criminal and immigration law. Jennifer Lee Koh, *Crimmigration Beyond the Headlines: The Board of Immigration Appeals' Quiet Expansion of the Meaning of Moral Turpitude,* 71 STAN. L. REV. 267 (2019). Convictions for different types of offenses, such as CIMTs (Crimes Involving Moral Turpitude) can result in deportation or denial of lawful status. *Id.* What crime a defendant is convicted of has taken on increasing importance because of the categorical approach in crimmigration that focuses on the elements of the crime for which the immigrant was convicted, rather than the behavior underlying the crime. *Id.* Additionally, over the last several years, the number and type of offenses that are classified as CIMTs has expanded. *Id.* The significance of what someone is convicted of thus becomes central to criminal plea negotiations, as defendants seek to avoid pleading or being convicted of a crime that might result in deportation, even if the conviction was for minor conduct like shoplifting. Prosecutors and defense attorneys can often find a resolution by pleading to a different offense or finding rehabilitative diversion terms that avoid a plea being taken.

68. Federal law recognizes several objectives as legitimate aims of sentencing: deterrence, crime prevention, distribution of just punishment, and effective offender rehabilitation. 18 U.S.C. § 3553(a). However, "[i]n an effort to appear tough on crime, lawmakers chose long sentencing periods almost arbitrarily, with no empirical foundation or justification for sentence length[]" and with the belief "that long sentences can achieve utilitarian and retributive punishment purposes. . . ." Jalila Jefferson-Bullock, *How Much Punishment is Enough?: Embracing Uncertainty in Modern Sentencing Reform*, 24 J. L. & POL'Y 345, 350 (2016). Jefferson-Bullock relays in this article the average day of a particular federal prisoner serving a 10-year sentence at a taxpayer cost of $290,000. *Id.* at 346. During his tenure in the penitentiary, the prisoner will receive no education, degree or certification, and no therapy or lessons on coping skills. *Id.* He will not be 10 years better, but he will still be expected to reenter society and reintegrate fully. *Id.* Examples like this highlight that current sentencing is not driven by finding the correct amount of incarceration needed to fulfill a particular sentencing objective, but simply by imposing lengthy incarceration in the abstract hope that it will fulfill the broader aim.

3. PROVISION OF EXCULPATORY EVIDENCE[69]

The Standards also state that "[b]efore entering into a disposition agreement, the prosecutor should disclose to the defense a factual basis sufficient to support the charges in the proposed agreement, and information currently known to the prosecutor that tends to negate guilt, mitigates the offense, or is likely to reduce punishment."[70] If practiced, this principle promotes the idea that a prosecutor's obligation to disclose exculpatory evidence to the defense applies not only before trial, but before a plea offer is accepted or rejected.

This principle would offer substantially broader protection to defendants than that afforded under constitutional law. The Supreme Court has ruled that the right to the disclosure of impeachment evidence, for example, is expressly a trial right, not a right held prior to accepting a plea offer.[71] In *Ruiz*, prosecutors offered a defendant a "fast track" plea bargain that required defendants to waive their right to impeachment evidence and the right to evidence that supports conceivable affirmative defenses, in exchange for a downward departure in the government's sentencing recommendation.[72] When the defendant declined such a provision, the government withdrew the offer.[73] The defendant subsequently pled guilty and asked the judge for the same sentencing recommendation they would have

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69. This Article will deal primarily with two forms of exculpatory evidence: *Brady* evidence and *Giglio* evidence. In *Brady*, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). Examples of evidence that fall within this category include evidence that points to another suspect, evidence that an element of the offense cannot be satisfied, and evidence that mitigates the extent of the defendant's culpability at sentencing. Evidence that bears on a witness's credibility, for example the witness's prior crime for a conviction of moral turpitude may not have any direct correlation to the defendant or the facts at controversy in the current case. Thus, it might not be considered exculpatory using the traditional *Brady* standard. However, intuitively, if there is reason to believe that a witness is lying when he testifies that the defendant committed a crime, evidence that bears on the question of whether he is lying can thus be seen as exculpatory, even if it is a step removed from the instant facts of the case. This omission was subsequently addressed by the Supreme Court. *See* Giglio v. United States, 405 U.S. 150 (1972). In *Giglio*, an unindicted coconspirator testified against the defendant and in cross examination stated that he had not been promised in exchange for his testimony that he would not be prosecuted. *Id.* at 151–52. Unbeknownst to the trial prosecutor, the witness had been made such a promise at a grand jury proceeding by a different prosecutor. *Id.* at 152. The Court held that material evidence that bore on the witness' credibility was classified as exculpatory evidence that should have been provided to the defense. *Id.* at 154–55. Of particular additional interest in this case are the American Bar Association's Prosecution Standards which are discussed heavily in this Article but are not binding on attorneys. In *Giglio*, the Court cited the Standards as persuasive authority supporting its holding. *Id.* at 153-54. The Court's reliance on this document when deciding the scope of exculpatory evidence law offers another compelling reason why prosecutors should voluntarily look to this document for ethical guidance.

70. STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 3-5.6 (Am. Bar Ass'n 4th ed. 2017).

71. United States v. Ruiz, 536 U.S. 622 (2002).

72. *Id.* at 625.

73. *Id.*

received had they accepted the fast track agreement.[74] The Court denied the request and the defendant appealed.[75]

In rejecting the defendant's position, the Supreme Court reasoned that in pleading guilty, the defendant was not only forgoing the right to a fair trial, but a variety of constitutional rights such as the right against self-incrimination and the right to confront one's accusers.[76] Moreover, the Court reasoned that "impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary*."[77] After balancing the government's interest in these types of offers against a defendant's interest in having this information prior to a plea, the Court held that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant."[78]

A traditional assumption as to why there is no need to mandate disclosure of exculpatory evidence in plea negotiations focuses on the concept that a defendant knows whether or not he committed a crime and this self-possessed knowledge, rather than what is shared with him by the government, can adequately guide his decision about whether to plead guilty or not. In *Do No Wrong: Ethics for Prosecutors and Defenders*, authors Peter A. Joy and Kevin C. McMunigal highlight the problems with this assumption and also support the idea of why prosecutors should be obligated to make *Brady* and *Giglio* disclosures during plea negotiations.[79] First, while the premise may be generally true, there are many conceivable situations where a defendant believes they are guilty, but actually is not and would not know this without the state providing exculpatory evidence.[80]

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74. *Id*. at 626.

75. *Id*.

76. *Id*. at 628–29.

77. *Ruiz*, 536 U.S. at 629 (emphasis in the original).

78. *Id*. at 633. It is important to note that *Ruiz* dealt specifically with a defendant waiving a right to impeachment/*Giglio* evidence, rather than traditional *Brady* evidence that would exculpate his guilt or mitigate his sentence. *Id*. Currently, the First, Second, Fourth, and Fifth Circuits have expressly held that *Ruiz* includes all exculpatory evidence, not just impeachment evidence, while the Seventh, Ninth, and Tenth Circuits, though not expressly stating such, have implied that when *Brady* evidence is withheld and a defendant pleads guilty, it might still equate to a constitutional violation despite *Ruiz*. Emily Westerfield, *Do Criminal Defendants have a Right to Exculpatory Evidence Prior to Pleading Guilty?* UNIV. CIN. L. REV. (Jan. 27, 2019), https://uclawreview.org/2019/01/27/do-criminal-defendants-have-a-right-to-exculpatory-evidence-prior-to-pleading-guilty/, [https://perma.cc/759K-3BHP].

79. PETER A. JOY AND KEVIN C. MCMUNIGAL, DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS 143–158 (2009).

80. *Id*. at 147. The authors point to two cases that followed this pattern. In one, a defendant charged with vehicular manslaughter pled guilty, believing that he was under the influence of marijuana and was sleep deprived. State v. Gardner, 855 P.2d 1144, 1147 (Idaho Ct. App. 1994). The defendant was not aware that the government had in its possession information from an expert that a blown-out tire on the vehicle was actually to blame for the fatal accident. *Id*. In the second case, a defendant pled guilty to a homicide charge related to an automobile accident, based on a police investigator's estimate of the vehicle's speed. Carroll v. State, 474 S. E.2d 737, 739 (Ga. Ct. App. 1996). Without having been provided with exculpatory information about that witness, the defendant could not know that he was unqualified to render such an opinion and that it was actually impossible under the scenario to reach the conclusion offered. *Id*. at 739-40.

The second argument is that an innocent person would plead guilty as a calculated business decision.[81] The authors offer an example of a defendant charged with robbery who is facing a fifteen-year sentence.[82] If the prosecutor finds out on the eve of trial that a witness is hesitating on their identification of the defendant, the prosecutor has an incentive to offer an overly generous deal to avoid acquittal and an innocent defendant might, for example, agree to serve a year to avoid the possibility of serving fifteen. The authors essentially hypothesize that the greater the amount of exculpatory evidence, the weaker the prosecutor's case.[83] The weaker the case, the greater the incentive to plead it out. Thus, it is plea negotiations where divulging exculpatory evidence is most needed because it is those cases where exculpatory evidence is most likely to distort the playing field between prosecution and defense if not disclosed.

Fundamental fairness must be a guiding consideration here. How can a defendant evaluate the wisdom in accepting a plea offer if his defense attorney cannot meaningfully assess the likelihood of his prevailing at trial? And how can a defense attorney accurately gauge that question if he or she does not know of impeachable convictions and bias by the government's witnesses or evidence that could help lend credibility to their defense? The *Ruiz* rule puts defense attorneys in the untenable position of having to advise their clients without the tools they need to make sure their advice is solid.

The language of the *Rules* offers an in-road into resolving this problem in a manner that is fairer to defendants. These rules place an obligation on a prosecutor to:

> make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigation information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.[84]

There are two things to note about this rule as it relates to plea offers. First, it does not technically address impeachment evidence (*Giglio* evidence), as this is different from traditional *Brady* evidence (evidence that tends to negate the guilt

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81. The Supreme Court has recognized that an individual can make a knowing, free, and voluntary decision to plead guilty to a crime, while maintaining that they did not commit the act, because it may be a rational decision to avoid harsher sanction. Alford v. North Carolina, 400 U.S. 25, 37 (1976). In *Alford*, the Court was addressing a legal landscape where lower courts were divided on the issue of whether it was legitimate for a person to plead guilty while maintaining their factual innocence. *Id.* at 33–34. The Court found persuasive the reasoning that a defendant might believe that a jury would convict him despite his protestations of his own innocence and that he would fare better at sentencing by pleading guilty. *Id.* at 37–38.

82. JOY & MCMUNIGAL, *supra* note 79, at 150.

83. *Id.*

84. MODEL RULES R. 3.8.

of the accused or mitigate the offense).[85] But, where this rule begins to offer a defendant greater protection is in the use of the word "timely disclosure." State bars, such as Virginia's, have looked at that language and concluded that it gives rise to a right to exculpatory evidence earlier than that mandated by the U.S. Constitution.[86] In that ethics opinion, the Virginia State Bar examined whether the use of the language "timely disclosure" in Rule 3.8 entitles a defendant to have this information disclosed during plea negotiations.[87] In this opinion, the Bar notes numerous distinctions between the constitutional requirements created by *Brady* and its progeny and Rule 3.8, including whether agents of the prosecutor are implicated and a requirement for the disclosure of all exculpatory evidence rather than simply exculpatory evidence that is material.[88] While not creating a bright-line standard, the Virginia State Bar opined that "timely disclosure" as used in the *Rules* means, "as soon as practicable considering all the facts and circumstances of the case."[89] This concept is broadened further in the Standards, which specifically state that exculpatory evidence should be disclosed before a disposition agreement is entered into.[90] Voluntary adherence to a heightened standard where the government turns over *Brady* and *Giglio* material before a plea offer is accepted ensures a fairer system where plea negotiation occurs on a level playing field and where the defense does not have to rely on blind speculation in advising a defendant about choices that can forever impact his life and the lives of his loved ones.

4. WAIVER OF RIGHTS IN PLEA NEGOTIATIONS

Waiver of rights also plays a significant role in the ethical dimensions of plea offers. Of course, any guilty plea involves the waiver of all trial rights (the right to object to the admissibility of evidence, the right to a trial itself, the right against self-incrimination, and the right to appeal in many cases). However, when prosecutors seek to broaden those waivers in non-standard ways, it creates ethical issues. The Standards highlight this issue in cautioning against any waiver of the right to appeal a sentence in excess of an agreed or reasonably anticipated

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85. *See* Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978).

86. Va. State Bar, Legal Ethics Op. 1862 (2012).

87. *Id.*

88. Originally, a *Brady* violation occurred when withheld evidence was considered "material" to guilt or sentencing. Brady v. Maryland, 373 U.S. 83, 87 (1963). Over the years, the Supreme Court has refined the understanding of materiality such that it "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. . . ." Kyles v. Whitley, 514 U.S. 419, 434 (1995). The Court went on to hold that "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.*

89. "The ethics rule makes no specific mention of plea negotiations or guilty pleas. But the language of the rule, in particular its requirement of 'timely disclosure,' certainly appears to mandate that prosecutors disclose exculpatory material during plea negotiations, if not sooner." JOY & MCMUNIGAL, *supra* note 79, at 145.

90. STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 3-5.6 (Am. Bar Ass'n 4th ed. 2017).

sentence, any post-conviction claim addressing ineffective assistance of counsel or prosecutorial misconduct (with limited exceptions), and any comprehensive waiver of a right to file a *habeas corpus* petition.[91] Additionally, while acknowledging that plea offers can include other waivers on an individualized basis, so long as the waiver is voluntary, the waivers should not be relied on to hide an injustice or flaw in the case and negotiated agreements should not include unlawful terms or terms that are in violation of public policy.[92] Waivers outside of trial rights have been given constitutional protection for some time. For example, waiving a right to file a civil lawsuit, known as a "release-dismissal agreement," is generally permitted.[93] In fact, absent expressly waiving such a claim, a mere guilty plea does not act to bar a defendant from subsequently filing a lawsuit claiming that his constitutional rights were violated during the investigation of the case.[94] Additionally, a defendant can waive his Fourth Amendment rights as part of a plea, subjecting himself to warrantless search by law enforcement and probation officers without evidence of wrongdoing.[95]

Waiver of rights is integral to plea negotiations. At its core, the negotiation is about the state giving up something it believes it could obtain (additional incarceration, conviction, etc.) in return for the defendant surrendering a key right. For plea bargaining as a process to work, these basic waivers have to be maintained. But expansive waivers can corrode the fairness of the criminal justice system in two regards. First, they can act to suppress the exposure of systemic injustice and flaws in the judicial system. Improper investigative techniques, withholding of exculpatory evidence, and insufficient representation by defense counsel can all be concealed by a plea bargain whose waivers make sure that these issues never come to light. And if the aim of a criminal justice system is to ensure resolution of criminal charges in a fair way, this type of suppression undermines that objective. Second, aggressive non-trial related waivers can lead to probation being not only more onerous on the defendant, but downright humiliating. If a probationer

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91. STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 3-5.8 (Am. Bar Ass'n 4th ed. 2017).

92. *Id.*

93. *See* Newton v. Rumery, 480 U.S. 386, 397–98 (1987).

94. Haring v. Prosise, 462 U.S. 306, 321–22 (1983).

95. The Supreme Court has recognized that probationers are entitled to less protection than other citizens. *See* Griffin v. Wisconsin, 483 U.S. 868, 880 (1987). In *Griffin*, the Court held that a search of a probationer based on a state statue allowing such searches with reasonable cause was itself reasonable. The Court held that supervision of probationers created a "special need" for the state beyond normal law enforcement needs. *Id.* at 873–74. Thus, it was reasonable for the state to impose additional restrictions on probationers' liberty to "assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large." *Id.* at 875. Following *Griffin*, there was a split among federal circuits and the states about whether a probationer's waiver of Fourth Amendment protections must be supported by "reasonable cause" or can be a complete and total waiver, such as to permit a search by a probationer with no cause whatsoever, outside of the individual being on probation. Sean M. Kneafsey, Comment, *The Fourth Amendment Rights of Probationers: What Remains After Waiving Their Right to be Free from Unreasonable Searches and Seizures?*, 35 SANTA CLARA L. REV. 1237, 1238 (1995).

can be searched day and night by law enforcement without cause, he loses any meaningful semblance of personal autonomy. This in turn compromises the criminal justice system's aim of reintegrating the offender as a full citizen.

How then is the balance appropriately struck? A prosecutor offering a plea offer should seek no waivers in excess of what is necessary to effectuate the plea itself and legitimate rehabilitative objectives.

II. GUIDING PHILOSOPHY AND SYNTHESIS

How can all of these thoughts be distilled into concrete guidance for the prosecutor who is seeking to emulate the highest ethical standards in the plea bargaining process? Much of this Article has focused on shifting the traditional paradigm that prosecutors use in approaching their cases. Changing the culture of prosecution requires altering the conversations that prosecutors have about their cases at an individual level, in the context of supervision, and within the community of prosecutors more broadly. I offer ten questions drawn from what has been discussed in this Article that a prosecutor should ask himself or herself when approaching the plea negotiations in a particular case. After addressing these questions, I will identify specific ways in which they could be utilized in the individual, supervisory, and communal context.

1. Does the plea offer, both in its substantive terms and the procedure by which it is being negotiated, advance the principles of diligence, fairness, and honesty? There is admittedly not a hard standard by which a person can assess compliance with these three values. However, there is legitimate room for intuition and feeling in ethical analysis. After all, our gift of conscience is perhaps the greatest means by which we can assess the correctness of our actions. How does that play out in the context of a plea agreement? At its core, this question asks the prosecutor whether he or she can be proud of the conduct in the negotiation and the plea offer. If everything that could possibly be known about the case and the offer were displayed on the front page of the local newspaper, would it bring accolades or shame to the prosecutor's office? When deciding whether to disclose evidence that is known, how would the failure to disclose appear to the public if that is what they read about? Would a layperson, not to mention the defense attorney or the court, perceive it to be honest if it was known that a witness died, the prosecutor knew it, knew that he could not prove the case in that witness's absence and still extracted a plea from a defendant? If the prosecutor cannot assert that the negotiation and process and outcome demonstrate diligence, fairness, and honesty, then action needs to be taken. Maybe it is dismissing the case, perhaps it is exercising additional diligence before making another plea offer, maybe it is making basic disclosures about the evidence along with the plea, or maybe it is changing the terms of the offer. But when diligence, fairness, and honesty are held up as guideposts to conduct, it is more likely that an appropriate outcome will result.

2. What is the minimal punishment in terms of conviction and incarceration that is needed to accomplish justice, deterrence, and rehabilitation in this case? This Article has highlighted that society often articulates what it is looking for in sentencing—just punishment, rehabilitation of the offender, etc. But sometimes the prosecutor makes the mistake of simply using a lengthy sentence to ensure these aims are met. What happens when we ask what is the *minimum* sentence needed to give justice to the victim, to keep society safe, and to ensure that the offender has learned a lesson? In some heinous crimes, that may indeed be life in prison. But that is the exception, not the norm. Asking the question in this manner, rather than asking what is the highest conviction and longest term the prosecutor can extract from negotiations in light of the evidence or possible charges, shifts the paradigm away from game theory and toward the endeavor to be fundamentally fair. Asking the question this way also avoids the enormous cost to society and to defendants and their families when we incarcerate people far in excess of what is needed to accomplish justice.[96]
3. Before making an offer in this case, have you provided full discovery, to include all *Brady* and *Giglio* evidence, so that the defense attorney will be able to fairly assess the merits of the case and advise their client? If you are holding on to evidence in order to get a plea and you know you would disclose the evidence prior to a trial, it does not pass an intrinsic smell test. Undoubtedly, if you drill down into why you are withholding the evidence at the earlier time, it is out of a concern that the defendant will not plead guilty if he knows about it. And if it is viewed that way, justice has not been served by the omission because the defendant has essentially been duped into pleading guilty. Gamesmanship should be set aside, and honesty and fairness embraced in their fullest meaning.
4. Have you practiced full diligence by consulting with the victim and the investigating officer, and thoroughly understanding the evidence and law in the case before making an offer, so that you can do so with confidence? Making sure that you consult with stakeholders prior to making a plea accomplishes several ends. First, it is the right thing to do. A victim is the person most immediately impacted by the crime and, while their view cannot control, they should at least have their voice heard before the government acts.[97] Second, engaging in consultation before the plea offer

96. It may be the case that only by the prosecutor asking for a shorter sentence will excessive sentencing be reined in, as the courts appear unwilling to make significant use of the Eighth Amendment's protection against "cruel and unusual punishment" to strike down seemingly disproportionate sentences. *See, e.g.*, Ewing v. California, 538 U.S. 11, 30 (2003) (upholding California's three strikes law, which resulted in a twenty-five-year to life sentence for a defendant who stole three golf clubs).

97. States have taken different approaches to trying to ensure that the rights of victims are respected while recognizing that prosecutors have a duty to the community that extends beyond the victim. In Virginia, for example, a prosecutor in a felony case,

> upon the victim's written request, shall consult with the victim either verbally or in writing (i) to inform the victim of the contents of a proposed plea agreement and (ii) to obtain the victim's views about the disposition of the case, including the victim's views concerning dismissal, pleas, plea negotiations and sentencing. However, nothing in this section shall limit the ability of the attorney

avoids the temptation for a prosecutor to undermine the plea when the victim or police later find out about it and express displeasure. Lastly, it helps avoid an embarrassing confrontation that undermines the credibility of your office if the victim in a serious case takes a public posture against how your office has handled the case. From a resource perspective, it can be tempting to avoid doing research about a case and to try to resolve it first in order to conserve resources for those cases that are actually headed to trial. However, if the prosecutor has not done the research necessary to know that the law backs up their ability to try the case, making an offer first can lead the prosecutor into a bad situation. If the defendant calls the bluff, the prosecutor loses credibility by having to either back down and dismiss the case after making an offer or, alternatively and even worse, takes a case to trial that he should not. This can be avoided through diligent preparation prior to making a plea.

5. At the end of the day, if the defendant rejects the plea offer, do you have the witnesses and evidence available to take this to trial and have a reasonable likelihood of prevailing? If not, consider dismissing the case. It will build your reputation in the long term and give credibility to you in the negotiation process. Remember, the first time you try to bluff a defense attorney and it is called, your reputation is destroyed.
6. Are you being transparent with the defense about what your intentions are if plea negotiations fail, but doing so in a non-threatening manner, so that the defendant's attorney can meaningfully advise their client and to help you avoid constitutional problems? For example, if rejection of your plea offer means that you will be bringing additional charges against the defendant, be up-front in stating that. Expressing your intentions transparently means that the defense attorney can better advise the defendant. Additionally, it helps legally inoculate you from a later claim of prosecutorial vindictiveness, because your subsequent litigation steps are not as likely to be interpreted as negatively reacting to a defendant's insistence on exercising the right to have a trial.
7. Are you taking advantage of a defendant? One way to answer this is to look at your offer. If the risk after trial is so disproportionate to the outcome that you have offered in a plea that no reasonable person could make any choice but to plead guilty, you are likely acting in a coercive fashion that renders the justice system less just. Moreover, this is where you run the risk of what should be the prosecutor's worst nightmare—convicting an innocent person. If a defendant's conduct is not so egregious that you are willing to offer minimal incarceration in a plea, what value is being advanced by charging the case in such a way that in the plea's absence the defendant is incarcerated for decades? If you have structured the

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for the Commonwealth to exercise his discretion on behalf of the citizens of the Commonwealth in the disposition of any criminal case. The court shall not accept the plea agreement unless it finds that, except for good cause shown, the Commonwealth has complied with clauses (i) and (ii). Good cause shown shall include, but not be limited to, the unavailability of the victim due to incarceration, hospitalization, failure to appear at trial when subpoenaed, or change of address without notice.

VA. CODE ANN. § 19.2-11.01(A)(4)(d) (2021).

incentives that way, are you trying to coerce a plea? If so, you are likely not trying to advance the norm of fairness to the best extent practical.

8. Have you actively considered any unique collateral circumstances that the defendant faces that may make whatever disposition you have offered disproportionately harsh for the conduct at issue? Is there anything you can do to alter the disposition so that it still advances the aims of equity and accountability but does so without unfairly devastating the life of the defendant and his or her family? For example, perhaps a defendant with immigration consequences could perform additional community service in exchange for a disposition in the case that does not result in deportation for minor conduct.
9. If you are dealing with a *pro se* defendant, are there any measures you can take or ask the judge to take to make sure that they are making a fully informed and appropriate decision for themselves? Are you treating the defendant the same way you would a similarly situated defendant who had hired a very expensive attorney? Have you made sure that the defendant knows who you are, that you do not represent their interests, and that they should contact an attorney? Are you taking actions consistent with those values? For example, are you making a "one-time offer" that will expire if the defendant wants to continue the case and consult with an attorney? If so, it is worth rethinking this position.
10. Does your plea offer include waivers that are abnormal to most criminal cases? If so, are these absolutely vital to accomplish the necessary justice, rehabilitation, and deterrence needed in your case, or are they motivated by something else (civil liability for a jurisdiction, shielding improper police behavior, or simply dehumanizing a probationer)? Is there a unique reason, particular to this defendant, that would warrant further curtailing their constitutional rights on probation? Individual consideration might lead to different conclusions—the state's interest in restricting a probationer's privacy interests might be different when the underlying crime is child sexual assault rather than drug possession, for example.

These questions could be used in a way that meaningfully impacts the criminal justice system if they are a) used directly by prosecutors as they handle their cases, b) used by supervisors in prosecutor's offices in how they manage those they supervise, and c) incorporated into the training of prosecutors at a broader level. The individual level is significant because that is usually where the decisions are made that impact defendants' lives. If a prosecutor deliberately asks themselves each of these ten questions before formally extending a plea offer, they are more likely to act in a way that advances a just outcome. Taking the deliberate time to think about each of these ten issues may raise ethical red flags that the prosecutor can address before an injustice is done. Moreover, it will cause the prosecutor to be more thoughtful about the process they are using to exercise one of the most significant powers of their office. Taking the time to think through these ethical questions in each plea offer will develop the prosecutor's ethical muscles by forcing them to consciously think in every case about the broadest dimensions of justice.

However, for these norms to have the greatest impact, they also need to be incorporated at a supervisory level. Newer prosecutors look to the leadership of the office in which they work for guidance on how to do their job and how to succeed. If their supervisors are emphasizing conviction rates and praising lengthy sentences, it promotes a more traditional prosecution culture driven by statistics, and that culture has resulted in systemic injustices. Imagine instead a supervisor, using these ten questions as a starting point, having a dialogue with a trial prosecutor about their case. Making use of these questions would emphasize that the office places primary value not simply on conviction and incarceration, but on what justice means in the fullest sense of the word. Moreover, the ethical red flags that may be raised by asking these questions can be addressed by the supervisor before harm is done and injustice results.

Lastly, incorporating these questions into the conversations we have as a community of prosecutors can transform the culture of prosecution. The place where this can happen most easily is in the context of legal education and instruction. I have taught ethics to prosecutors for well over a decade, and I am thankful to have seen a significant change in the tone of discussions that have happened in those classes over the last ten years. For example, when I first began teaching, I would receive a lot of pushback when I argued that just because you could legally do something as a prosecutor (for example, not disclosing the death or unavailability of a witness) does not mean you should. In more recent years, I see fewer people arguing for these ethically tenuous positions. It is in conferences and continuing education classrooms where the culture of prosecution is being set. These forums help instruct newer prosecutors on what the law is and the best way to do one's job. And the lessons learned in these classrooms become the expectations that we hold for each other and are often brought back into the individual conversations that we have in our offices. It is within the context of teaching that we can instill the value that ethics should not be a race to the bottom and should instead be about upholding the version of our profession at its best. Ethics instruction that seriously considers and advances the values behind the ten questions asked above will promote a culture of prosecution that aims for justice at its best.

CONCLUSION

We live in a remarkable time for criminal justice reform. Society is engaging in a deep and long overdue conversation about what is needed to keep society safe and what it means to have a system that is fair and just.[98] Many great structural changes and initiatives will come out of these conversations. But we cannot ignore the reality that the prosecutor remains one of the most powerful figures in

98. *See, e.g.*, Kenny Lo, Sarah Figgatt, Betsy Pearl & Chelsea Parsons, *5 Discussions That Shaped the Justice Reform Movement in 2020*, CTR. FOR AM. PROGRESS (Mar. 18, 2021), https://www.americanprogress.org/issues/criminal-justice/news/2021/03/18/497328/5-discussions-shaped-justice-reform-movement-2020/, [https://perma.cc/JJ6U-ADKW].

our court system. Meaningful reform that makes our system better does not have to wait for state legislatures and Congress to act—something they may never do or that may be wholly insufficient when they do. Rather, those with power can change how they use that authority to ensure that our communities are kept safe while defendants are treated with dignity, justice, and fairness. While prosecution will continue to experience external change, the systemic transformation we can advance by emphasizing higher ethical standards for ourselves individually, in those we supervise, and in our profession as a whole will bring us closer to a justice system that is actually just.