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A HOLISTIC FRAMEWORK TO AID RESPONSIBLE PLEA-BARGAINING BY PROSECUTORS

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INTRODUCTION

In our criminal justice system, ninety-four percent of cases are resolved through plea in state courts.[1] As Justice Kennedy recently observed: "the reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials."[2] This note is focused on expanding what prosecutors believe justice entails during the plea-bargaining process. Unlike theories of plea-bargaining that state the goal to be the "highest deserved punishment the prosecutor could obtain on a plea," this note focuses on how prosecutors can ensure that the lowest deserved punishment possible to achieve

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[1] Erica Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES, Mar. 23, 2012, http://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html.

[2] Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012).

justice is imposed in order to preserve a defendant's right to liberty.[3] To achieve this goal, the note attempts to explain what factors individual prosecutors consider when plea bargaining. If provided a framework, prosecutors are capable of evaluating the multiple considerations that would be relevant in attempting to maximize the public good.[4] This note operates from the premise that it is possible, and perhaps preferable, to transform the culture of prosecutors' offices from the ground up.

In order to contextualize the way these factors would be considered, it is important to understand the amount of prosecutorial discretion possessed by individual prosecutors. As such, this note explores the scope of prosecutorial discretion in plea-bargaining. First, the note considers the scope of prosecutorial discretion possessed by individual prosecutors within the context of office customs, office policies, ethical obligations and laws. The note then outlines a framework of factors a prosecutor might consider in deciding what plea deal to offer including the completeness of information, purposes of punishment, the defense counsel, reasons a defendant might plead guilty besides factual guilt, and impacts of punishment on the legitimacy of law. This is the first academic paper to suggest that line prosecutors themselves attempt to conduct a multi-factored analysis in determining what plea deal should be offered is necessary and that the plea deal should be distinct from the sentence that might be offered at trial given the lack of procedural safeguards.

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[3] *Contra* Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 607 (2005).
[4] *Contra* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1500 (1993).

I. WHAT FACTORS IMPACT THE SCOPE OF PROSECUTORIAL DISCRETION IN PLEA-BARGAINING?

Prosecutors, like all lawyers, are held to standards of behavior that inform their practice of law and limit the scope of their discretion. In order to understand how much discretion prosecutors can practically exercise, it is necessary to understand which of these factors allow for discretion, how far that discretion extends, and the consequences for failing to comply with the relevant standards. This note categorizes the standards of behavior applicable to prosecutors into custom, office policy, ethical responsibility, and the law (statutes and cases).

A. CUSTOM

For the purposes of this writing, custom is defined as unwritten, informal, and common practices. There is evidence that internal office standards create customs by prosecutors to either advance or subvert those standards.[5] It has been suggested that "leadership could do more to create and shape office culture, values, norms, and ideals."[6] However, even in an office where leadership is not interested in conceptions of justice beyond retribution, an individual prosecutor can choose whether or not to abide by custom. Since custom is unwritten and informal, there are no officially articulated consequences for failing to meet custom. However, failure to abide by custom can lead to social alienation within an office and even retaliation using a separate legitimate pretext.

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[5] *See generally* Howe, *supra* note 3, at 615 n.87 (stating that a subterfuge developed to avoid a plea bargain ban implemented by a local prosecutor for certain felonies involving firearms).

[6] Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 964 (2009).

A custom is an informal practice and, therefore, a prosecutor would not know the potential, informal consequences of failing to abide by it to help in her decision-making about whether or not to abide by custom. For example, in most prosecutors' offices, custom would dictate that a line prosecutor does not help the defense counsel prepare her witnesses for cross-examination by the prosecutor. In most offices, this would be an unwritten, though nearly ubiquitous practice due to the adversarial nature of the criminal justice system.

A prosecutor in the Manhattan DA's office, Daniel Bibb, chose to disregard custom when he prepared a defense witnesses for his own cross-examination. Mr. Bibb did this because he was ordered to retry a homicide case, where he believed that the two defendants were wrongfully convicted after reexamining the facts.[7] As a result of the experience, Bibb eventually resigned from his job after working in the office for over twenty years.[8] He was also investigated for ethical wrongdoing, but no basis was found for disciplinary action.[9] Though there was no formal consequence or punishment, Bibb left his job as a result of the social alienation that followed from failing to abide by custom. When making decisions during plea-bargaining, line prosecutors would be well-served by considering whether there is any requirement to abide by a certain practice or if it is merely custom. Prosecutors may realize that they have more discretion than they originally thought, despite the social consequences of failing to abide by custom.

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[7] David Luban, *The Conscience of a Prosecutor*, 45 VAL. U. L. REV. 1, 10-12 (2010).
[8] Benjamin Weiser, *Doubting Case, a Prosecutor Helped the Defense*, N.Y. TIMES, June 23, 2008, http://www.nytimes.com/2008/06/23/nyregion/23da.html.
[9] Benjamin Weiser, *Lawyer Who Threw a City Case Is Vindicated, Not Punished*, N.Y. TIMES, Mar. 4, 2009, http://www.nytimes.com/2009/03/05/nyregion/05da.html.

B. INTERNAL OFFICE POLICY

In this writing, internal office policy is distinguished from custom as a written practice designed to ensure consistency in exercise of discretion by prosecutors. This type of self-regulation can and does work well to limit prosecutorial discretion.[10] Limiting prosecutorial discretion through policy may serve to equalize treatment amongst defendants.[11] However, there is no obligation to make internal office policies public and there are pros and cons to making policies publicly available.[12] There may be real or perceived ambiguities in office policy and there may or may not be protocols on how to proceed when facing such an ambiguity. However, for a line prosecutor, the discretion in following these policies is limited to a prosecutor's interpretation of the policies. There is no discretion regarding whether or not to follow them. The consequences for failing to abide by office policy include the social alienation described regarding custom but can also be sufficient cause to fire a prosecutor or, at the least, limit her advancement in the prosecutor's office.

For example, an office policy can be ambiguous by outlining a factor-based evaluation for a decision without also providing guidance on how to weigh the factors.[13] An experience of a junior AUSA in the federal system in the Eastern District of New York illustrates this point. The internal policy for assault, at the Eastern District of New York, read, "[a]ssault cases should be accepted or declined at the discretion of the AUSA, taking into consideration the nature of the assault, the degree of the injury, the criminal background of the defendant, and any mitigating or aggravating

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[10] Bibas, *supra* note 6, at 1003.
[11] Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1184-85 (1998).
[12] *Id.* at 1185-86.
[13] Bibas, *supra* note 6, at 1005.

factors."[14] The junior AUSA, based on the factors outlined in this policy, decided that the facts described to him by a police officer did not warrant a criminal prosecution.[15] However, after relaying his decision against prosecution to the police officer, the officer's irate response caused the junior AUSA to second-guess himself.[16] As a result, the junior AUSA called his supervisor to ensure that he appropriately weighed the factors outlined in the policy.[17] The supervisor informed the junior AUSA that a ticket could be issued as a way to address the defendant's conduct with a less extreme alternative than detaining the person with an arrest.[18]

This example highlights the fact that often the most important decision a prosecutor can make in plea-bargaining is the charging decision because all other factors impacting plea-bargaining (including pre-trial detention and possible penalties) follow from the charging decision. This emphasizes the importance of prosecutors familiarizing themselves with their jurisdiction's statutes, including the possible remedies. In the above example, the policy did not state the alternative of issuing a ticket rather than making an arrest. However, the junior AUSA made a discretionary decision in consulting with the supervisor and the supervisor was knowledgeable and experienced enough to be aware of all of the charging options, including issuing a ticket. Although it was not stated in the policy, the junior AUSA had more options and discretion than he initially believed. The policy obscured the AUSA's understanding of how much discretion he had until he looked deeper into what the statute required. Thus, although prosecutors do not

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[14] JOHN KROGER, CONVICTIONS: A PROSECUTOR'S BATTLES AGAINST MAFIA KILLERS, DRUG KINGPINS, AND ENRON THIEVES 106 (2008).
[15] *Id.*
[16] *Id.*
[17] *Id.* at 108.
[18] *Id.*

have discretion to ignore office policy, prosecutors exercise discretion in deciding how to implement office policy and might also have statutorily available alternatives that the policy doesn't state during the plea-bargaining process.

C. ETHICAL RESPONSIBILITY

Every jurisdiction has ethical rules of professional conduct that guide the approach rather than the substance of lawyer's conduct in practice. These rules are often based on the model rules from the American Bar Association.[19] While the ethical rules vary slightly across jurisdictions, there are almost always special responsibilities for prosecutors[20] and specific prosecutorial standards for plea-bargaining.[21] The rules specific to the jurisdiction of practice are not optional or discretionary in any way. They may, however, be ambiguous and subject to interpretation. Failure to comply with ethical rules as a prosecutor can result in sanctions including disbarment.[22] As the Supreme Court put it, "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers."[23]

Instances of prosecutors failing to meet ethical standards are not unheard of; between 2004 and 2008 there were 660 court findings of prosecutorial error or misconduct in five sample states (Arizona,

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[19] *See Model Rules of Professional Conduct*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited June 15, 2017) (explaining that forty-nine states have professional conduct rules that follow the American Bar Association format).

[20] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8 (1983).

[21] *See, e.g.*, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION stds. 3-5.6 to -5.8 (2015).

[22] MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10.A(1) (2002).

[23] *See* Imbler v. Pachtman, 424 U.S. 409, 429 (1976) (articulating common law immunity).

California, Pennsylvania, New York and Texas).[24] However, only one prosecutor was disciplined.[25] By and large, bar authorities have proven to be ineffectual.[26] This lack of enforcement may result in office customs and policies where there is "an environment in which misconduct can go undetected and undeterred."[27] Of course, a shortfall in enforcement does not change a prosecutor's ethical responsibility to abide by those rules.

D. LAW

Finally, both statutory and case law limit a prosecutor's discretion. The statutory law limits a prosecutor's discretion in obvious ways by outlining what acts are criminal and the maximum penalties. In fact, many courts have held that a defendant is entitled to withdraw a plea of guilty where the plea is entered pursuant to a plea bargain contemplating an illegal sentence.[28] The case law limits a prosecutor's discretion by creating disclosure requirements.[29]

This is more complicated than it initially appears because while certain laws apply at trial, they may not apply during plea-bargaining. For example, the disclosure of exculpatory evidence is constitutionally mandated pre-plea, but disclosure of information for impeachment purposes is not.[30] Impeachment disclosures (and

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[24] INNOCENCE PROJECT, PROSECUTORIAL OVERSIGHT: A NATIONAL DIALOGUE IN THE WAKE OF *CONNICK V. THOMPSON* 12 (2016).
[25] *Id.*
[26] Bibas, *supra* note 6, at 976.
[27] David Keenan et al., *The Myth of Prosecutorial Accountability after* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 210 (2011).
[28] Christopher Vaeth, Annotation, *Guilty Plea as Affected by Fact that Sentence Contemplated by Plea Bargain is Subsequently Determined To Be Illegal or Unauthorized*, 87 A.L.R. 4th 384 § 3.
[29] *See, e.g.,* Brady v. Maryland, 373 U.S. 83, 87 (1963).
[30] United States v. Ruiz, 536 U.S. 622, 625 (2002).

others) may, however, be statutorily required depending on the jurisdiction. Again, there is no discretion regarding whether or not to abide by the law. It is only where the law is ambiguous, or subject to interpretation, that a prosecutor may exercise discretion. The consequences of not following the law depend on the type of violation. For example, the presiding judge should not accept a plea deal that does not comport with the statute whereas violations of disclosure obligations may later result in the plea deal being vacated. The previously discussed consequences of social isolation alienation in a prosecutor's office, being fired or unable to be promoted, and sanctions from the bar or losing your license are all likely to also apply.

To be clear, determinations about prosecutorial legal obligations at the time of plea-bargaining do not necessarily use the same standards as retrospective determinations about whether violations occurred. Justice Kennedy stated to a prosecutor in an oral argument that, "You don't determine your *Brady* obligation by the test for the *Brady* violations. You're transposing two very different things."[31] This statement serves as a reminder that while consequences of violations may be informative, they are not dispositive in determining prosecutorial legal obligations. That is, determining that a decision by a prosecutor would not be found to be a legal violation of a prosecutor's *Brady* obligations after the fact does not remove a prosecutor's legal obligation to turn over exculpatory material in the present.

II. WHAT PLEA DEAL SHOULD A PROSECUTOR OFFER?

The conventional wisdom is that prosecutors should strike plea bargains considering what the expected trial outcomes are likely to

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[31] Transcript of Oral Argument at 49, Smith v. Cain, 132 S. Ct. 627 (2011) (No. 10-8145).

be.[32] Research on human behavior, however, reveals that people (including prosecutors) are not that good at making assessments about likely outcomes at trial and, secondly, are not good at making an effective comparison between the outcome at trial and the outcome from plea bargaining.[33] As a result, this note argues that prosecutors need to consider many more factors in making plea bargaining offers including the completeness of the information and the limitations of defense counsel.

This framework also uses data to offer suggestions to ensure that the goals of punishment are being met. Further, the framework offers data on the impact of criminal sanctions on defendants and encourages prosecutors to consider the impact in the plea-bargaining process. Finally, there is discussion on the impact punishment has on perceptions of the law's legitimacy and how prosecutors can conduct themselves to improve the actual and perceived legitimacy.

A. COMPLETENESS OF THE INFORMATION

It is possible, if not likely, that the prosecutor offering the plea bargain is not the same prosecutor who conducted the initial interviews of the witnesses in deciding to file a criminal complaint.[34] It is, therefore, important to consider how meticulously the case and witnesses were likely evaluated given the office's policy and custom. Prosecutors should be mindful that there may be information unavailable during plea-bargaining that would have become apparent at trial. Given the incompleteness of the information presented to them, prosecutors should be especially skeptical of

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[32] Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464 (2004).

[33] Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163, 169 (2007).

[34] DAVID W. NEUBAUER & HENRY F. FRADELLA, AMERICA'S COURTS AND THE CRIMINAL JUSTICE SYSTEM 148 (10th ed. 2010).

using a common information processing trap amongst prosecutors that would lead a prosecutor to believe that all information from the defense attorney offered pre-trial should be filtered through the lens that defendants, as a group, are guilty.[35]

Furthermore, even defendants with well-resourced representation may be operating with limited information, as a result of lack of pre-plea bargaining disclosure requirements and time pressures. Prosecutors should be mindful that they may know information that the defense counsel does not, but would later be disclosed if the case went to trial.[36] Similarly, at trial, defendants have procedural safeguards that allow them to challenge the narrative of the prosecution including the right to confront witnesses against them to test both their credibility as witnesses and veracity of the testimony.[37] At trial, defendants also have the right to be made aware of exculpatory evidence. [38] There are few similar procedural safeguards during the plea bargaining process.[39] In cases resolved through plea-bargaining, defendants do not have the opportunity to offer explanations or alternate interpretations for facts in a case. This is all to suggest that prosecutors must consider legal innocence at least as much as factual innocence.[40]

In fact, it has been said that precisely because plea bargaining does not require consideration of legal innocence, it makes a mockery

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[35] *Id.* at 181.

[36] *See* Michael Nasser Petegorsky, Note, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory* Brady *Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3614-31 (2013) (discussing the circuit split regarding the use of the *Brady* rule to challenge a guilty plea for the failure to divulge exculpatory evidence).

[37] Crawford v. Washington, 541 U.S. 36, 61-62 (2004).

[38] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[39] *See* F. Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 200-01 (2002).

[40] Zacharias, *supra* note 11, at 1142.

of our procedural traditions which distinguish between factual and legal innocence.[41] However, the Court has stated that while the "process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, [] we have repeatedly held that the government 'may encourage a guilty plea by offering substantial benefits in return for the plea.'"[42] Still, the question has and must be raised as to whether concerns about efficiency "warrant[] usurpation of our personhood and suppression of the substantive and procedural rights guaranteed by the United States Constitution."[43]

Supporters of plea-bargaining suggest that defendants are merely bartering the entitlements that come with trials to further their own self-interest even though, in the process of this bartering, the completeness of information considered is sacrificed.[44] This view of plea-bargaining also ignores research that demonstrates most people are loss averse, meaning that they are not making perfectly rational calculations based on complete information but trying to avoid negative outcomes.[45] In light of the fact that defendants are not making rational calculations but trying to avoid negative outcomes, a responsible prosecutor should be weary of overestimating and overstating the strength of her case in determining the appropriate

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[41] *See* Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism*, 57 WM. & MARY L. REV. 1505, 1516 (2016).
[42] *See* United States v. Mezzanatto, 513 U.S. 196, 209-10 (1995) (quoting Corbitt v. New Jersey, 439 U.S. 212, 219 (1978)).
[43] Robert Schehr, *The Emperor's New Clothes: Intellectual Dishonesty and the Unconstitutionality of Plea-Bargaining*, 2 TEX. A&M L. REV. 385, 388 (2015).
[44] *See, e.g.*, Howe, *supra* note 3, at 627.
[45] Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 342 (1984).

plea deal because the lack of procedural safeguards also tends to cause prosecutors to have less than complete information.[46]

B. PURPOSES OF PUNISHMENT

The purpose of punishment in the context of criminal law is commonly understood to advance one of four penological objectives: incapacitation to restrict a potentially dangerous person's movements, deterrence to discourage others from breaking the law, rehabilitation to help solve problems that led the person to commit the crime and limit the likelihood they would commit a crime again, and retribution to exact vengeance for the harm caused.[47] However, the academic literature over the last many years has focused heavily on retribution and strong retribution. In order to best serve justice, prosecutors need to consider all four penological objectives and use the few studies available when considering how, or even if, criminal sanctions advance these objectives.[48]

1. Incapacitation

Defendants whose sentences include incarceration will be incapacitated for some period of time thereby limiting ability to commit more crimes. However, it is important to remember that approximately 95% of people in state prison are at some point released.[49] Only one study exists quantitatively evaluating whether it is possible that prison time can actually be harmful to the public

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[46] *Contra* Howe, *supra* note 3, at 628.
[47] H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 3 (2d ed. 2008).
[48] Slobogin, *supra* note 41, at 1520.
[49] Timothy Hughes & Doris James Wilson, *Reentry Trends in the United States: Inmates Returning to the Community After Serving Time in Prison*, U.S. DEP'T OF JUSTICE 1, http://www.bjs.gov/content/pub/pdf/reentry.pdf (last updated Apr. 14, 2004).

because people who are incarcerated learn to commit new crimes.[50] This is a concern often not considered by prosecutors because "the prosecutor is not accountable for the prison system."[51] However, if prosecutors conceive of themselves as protectors of public safety than this is a factor that must be considered.

The study finding prison time can be harmful was conducted in Harris County, Texas and found that longer exposure to jail and prison increases the likelihood of new criminal behavior with the largest effects observed for drug possession and property crimes.[52] Notably, misdemeanor defendants are more likely to be charged with drug possession or dealing post-release, even if their prior offense did not relate to drugs.[53] The effect on drug offenses, which were the most common post-release crime type in this study, suggests a distinct possibility that inmates are learning how to commit new types of crimes while incarcerated.[54]

Even if incarceration was not making defendants better criminals, the hope is that incapacitation would be incapacitating people likely to commit additional crimes if released. However, a recent study by the Brennan Center determined that an estimated thirty-nine percent of federal and state prisoners are incarcerated with little public safety rationale based on the evaluation of four factors: seriousness, victim impact, intent and likelihood of recidivism.[55] The report notes that approximately fourteen percent of today's prisoners have already served sufficiently long sentences and

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[50] Michael Mueller-Smith, The Criminal and Labor Market Impacts of Incarceration 44-45 (May 1, 2015), http://cep.lse.ac.uk/conference_papers/01_10_2015/smith.pdf.
[51] Standen, *supra* note 4, at 1499.
[52] Mueller-Smith, *supra* note 50, at 44.
[53] *Id.*
[54] *Id.*
[55] JAMES AUSTIN & LAUREN-BROOKE EISEN, BRENNAN CENTER FOR JUSTICE, HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 7-8 (2016).

could be released with little public safety concern and that seventy-nine percent of today's prisoners suffer from either drug addiction or mental illness and so alternative interventions would be more appropriate.[56] Although individual prosecutors are not responsible for the policies and procedures in their jurisdictions determining whether these recommendations are implemented, these statistics suggest that line prosecutors should begin making efforts to decarcerate and redirect defendants, when possible, rather than to incarcerate them.

Even if a prosecutor disputes these statistics or conclusion, unless a prosecutor is certain that a defendant will never be released, prosecutors must also consider the impacts of incarceration in determining whether a plea deal advances the pursuit of justice.

2. Deterrence

Another purpose of punishment in our criminal justice system is to limit crime by imposing penalties that discourage criminal behavior. However, recent studies have shown that the increases in sentence length that followed the "tough on crime" era had little, if any, deterrence effect on general crime rates.[57] The studies posit a number of possible explanations, including both lack of public awareness about penalties and criminal behavior being closely linked to impulsiveness due to the offender's youth rather than a rational decision.[58] Therefore, prosecutors should not attempt to offer longer sentences during plea-bargaining with the purpose of "sending a message" to the public thinking it will lead to crime prevention.

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[56] *Id.* at 8.
[57] *See* Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced*, 10 CRIMINOLOGY & PUB. POL'Y 13, 27-31 (2011).
[58] *Id.*

To understand whether the threat of future incarceration would impact a specific individual's behavior in the future if leniency was offered in the present, it is helpful to understand how people make decisions in the present knowing that they may face consequences for those decisions later.[59] Behavioral economics teaches that when making decisions, people value the circumstance of their future selves at a discounted rate relative to their current desires.[60] The closer the discount rate is to one, the more an individual values the circumstances of their future self the same as their current self. There is one study that examines the differences in discount rates between people who have been previously incarcerated (.74 discount rate) and the public as a whole (.95 discount rate).[61] This means that those who have been incarcerated are more focused on the present than those who have not been. Even so, those who have been previously incarcerated remain responsive to the threat of future incarceration. Thus, plea deals that do not include incarceration can still be effective in deterring previously incarcerated defendants from committing future criminal acts and should not be excluded from consideration in plea deals.

Even as people remain sensitive to future threats of incarceration, there are diminishing marginal returns to longer sentences.[62] So, as the sentence imposed is increasingly harsh, the marginal deterrent effect decreases.[63] There is some variation in how deterred an individual will be by the sentence length based on the type of offender. Highly educated people are more responsive to

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[59] S.K., *Longer Jail Sentences Do Deter Crime, But Only Up to a Point*, THE ECONOMIST, Mar. 29, 2016, http:/www.economist.com/blogs/freeexchange/2016/03/criminal-justice.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

heftier sentences than drug offenders.[64] This responsiveness can often be included in our current criminal justice system only through prosecutorial discretion in plea-bargaining because it runs counter to the majority of our current sentencing schemes, which are more lenient on white collar crimes and harsher on drug offenses.

Relying on the idea of diminishing marginal deterrent effects as sentences increased, Washington became one of the first states to experiment with a swift and certain model of punishment.[65] In the old model, people who violated their parole or probation were sentenced to thirty, sixty, or ninety days, but only if there was room in the county jail.[66] In the new model, they are sentenced to only three days but are guaranteed to serve time in jail.[67] Over the course of a year, this study found fewer people being convicted of new crimes after receiving the less severe punishment and an 84% drop in people who committed a new crime resulting in them being sent to prison.[68] The researchers attribute this to the certainty of the punishment being a more effective deterrent than the severity of the punishment.[69] Although line prosecutors don't control the certainty of an individual being arrested, it is important to remember that more punitive plea deal offers will have limited value in deterring an individual from committing a crime in the future.

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[64] *Id.*

[65] Keith Humphreys, *The Interesting Thing That Happened when Washington State Tried an 18th-Century Version of Justice*, WASH. POST, Sep. 19, 2016, https://www.washingtonpost.com/news/wonk/wp/2016/09/19/the-interesting-thing-that-happened-when-washington-state-tried-an-18th-century-version-of-justice/.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

3. Rehabilitation

In order to evaluate the rehabilitative potential of a plea deal, prosecutors must make an active effort to learn where defendants with different sentences are incarcerated, the conditions of those facilities, and the access as well as quality of rehabilitation programs available. Prosecutors should avoid relying on anecdotal evidence and instead make an active effort to learn about evaluations done regarding the quality of rehabilitative services. If there are few rehabilitative options available, prosecutors may find themselves offering plea deals that focus on the other purposes of punishment. Still, it is important for prosecutors to realize that the punishment is not serving to help rehabilitate the defendant. Moreover, with the increase in courts to serve specific populations (veteran's courts, drug treatment courts, mental health courts etc.) and diversion programs, prosecutors should also be fully informed about opportunities to use discretion in plea-bargaining to advance rehabilitation through alternatives to incarceration.

For example, District Court Judge Michael Davis recently accepted a plea deal where a defendant plead guilty to attempting to support the Islamic State in Syria and the Levant (ISIL) where the defendant was released to a halfway house for rehabilitation, noting that the federal prison system had no services to de-radicalize the defendant and said even a short prison sentence could close a narrow window to turn the young man's life around.[70]

4. Retribution

Determining whether a system has been effective in retribution is challenging because there is no objective measure of vengeance. In

[70] Stephen Montemayor & Faiza Mahamud, *Two ISIL Defendants Get Modest Sentences; Third Gets 10 Years*, STAR TRIBUNE, Nov. 14, 2016, http://www.startribune.com/first-three-sentences-in-minnesota-isil-recruit-case-to-be-imposed-monday/401078285/.

fact, many scholars have said that the practice of negotiating an admission of guilt in exchange for a lowered charge or sentence cannot be reconciled with a retributively-based criminal law's idea of just deserts.[71] However, if one accepts that plea bargaining is necessary to the criminal justice system, the question becomes how to gauge how vengeful a prosecutor should be in offering plea deals. This note agrees with other scholars who suggest that prosecutors should look to those most directly impacted by crimes—victims—for guidance about what they want from the criminal justice system.[72] On the whole, victims are not primarily concerned with maximizing punishments.[73] In fact, what victims want most is information about their cases, a participatory role, fair and respectful treatment, emotional healing, apologies, and restitution.[74] If prosecutors view their efficacy in ensuring justice for victims to be related to convictions and length of sentences, then they are not correctly fulfilling the goal of victims.[75]

Only one study has been done that attempts to quantify what victims desire from the criminal justice system. That study found that six in ten victims of crime prefer that prosecutors consider victim's opinions on what would help them recover from the crime, even when the victims do not want long prison sentences.[76] Furthermore, over 70% of crime victims believe that prosecutors' primary goal should be solving neighborhood problems and stopping repeat

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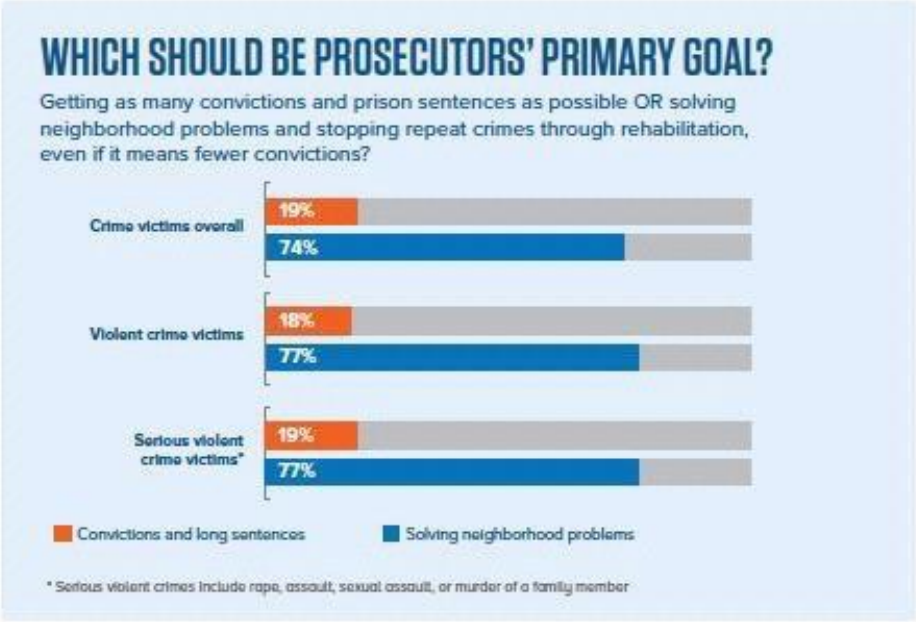
[71] *See* Michael T. Cahill, *Retributive Justice in the Real World,* 85 WASH. U. L. REV. 815, 854 (2007).
[72] Zacharias, *supra* note 11, at 991-94.
[73] *Id.* at 992.
[74] *Id.*
[75] *Id.*
[76] ALLIANCE FOR SAFETY AND JUSTICE, CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF VICTIMS' VIEWSON SAFETY AND JUSTICE 24 (2016).

crimes through rehabilitation even if it means fewer convictions.[77] These and other findings are reported in the chart below.[78]



In fact, the majority of crime victims do not even report their victimization.[79] In 2010, forty-two percent of victims of serious violent crime (rape or sexual assault, robbery, or aggravated assault) nationwide did not report the crime to the police.[80] For simple assault, the number was even higher at fifty-one percent and for

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[77] *Id.* at 25.
[78] *Id.*
[79] LYNN LANGTON ET AL., U.S. DEP'T OF JUSTICE, NCJ 238536, VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006-2010 at 1 (2012).
[80] *Id.* at 2.

property crime it was even higher at sixty percent.[81] Over a third of victims in 2010 who did not report a crime stated that they did not report the crime to the police because they dealt with it another way or believed that it was a personal matter.[82] This demonstrates that many crime victims do not believe that the criminal justice system will be responsive in the way that they would prefer. These data force prosecutors to ask who is benefiting from the pursuit of retribution as a penological objective.

C. DEFENSE COUNSEL

The presence, quality, and obligations of defense counsel should also be considered by a prosecutor during plea bargaining because defense counsel plays a crucial role in helping defendants navigate the plea bargaining process. Importantly, the federal constitutional right to counsel attaches at a defendant's first appearance (even if bail or plea bargains are set at the first appearance),[83] and attaches in cases where a defendant is facing incarceration as a potential sentence.[84] If those conditions are not present, it is possible that a defendant is making a decision about whether to accept a plea deal without being advised by a lawyer.

Furthermore, even where defendants are represented, the quality of representation may vary. This creates the issue of lower quality representation possibly taking the form of defense counsel "who have less knowledge of prevailing market rates for pleas and fewer resources to expend to obtain the market price."[85] Prosecutors

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[81] *Id.*
[82] *Id.* at 1.
[83] Rothgery v. Gillespie Cnty., 554 U.S. 191, 213 (2008).
[84] Argersinger v. Hamlin, 407 U.S. 25, 37-38 (1972); *see also* Scott v. Illinois, 440 U.S. 367, 373 (1979) (holding that the Sixth Amendment does not require counsel in misdemeanor cases where no imprisonment is at stake).
[85] Standen, *supra* note 4, at 1485.

should also remember that anchoring has a robust effect in the psychological literature, thereby giving strong effect to the first offer put on the table by the prosecutor.[86] As a result, prosecutors have a responsibility to offer just plea bargains rather than assuming defense counsel will negotiate a just sentence.

Additionally, defense attorneys are ethically obligated to advise clients to accept a prosecutor's first offer if they believe that it is in the best interest of the client.[87] Thus, prosecutors should be weary of allowing emotions to cause them to make a first offer that is more punitive than necessary to ensure that "justice shall be done" because there is nothing to be gained from such an offer.[88] In this vein, prosecutors would do well to remember that they, like defense attorneys, are repeat players and establishing a reputation as a fair prosecutor will help in future plea bargaining negotiations.[89] In summary, prosecutors would perform their job of serving the public interest better if they took a cooperative view of plea bargaining rather than approached it based on a group identity that encourages prosecutors to view the plea bargaining process as "us [prosecutors] against everyone else."[90]

These suggestions, in considering the role of defense counsel, are less useful if prosecutors prefer harsher sentences than the plea deal because they believe the defendant actually deserves a harsher

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[86] Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 201 (2007).

[87] Lafler v. Cooper, 132 S. Ct. 1376, 1387-89 (2012) (holding a defendant was entitled to a remedy when he rejected a favorable plea offer based on the poor advice of trial counsel); *see also* CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION std. 4-1.3(g) (2015).

[88] *See* Berger v. United States, 295 U.S. 78, 88 (1935).

[89] Bibas, *supra* note 32, at 2480-81.

[90] NEUBAUER & FRADELLA, *supra* note 34, at 179 (quoting GARY T. LOWENTHAL, DOWN AND DIRTY JUSTICE 288 (2003)).

sentence.[91] In this scenario, prosecutors view the plea deals they are offering as discounted versions of the punishment the defendant actually deserves offered only due to limited resources.[92] If this is the case, then considerations of the completeness of information and the purposes of punishment mentioned in the previous sections become increasingly important.

D. REASONS FOR AN INNOCENT DEFENDANT TO PLEAD GUILTY

Approximately fifteen percent of people who were later exonerated were convicted as a result of a guilty plea.[93] This suggests that innocent people do plead guilty, and it is worth prosecutors considering why an innocent individual may choose to plead guilty and attempt to limit those circumstances to ensure justice is truly being served. First, the case law's definition of "coercive" behavior in plea-bargaining is extremely limited.[94] Generally, the Supreme Court has held that a defendant has the right to make rational decisions based on a counseled evaluation of his own best interests.[95] The Court has neglected to examine substantive questions of when and whether a plea or trial sentence is disproportionate, or when and

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[91] Howe, *supra* note 3, at 604.

[92] *Id.*

[93] *Innocents who Plead Guilty*, NAT'L REGISTRY OF EXONERATIONS 1 (Nov. 24, 2015), http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf.

[94] *See generally* Town of Newtown v. Rumery, 480 U.S. 386, 393 (1987) (holding that an agreement requiring a waiver of a civil suit in exchange for dismissal of criminal charges is not unconstitutionally coercive); Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (holding that carrying out a threat to charge someone with a more serious offense if they refuse to plead guilty to a lower charge is constitutional so long as the accused is free to accept or reject the prosecution's initial offer); North Carolina v. Alford, 400 U.S. 25, 31 (1970) (holding that pleading guilty to limit the possible penalty does not necessarily demonstrate a guilty plea is not the product of a free and rational choice).

[95] *See* Brady v. United States, 397 U.S. 742, 756-58 (1970).

whether the sentencing differential between plea and trial is so great that the defendant was given no practical choice but to take the deal.[96] As a result, it falls on a responsible prosecutor to consider what factors, including those unrelated to guilt and sentence length, might result in circumstances that are coercive to a particular defendant. This starts with prosecutors recognizing that our system systemically silences criminal defendants by minimizing and scripting their speaking roles thereby making it almost impossible for a prosecutor to know a defendant's views or the factors that he or she might be considering.[97]

Furthermore, defendants may be in circumstances that limit their autonomy and ability to adequately evaluate relevant factors in accepting a plea deal. Limitations on a defendants' ability to understand the proceedings may be a result of the quality or resources of the defense counsel, [98] mental capacity of the defendant,[99] or even the quality of court interpreters provided to defendants. [100] As a result of factors limiting a defendant's understanding, he may end up choosing to accept a plea bargain without considering all of the information. As prosecutors, beholden to justice,[101] there is an imperative to make sure all factors are being considered to ensure a just result.

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[96] Josh Bowers, *Plea Bargaining's Baselines*, 57 WM. & MARY L. REV. 1083, 1086 (2016).
[97] Zacharias, *supra* note 11, at 994-95.
[98] JUSTICE POL'Y INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 10-15 (2011).
[99] REBECCA VALLAS, CTR. FOR AM. PROGRESS, DISABLED BEHIND BARS: THE MASS INCARCERATION OF PEOPLE WITH DISABILITIES IN AMERICA'S JAILS AND PRISONS 1-2 (2016).
[100] Rebecca Beitsch, *In Many Courtrooms, Bad Interpreters Can Mean Justice Denied*, STATELINE, Aug. 17, 2016, http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/08/17/in-many-courtrooms-bad-interpreters-can-mean-justice-denied.
[101] Berger v. United States, 295 U.S. 78, 88 (1935).

Although prosecutors are limited in how much they can ensure a defendant understands the proceedings, prosecutors can attempt to limit the coercive effects of plea-bargaining by familiarizing themselves with the data on how pre-trial detention affects sentencing as well as considering the possibility that a defendant may need to dispose of the case quickly to avoid pre-trial detention as a result of caregiving or employment obligations. Furthermore, a prosecutor should make an effort to learn whether they have the discretion to selectively enforce statutorily imposed collateral consequences[102] as part of a plea deal and consider doing so when the facts of a case suggest it is appropriate.[103] Similarly, a prosecutor should know whether there are non-financial alternatives to monetary fines and fees that might be available in the jurisdiction and proactively ask if the defendant requires those alternatives.

1. Impacts of Pre-Trial Detention

Particularly in cases where defendants do not have a right to an attorney and are being detained pre-trial for low-level offenses, defendants feel pressured to plead guilty just to get out of jail.[104] For example, defendants in New York City charged with misdemeanors and violations were eighty-four percent more likely to be convicted if they were detained pre-trial than if they were not detained pre-trial.[105] Given that these defendants were not being charged with

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[102] *See National Inventory of Collateral Consequences of Conviction*, THE COUNCIL OF STATE GVTS., http://www.abacollateralconsequences.org/map/ (last visited Aug. 11, 2016) (describing collateral consequences).

[103] Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1229-33 (2016).

[104] Alexandra Natapoff, *Misdemeanors*, 85 S. CALIF. L. REV. 1313, 1346-47 (2012) (describing the "immense" pressure on defendants accused of misdemeanors to plead guilty to get out of jail).

[105] MARY T. PHILLIPS, NEW YORK CITY CRIMINAL JUSTICE AGENCY, INC., PRETRIAL DETENTION AND CASE OUTCOMES, PART 1: NONFELONY CASES 28 (2007).

felonies, it is possible that this was due to defendants accepting guilty pleas due to either a desire to leave jail or the way detention makes it difficult for defendants to participate in their defense (such as complications in communicating with counsel) rather than acts by the government through zealous investigation and prosecution.

Furthermore, the only study on the topic of the impact of pre-trial detention on recidivism found that the longer defendants who were identified as having a low public safety risk were detained pre-trial, the greater the chance that they would have a new criminal arrest prior to the trial and the greater the chance that they would commit a new crime over a two-year period.[106] Thus, pre-trial detention is not a neutral policy in how it impacts public safety. Rather, pre-trial detention can have the impact of being counterproductive both to a defendant's life due to the infringement on liberty and to the public by increasing their likelihood of offending.

2. External Obligations

Similarly, for people with children, jobs, or other obligations, the deprivations faced while awaiting trial (particularly if the defendant is detained pre-trial) can be worse than what an individual would face if they were convicted at trial.[107] Even if an individual is released on bail, it is often inconvenient and expensive to be obliged to make repeated appearances in court pending trial.[108] This is amplified by

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[106] LAURA AND JOHN ARNOLD FOUND., RESEARCH SUMMARY: PRETRIAL CRIMINAL JUSTICE RESEARCH 5 (2013).
[107] Natapoff, *supra* note 104, at 1347.
[108] *See How Courts Work: Steps in a Trial, Plea Bargaining*, AM. BAR. ASS'N, https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining.html (last visited June 19, 2017) (noting that plea bargaining is practical to avoid the time and cost of a trial).

the fact that "nothing clears a case faster than a guilty plea."[109] For a single parent, even a short time incarcerated can result in serious concerns about who will take over caregiving responsibilities.[110] A similar rationale would apply to a defendant's concern about losing employment or their place in a homeless shelter if they fail to meet their obligations for a couple of days.[111] These high process costs explain why almost every misdemeanor defendant, in the end, resolves his case with a guilty plea.[112]

3. Collateral Consequences

There are a variety of statutorily imposed collateral consequences that can result from criminal conviction including loss of occupational licensing, driver's license, and access to public benefits (including housing).[113] Defendants may be weighing the collateral consequences that are likely to result from losing a case at trial on different charges against accepting a guilty plea for lower charges.[114] This is especially relevant in the immigration context for non-citizens who could face possible deportation.[115]

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[109] Emily DePrang, *Poor Judgment: In Harris County, the Indigent Defense System Works Great – For Everyone but the Indigent*, TEXAS OBSERVER, Oct. 12, 2015, https://www.texasobserver.org/poor-judgment/.

[110] THE ANNIE E. CASEY FOUND., A SHARED SENTENCE: THE DEVASTATING TOLL OF PARENTAL INCARCERATION ON KIDS, FAMILIES AND COMMUNITIES 2 (2016).

[111] *See id.* at 3.

[112] Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, 241 (2007).

[113] *See National Inventory of Collateral Consequences of Conviction*, THE COUNCIL OF STATE GVTS., http://www.abacollateralconsequences.org/map/ (last visited Aug. 11, 2016).

[114] Todd A. Berger, *After* Frye *and* Lafler*: The Constitutional Right to Defense Counsel Who Plea Bargains*, 38 AM. J. TRIAL ADVOC. 121, 139 (2014).

[115] *Id.*; *see also* Padilla v. Kentucky, 559 U.S. 356, 373-74 (2010) (holding the failure to inform non-citizen defendants of the possible deportation consequences of a guilty plea constituted ineffective assistance of counsel).

Traditionally, judges were tasked with mitigating these collateral harms at sentencing.[116] Given that prosecutors are the decision makers in the plea-bargaining context, the responsibility now falls on them to be thoughtful of these considerations and make an effort to understand how they may impact a defendant's decision making.

4. Fines and Fees

Finally, a defendant may be considering the potential fines and fees that will result from a criminal conviction at trial in that county's jurisdiction, the defendant's ability to pay those fines and fees and the court's likelihood to consider that ability. This is especially true if they are pleading guilty to a different set of charges (with a different set of fines and fees) than they would be charged with if they proceeded to trial. Furthermore, some jurisdictions have court fees that accompany going to trial or restitution fines that are discretionarily set by the sentencing judge after a trial. Thus, a defendant may prefer a plea bargain where the knows what he will be required to pay.

E. IMPACT OF PUNISHMENT ON THE LEGITIMACY OF THE LAW

Prosecutors in plea-bargaining negotiations should remember that studies have shown that the perception that the legal system's authority is legitimate has a greater effect on a person's compliance with the law than the risk of punishment.[117] Furthermore, while decision recipients evaluate fairness based chiefly on process, decision makers focus largely on outcomes.[118] Therefore, prosecutors

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[116] Standen, *supra* note 4, at 1504.
[117] Greg Berman & Emily Gold, *Procedural Justice from the Bench: How Judges Can Improve the Effectiveness of Criminal Courts*, 51 JUDGES' J. 20, 20 (2012).
[118] Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 412 (2008).

can help cultivate legitimacy of the system by focusing on whether defendants believe that the system is treating them fairly.[119]

Currently, Black people are approximately 10 times more likely than white people to be incarcerated for drug possession despite the fact that 49% of Whites and 42.9% of Blacks admitted to using drugs at some point in their lifetime and, at most, Black people are twice as likely to sell drugs.[120] Similarly, there is nearly a seventy percent chance that an African-American man who does not finish high school will be in prison by his mid-thirties compared to a fifteen percent chance for a white man who does not finish high school.[121] Individual prosecutors may not be able to change systemic racism, but they can choose not to perpetuate disparities in enforcement by police officers during plea-bargaining.

Racial disparities in prosecution were evaluated in a study of prosecutors at the New York County District Attorney's Office, where Black and Latino defendants were statistically significantly more likely to be offered a custodial sentence at the plea-bargaining stage.[122] The same study found that Black and Latino defendants were more likely to be represented by court-appointed attorneys that had worse outcomes and that representation was a more predictive factor than race for sentence offers.[123] While the racial disparities observed in prosecutions may be a result of factors other than bias, prosecutors' legitimacy is undermined when observers of the system,

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[119] M. Somjen Frazer, *Examining Defendant Perceptions of Fairness in the Courtroom*, 91 JUDICATURE 36, 36 (2007), http://www.courtinnovation.org/sites/default/files/perceptionsoffairness.pdf.

[120] Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 266-75 (2009).

[121] Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 221, 231 (2009).

[122] BESIKI LUKA KUTATELADZE & NANCY R. ANDILORO, PROSECUTION AND RACIAL JUSTICE IN NEW YORK COUNTY—TECHNICAL REPORT 118 (2014).

[123] *Id.* at 130.

including the defendant, see racial disparities that can lead them to believe prosecutors are biased.

Furthermore, the American Bar Association recently amended Model Rule 8.4 to make it professional misconduct to engage in conduct a "lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."[124] One limitation of this rule is that it does not account for the effect of implicit bias by prosecutors who may unknowingly or unintentionally engage in discriminatory behavior during plea-bargaining.

In order to ensure that prosecutors are perceived as being fair, in addition to actually being fair during plea-bargaining, prosecutors can do a few things to cultivate legitimacy through procedural justice including ensuring defendant's had the opportunity to tell their side of the story (voice), explaining decisions to demonstrate that a neutral process was followed (neutrality), expressly addressing any claims asserted by the defendant in support of more lenient treatment (trustworthiness) and politeness as well as acknowledgment of a citizen's rights (respect).[125]

CONCLUSION

Prosecutors operate within an ecosystem of customs, policies, ethical responsibilities and laws but, nevertheless, maintain an enormous amount of discretion. It is perhaps easiest to lose sight of the immensity of that power in cases that are quickly plead out. However, for an individual defendant, every case and conviction affects his life in ways that prosecutors may not fully appreciate.

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[124] MODEL RULES OF PROF'L CONDUCT R. 8.4(g) (2016).
[125] O'Hear, *supra* note 118, at 426-31.

Similarly, victims may carry around the trauma of an event long after a prosecutor has disposed of a case. Therefore, prosecutors have an obligation to be thoughtful about whether infringing on the liberty of a defendant is actually helping the victim or serving public safety goals to ensure that plea bargaining actually furthers the ultimate aim of justice.