

# Plea Bargaining in the Shadow of the Guidelines

Jeffrey Standen

## TABLE OF CONTENTS

Introduction .....	1472
I. Prosecutorial Discretion in a World Without a Judge .....	1477
A. The Prosecutor as Monopsonist .....	1477
1. Reduced Plea Concessions .....	1478
2. Fewer Plea Exchanges .....	1480
3. Incentives to Discriminate .....	1483
4. Defendants Without Protection Against the Monopsonist .....	1486
B. Nonjudicial Constraints Do Not Impede Monopsony Power .....	1488
1. Rules Governing Sales of Information .....	1489
2. Rules Governing Sales of Convictions .....	1495
3. Rules Governing the Prosecutor's Public Trust .....	1497
II. Judges Vs. Prosecutors .....	1501
A. Before the Guidelines: Judges Control Prosecutors .....	1502
B. Under the Guidelines: Prosecutors Control Judges .....	1505
1. Charging and Sentencing Under the Guidelines .....	1506
2. The Consequences of Prosecutors Who Sentence .....	1512
III. Controlling Discretion in the World of the Guidelines .....	1517
A. Proposals to Check Prosecutorial Discretion .....	1519
1. Better Statutes .....	1519
2. Charging Guidelines .....	1521
3. "Real Offense" Sentencing .....	1528
B. A Proposal for Doing Justice in a Fallen World .....	1532
Conclusion .....	1537

# Plea Bargaining in the Shadow of the Guidelines

Jeffrey Standen†

*As the sole "purchasers" of criminal defendants' convictions and incriminating information, prosecutors act as agents of a monopsonist. As monopsonists, they possess substantial power to overwhelm criminal defendants in the plea bargaining process. Historically, such power has been constrained by independent judicial sentencing. The United States Sentencing Guidelines have substantially eliminated the discretion of federal judges to determine final sentences, curtailing judges' ability to constrain prosecutors. Because sentencing under the guidelines is largely "charge-offense based," prosecutors have more control over the sentencing outcomes, since they determine the charges. In this Article, Professor Standen argues that several commonly suggested solutions to constrain prosecutorial discretion are inadequate because they all maintain discretion in other parties rather than eliminating it. Discretion is inherent in any criminal justice system. Thus, the problems stemming from discretion are best addressed through dispersement. Effective dispersement of discretion can only be achieved by abrogating the requirement that judges adhere to the sentencing guidelines.*

## INTRODUCTION

Prosecutors are the agents of a monopsonist,<sup>1</sup> the government: they represent the sole purchasers of the convictions and incriminating infor-

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1. A monopsony exists when there is a single buyer of a good or service. Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 297 n.6 (1991) [hereinafter Blair & Harrison, *Antitrust Policy & Monopsony*] (citing GEORGE STIGLER, *THE THEORY OF PRICE* 216-18 (1987)). Recent scholarship in the antitrust area has begun a systematic investigation of the effects of monopsonies on product markets. See Roger D. Blair & Jeffrey L. Harrison, *Cooperative Buying, Monopsony Power, and Antitrust Policy*, 86 NW. U. L. REV. 331 (1992) [hereinafter Blair & Harrison, *Cooperative Buying, Monopsony Power, and Antitrust Policy*] (arguing that antitrust law should recognize a distinction between cooperative buying which results

mation that a multitude of criminal defendants have to sell.<sup>2</sup> As a result, prosecutors hold great bargaining power over defendants and are able to obtain exchanges of pleas at subcompetitive prices.<sup>3</sup> Further, to be faithful to their principals' interests, prosecutors have an incentive to discriminate against particular defendants or subgroups of defendants by attempting to settle like cases differently depending on defendants' personal characteristics unrelated to culpability.<sup>4</sup> In short, as agents of a monopsonist, prosecutors possess and have the incentive to exercise sub-

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in product efficiencies, and collusive monopsony, which results in a decrease in competition); Blair & Harrison, *Antitrust Policy and Monopsony*, *supra* (arguing for the integration of monopsony theory into antitrust policy analysis); Roger D. Blair & Jeffrey L. Harrison, *Rethinking Antitrust Injury*, 42 VAND. L. REV. 1539, 1565-68 (1989) [hereinafter Blair & Harrison, *Rethinking Antitrust Injury*] (analyzing collusive monopsony power).

2. The government has claimed a monopoly over the procurement of criminal convictions. See Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 388 (1986) (discussing the government's monopolization of the criminal process in contrast to the victim's historical role); see also A.J. Reiss, *Public Prosecutors and Criminal Prosecution in the United States of America*, 20 JURID. REV. (n.s.) 1, 1 (1975), reprinted in FRANKLIN E. ZIMRING & RICHARD S. FRASE, *THE CRIMINAL JUSTICE SYSTEM: MATERIALS ON THE ADMINISTRATION AND REFORM OF THE CRIMINAL LAW* 396, 396 (1980) ("The initiation of criminal proceedings and the prosecution of criminal matters in the United States . . . rest primarily with a public prosecutor. At law, private prosecution is possible . . . but it has virtually disappeared. . . .") (alteration in original); *infra* note 21. However, private purchasers can create a market niche alongside governmental monopsonies. In criminal cases, organized crime gangs constitute a potential purchaser of testimony. See *infra* notes 45, 55.

3. See *infra* Part I.A.1. The effects of monopsony power are evident in other settings as well. Before its demise led to "free agency," the reserve clause in Major League Baseball provided an example of a private monopsony. The reserve clause in effect bound the players to their ballclubs for the duration of their playing careers, thus allowing owners to maintain salary control. The breathtaking increase in both the value of players' salaries and the length of contracts when players gained the right to negotiate with more than one baseball team evidences the extent to which the monopsonist is able to restrict price.

For the baseball season of 1976, baseball players Bill Campbell, Bobby Grich, Wayne Garland, and Don Baylor were able to negotiate with but one baseball team. Their salaries were as follows:

Bill Campbell:	\$22,000
Bobby Grich:	\$68,000
Wayne Garland:	\$23,000
Don Baylor:	\$35,000

One year later, these players were in effect allowed to negotiate with any ball club. Each player signed contracts of at least four seasons in duration with an average salary over those seasons as follows:

Bill Campbell:	\$250,000
Bobby Grich:	\$300,000
Wayne Garland:	\$200,000
Don Baylor:	\$170,000

See Kevin Dupont, *Baylor: A Strong Leader*, N.Y. TIMES, Aug. 4, 1985, § 5, at 1 (listing Baylor's salaries); Leigh Montville, *The First To Be Free*, SPORTS ILLUSTRATED, Apr. 16, 1990, at 98 (listing Campbell, Grich, and Garland's salaries). These increases appear attributable to the demise of the ballclubs' monopsony and represent an average increase (or prior diminishment) of over 400%, not including the added benefit to the athlete of contract duration. Other major league baseball players have felt the effect of the end of the monopsony as well. In 1976, the year prior to free agency, the average salary in major league baseball was \$52,300; the first class of free agents averaged \$200,696. Montville, *supra*.

4. See *infra* Part I.A.3.

stantial power to overwhelm criminal defendants in the plea bargaining process.<sup>5</sup>

Historically, the prosecutor's extraordinary bargaining power<sup>6</sup> over defendants was constrained by independent judicial sentencing.<sup>7</sup> The bargains that prosecutors offered and struck with criminal defendants were confined to a range representing a discount of the likely judicial sentencing outcome.<sup>8</sup> Thus, regardless of the extent of the prosecutor's potentially exploitative bargaining power or the paucity of plea concessions offered by the prosecutor, the defendant retained the option of proceeding to trial. In effect, the defendant could always reject the prosecutor's offer for the judge's. As a result, prosecutors' plea offers were necessarily fashioned in response to likely judicial sentences.<sup>9</sup>

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5. Professor Stephen Schulhofer has broadly defined plea bargaining as "any process in which inducements are offered in exchange for a defendant's cooperation in not fully contesting the charges against him." Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1037 (1984). Using Professor Schulhofer's approach, this Article will examine "plea bargaining" in its broad sense, to include "not only formal, officially sanctioned plea bargaining, but also the wide variety of informal, *sub rosa* behavior patterns in which indirect inducements, unspoken commitments, and covert cooperation create the functional equivalent of explicit bargaining." *Id.* at 1038. In this broad sense, offers of grants of immunity are also a form of plea bargaining. See *infra* Part I.B.1 for a discussion of prosecutors' purchases of information from criminal defendants in return for grants of immunity.

6. Professor John Langbein has compared prosecutorial plea bargaining tactics with methods of torture in medieval times. John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12-19 (1978).

7. Commentators have described other constraints on prosecutorial discretion. See Elisabeth Alden Bresee, *Prosecutorial Discretion*, 75 GEO. L.J. 859, 861-62 (1987) (asserting that courts have a responsibility to protect against abuses of prosecutorial discretion that violate defendants' constitutional rights); Sarah J. Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383, 414 (1976) (arguing that an emphasis on winning influences prosecutors' charging decisions); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 291-99 (1980) (noting that supervisory personnel are often concerned with promoting a uniform office policy); Leonard R. Mellon et al., *The Prosecutor Constrained By His Environment: A New Look At Discretionary Justice in the United States*, 72 J. CRIM. L. & CRIMINOLOGY 52 (1981) (finding that the external environment and prosecutorial policy act as constraining devices). See generally JOAN E. JACOBY ET AL., PROSECUTORIAL DECISION MAKING: A NATIONAL STUDY (1982) (finding a consistency among prosecutors and among prosecutorial offices in handling hypothetical cases).

For examples of cases detailing constraints on prosecutorial discretion, see *Wayte v. United States*, 470 U.S. 598, 608 (1985) (holding that decisions to prosecute must not violate the Equal Protection Clause); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (granting habeas corpus petition because of discriminatory motives in prosecution); *Raheja v. Commissioner*, 725 F.2d 64, 67 (7th Cir. 1984) (stating that selective prosecution may rise to the level of an equal protection violation); *Nader v. Saxbe*, 497 F.2d 676, 679-80 n.19 (D.C. Cir. 1974) (finding that prosecutorial discretion "is subject to statutory and constitutional limits enforceable through judicial review"); *McCray v. Maryland*, 456 F.2d 1, 3 (4th Cir. 1972) (holding that 42 U.S.C. § 1983 may provide a cause of action against prosecutors despite claims of prosecutorial immunity).

The Department of Justice rules also restrict the discretion of prosecutors. See, e.g., 8 THE DEPARTMENT OF JUSTICE MANUAL §§ 9-27.000 to .760 (1992-1 Supp.) (providing guidelines governing the initiation and declination of prosecution, selection of charges, plea agreements, opposition to offers to plead "nolo contendere," nonprosecution agreements, and sentencing).

8. See *infra* Part II.A.

9. Because judicial sentences were more difficult to predict in cases involving crimes which

Judicial sentencing no longer limits prosecutorial power in federal courts. The United States Sentencing Guidelines<sup>10</sup> have substantially eliminated the discretion of federal judges to determine final sentences and have thus curtailed judges' ability to constrain prosecutors. Today it is the sentencing guidelines, rather than judge-determined sentences, that supply the parameters of plea bargaining.

The sentencing guidelines, however, fail to constrain prosecutorial power. Because the sentencing guidelines are largely "charge-offense based," the eventual sentencing outcome is determined primarily by the crime with which the prosecutor charges the defendant.<sup>11</sup> By determining sentencing outcomes as a function of charging decisions, the sentencing guidelines have had the unintended effect of giving more control over the sentencing outcome to the person who controls charging, the prosecutor. Instead of constraining prosecutors, the sentencing guidelines further empower them.

The prosecutor's new power to shape the outcomes of criminal trials radically alters the nature of plea bargaining.<sup>12</sup> Rather than being constrained to shape bargains according to judge-determined sentencing parameters, the prosecutor now determines with little inhibition the sentencing parameters. Because the prosecutor now sets the range from which the prosecutor and defense counsel discount to reflect the likelihood of conviction and the costs of trial, full exercise of the prosecutor's monopsony power is now possible. Indeed, full exploitation of the monopsony power by prosecutors constitutes faithful service to their principals, using public resources to maximum effect. Further, except in cases of gross overcharging, neither the judge nor the jury can gainsay the prosecutor's selection of the bargaining parameters. If a defendant opts not to accept the prosecutor's offer and is convicted as charged, the guidelines sentence is typically an automatic function of the charge.

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were not "normal" and therefore did not have an established "price" or "worth," prosecutors may have been less restricted by judicial sentencing in plea bargaining in these types of cases. See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN LOWER CRIMINAL COURT* 175-85 (1979); David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBLEMS 255, 260 (1965) (defining "normal" crimes).

10. See U.S. SENTENCING COMM'N, *GUIDELINES MANUAL* (1992) [hereinafter U.S.S.G.]. Although this analysis will focus on the effect of the federal sentencing guidelines on federal plea bargaining, its arguments address any systematic method of constricting judicial sentencing discretion. Like the federal system, many states have sentencing guidelines. See generally SANDRA SHANE-DUBOW ET AL., NATIONAL INSTITUTE OF JUSTICE, *SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT* (1985) (analyzing state adoptions of sentencing guidelines systems); Frederick A. Hussey & Stephen P. Lagoy, *The Impact of Determinate Sentencing Structures*, 17 CRIM. L. BULL. 197 (1981) (same).

11. See *infra* Part II.B.

12. A review of 40,000 federal convictions by the United States Sentencing Commission revealed that approximately 85% of federal criminal convictions resulted from guilty pleas. U.S. SENTENCING COMM'N, *SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS* 9, 48 (1987).

Consequently, the prosecutor's control over the charge is effectively control of the sentence. Plea bargaining, traditionally understood as a process of bargaining over neutral sentencing outcomes, is a thing of the past.

Several solutions to this problem of prosecutorial control over sentencing appear plausible: 1) Congress might define crimes more exactly to limit the prosecutor's discretion in charging;<sup>13</sup> 2) guidelines governing prosecutors' charging decisions might constrain their effective power to sentence;<sup>14</sup> or 3) "real offense" sentencing might sever the connection between the count of conviction and the sentence, thus eliminating the prosecutor's ability to control sentences through charging.<sup>15</sup>

These proposals to curb prosecutorial discretion are not satisfactory, however, because they effect greater concentrations of discretion in various other parties rather than tending to eliminate discretion. Because discretion inheres in any criminal justice system, the best method to deal with the problems it creates is to disperse it. This Article argues that effective dispersement of discretion can be achieved only by abrogating the requirement that judges adhere to the sentencing guidelines.

Part I of this Article describes prosecutors' tremendous monopsony power by examining prosecutorial plea bargaining in a world without a judge. Acting without judicially imposed constraints, the prosecutor's role as an agent of the government monopsonist gives the prosecutor the ability to exploit fully his enormous bargaining advantages over defendants. Part I also explores how the rules of plea bargaining empower prosecutors rather than restrict them as they were designed to do.

Part II describes the constraining influence of the judge on prosecutorial bargaining prior to the introduction of the guidelines. Without this judicial control, prosecutors now control final sentences through charging. The implications of this development are extensive. In effect able to set sentences without engaging in bargaining, prosecutors may now fully exercise their monopsony power. Having supplanted the judge, prosecutors have also been effectively charged with the unwelcome task of managing prison populations.

Part III argues that several commonly suggested solutions to the problem of prosecutorial discretion are inadequate because they concentrate discretion further, exacerbating the trend started by the introduction of the sentencing guidelines. Thus, Part III suggests that the elimination of discretion within the criminal justice system is impossible and recommends instead that discretion be dispersed to minimize its harmful potential.

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13. See *infra* Part III.A.1.

14. See *infra* Part III.A.2.

15. See *infra* Part III.A.3.

## I

## PROSECUTORIAL DISCRETION IN A WORLD WITHOUT A JUDGE

To understand the extent of prosecutors' discretion in plea bargaining now that it is unfettered by judicial constraints, it is useful to consider how, without the restrictions that were imposed by judicial sentencing, prosecutors' monopsony power enables them to extract pleas in exchange for subcompetitive prices and to discriminate against certain classes of defendants. Isolating prosecutorial power from the limits formerly imposed by judicial sentencing also reveals the ineffectiveness of nonjudicial limitations on prosecutorial discretion in plea bargaining.

A. *The Prosecutor as Monopsonist*

The academic literature contains many discussions of the problematic role of the public prosecutor in a plea bargaining system.<sup>16</sup> The prosecutor's status as an agent renders the prosecutor's motives and judgments in plea bargaining suspect.<sup>17</sup> Agency theory suggests that prosecutors' purchases of reduced punishments to preserve prosecutorial

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16. See Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968) (detailing problems with the plea bargaining system); Brian Forst & Kathleen B. Brosi, *A Theoretical and Empirical Analysis of the Prosecutor*, 6 J. LEGAL STUD. 177 (1977) (analyzing the problem of handling repeat offenders as an investment decision for the prosecutor); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 38 (criticizing plea bargaining in practice as a nonnegotiable administrative determination of culpability); Kenneth Kipnis, *Plea Bargaining: A Critic's Rejoinder*, 13 LAW & SOC'Y REV. 555, 557-58 (1979) (asserting that plea bargaining conflicts with the liberal-democratic ideals of the criminal justice system); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957 (1989) (arguing that prosecutors should disclose material evidence favorable to defendants during plea bargaining); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43 (1988) (arguing that discretion results in unfairness); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992) (advocating reform because of barriers to efficient bargaining in the plea bargaining process); Mark Tushnet & Jennifer Jaff, *Critical Legal Studies and Criminal Procedure*, 35 CATH. U. L. REV. 361 (1986) (discussing critical legal studies using plea bargaining as a case study).

17. See Richard P. Adelstein, *The Negotiated Guilty Plea: A Framework for Analysis*, 53 N.Y.U. L. REV. 783, 806-07 (1978) (finding that the prosecutor's budgetary constraints do not lead to maximized deterrence as the prosecutor may ignore "moral cost" considerations important to society); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 300-01, 331 (1983) (alluding to prosecutors' agency problems but concluding that prosecutors' self-interest in successful prosecutions leads them to maximize deterrence); Gifford, *supra* note 16, at 68-70 (asserting that plea bargaining may undermine the legislature's intent in passing determinate sentencing statutes); Schulhofer, *supra* note 16, at 49-60 (detailing agency costs, including self-dealing, associated with both prosecutors and defense counsel).

For examples of other prosecutorial misfeasances alluded to in the literature, see Gifford, *supra* note 16, at 45-51 (suggesting that the prosecutors' bargaining advantages may coerce defendants into accepting proposed plea agreements); Schulhofer, *supra* note 5, at 1084-86 (arguing that the prosecutor's preference to dispose of adjudications by plea is not significantly cheaper or more efficient); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1554-60 (asserting that prosecutorial discretion denies defendants fair process and equal treatment, and shields the system's defects from public scrutiny).

resources may be informed by self-interest,<sup>18</sup> may lead to oppressive bargains,<sup>19</sup> and may fail to maximize deterrence.<sup>20</sup>

Because prosecutors act on behalf of a monopsonist,<sup>21</sup> market analysis suggests that they will tend to depress price by offering smaller plea concessions, diminish the number of plea agreements offered, and discriminate against certain defendant classes. Defendants, both individually and as a class, are unlikely to have any systematic defenses to this prosecutorial oppression. Ironically, to the extent that agency problems render prosecutors inefficient servants of their principal, this ineffectiveness serves to mitigate the oppressive tendencies of the prosecutorial monopsony. This Part addresses these concerns in turn.

### 1. *Reduced Plea Concessions*

One important feature of prosecutors' monopsony power is the ability, in the absence of the judge, to dictate the price, that is, the terms, of plea agreements. Classical economic theory holds that monopsonists, like all economic actors, seek to maximize the profits that their market positions make available.<sup>22</sup> As the sole purchaser of an item for sale, the monopsonist is able to offer a low price for the item because the seller has no other outlet to sell the item.<sup>23</sup> Exploitation of this power enables the monopsonist to extract any available gains of trade<sup>24</sup> from the seller, inducing a sale at a point just above the seller's indifference. With a monopsonist buyer and multiple sellers<sup>25</sup> in the context of plea bargain-

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18. See Forst & Brosi, *supra* note 16, at 183.

19. See Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 652-56 (1981) (contending that plea bargaining is an unfair and irrational process); Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1395-1407 (1970) (arguing that plea bargaining undermines a defendant's Fifth Amendment privilege against self-incrimination and Sixth Amendment right to confront one's accusers). *But see* Scott & Stuntz, *supra* note 16, at 1911 (arguing that plea bargaining satisfies the standards of fairness traditionally associated with contractual processes).

20. *Cf.* Forst & Brosi, *supra* note 16, at 191 ("The findings . . . provide no empirical support to the hypothesis that the prosecutor attempts to give more attention to cases involving defendants with extensive arrest records."); *see also* Schulhofer, *supra* note 16, at 47 (contending that criminal processes are not a "market" gravitating toward an efficient equilibrium but a political system gravitating toward a regulatory equilibrium).

21. See, e.g., Cardenas, *supra* note 2, at 388 ("The state now asserts a monopolistic power in the initiation and management of criminal proceedings. Contrary to the past, criminal proceedings involve only two official parties: the state, as represented by the public prosecutor, and the defendant."); *see also* Schulhofer, *supra* note 16, at 64-66 (comparing the plea bargaining process to a true market system). For an overview of monopsony economics, see Blair & Harrison, *Antitrust Policy and Monopsony*, *supra* note 1, at 301-06; Blair & Harrison, *Cooperative Buying, Monopsony Power, and Antitrust Policy*, *supra* note 1, at 333-36; Blair & Harrison, *Rethinking Antitrust Injury*, *supra* note 1, at 1565-68; Jonathan M. Jacobson & Gary J. Dornian, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULL. 1, 5-18 (1991).

22. See Jacobson & Dornian, *supra* note 21, at 7.

23. *Id.* at 5-10.

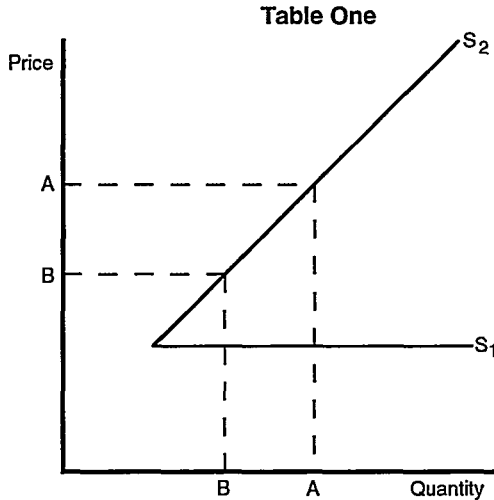
24. See *infra* note 42.

25. Some cases may not be fungible with others, thus creating a bargaining situation where



ing, therefore, the prosecutor can compel the defendant to take the plea for a price or sentence only slightly lower than that at which the defendant would prefer to go to trial.<sup>26</sup>

To confirm this proposition, consider the following graph.



Curve  $S_1$  represents the supply curve facing a buyer in a competitive market. The curve is perfectly flat because the buyer has no "market power": as one buyer among many, a buyer generally cannot alter the price of each purchase by reducing or increasing the quantity of purchases. Now consider curve  $S_2$ .  $S_2$  is the supply curve for the entire industry. Quantity rises as a function of price because more sellers will be willing to sell (or will appear) at a higher price.<sup>27</sup>

In a market featuring a monopsonist, the industry supply curve ( $S_2$ ) is the monopsonist's supply curve because the monopsonist is the sole

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these defendants have some market power, in effect moving from a pure monopsony to a "bilateral monopoly," where both the seller and the buyer have power to move price self-interestedly. See Jacobson & Dorman, *supra* note 21, at 19 (discussing the effects of a bilateral monopoly). The clearest example of a nonfungible case which creates the possibility of a bilateral monopoly in the plea bargaining system would involve a defendant who has sole access to important incriminating information. In a bargain substantially over access to this information, the seller/defendant could demand a better, or above-market, price from the prosecutor, perhaps even requesting witness protection. The prosecutor's need to pay the higher price would be increased to the extent that the prosecutor's competitors for this information, that is, the defendant's former coconspirators, threaten to exact reprisals for the revelation of incriminating information. Outside of this scenario, however, it appears likely that prosecutors see most cases as fungible.

26. "[T]he defendant will agree to a guilty plea if he perceives the cost of the sentence received upon the plea as less than the expected disutility of the trial prospect and its associated sentence." Adelman, *supra* note 17, at 809.

27. Because the prosecutor is the purchaser of the plea, a "higher" price is equivalent to a lower sentence throughout this Article. Thus, for example, the statement that more sellers are willing to sell at a *higher* price is equivalent to saying that more defendants are willing to enter into pleas when the sentence is *lower*.

industry buyer. In the context of plea bargaining, the prosecutor's supply curve for plea purchases looks like curve  $S_2$ . The prosecutor can move the market price along curve  $S_2$  simply by determining the quantity of purchases. By reducing the number of purchases from quantity A to quantity B along the horizontal axis, the prosecutor can lower the price, that is, diminish the concessions that must be paid for plea bargains, from price A to price B along the vertical axis.

Consequently, the prosecutor as monopsonist can control the outcome of plea bargains to maximize "profit" at the defendant's expense. The prosecutor can use the threat of a criminal trial (and possible additional criminal penalties) to extract a plea agreement at or close to the upper end of the range of sentencing outcomes, short of the defendant's point of indifference.<sup>28</sup> In a world without a judge, a prosecutor can diminish the price of plea bargains at will.<sup>29</sup>

## 2. Fewer Plea Exchanges

In order for prosecutors to buy pleas at lower prices, they must be willing to reduce the quantity of their purchases. Thus, according to classical monopsony theory, fewer actual exchanges of convictions will take place in a monopsonized market than in a competitive market. This result occurs because the lessened attractiveness of the offered terms will render more defendants/sellers willing to forgo the exchange and try the case, or hold out for more concessions,<sup>30</sup> than would do so in a market featuring a competitive price.<sup>31</sup> Therefore, by reducing the quantity of plea exchanges, the prosecutor willingly forgoes the purchase of convictions that would have been purchased in a competitive market.

Implicit in the proposition that the prosecutor will reduce the quantity of purchases below the competitive level is the notion that the prose-

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28. See Blair & Harrison, *Antitrust Policy and Monopsony*, *supra* note 1, at 316-17 (explaining that a monopsonist may be able to exploit fully its power by forcing sellers onto their all-or-none supply curve and extracting the producer surplus).

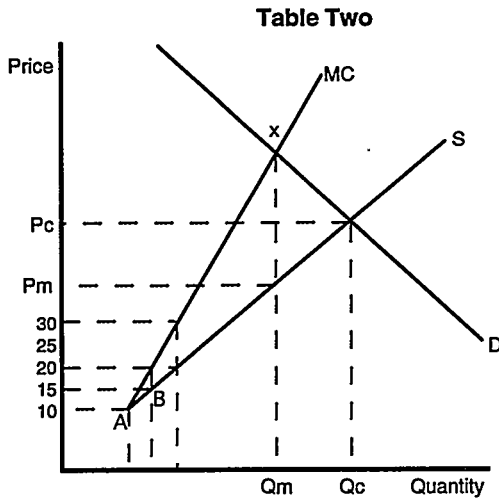
29. The limitations imposed by judicial sentencing are discussed *infra* Part II.A.

30. The prosecutor facing a reluctant seller could, of course, modify his offer. In the context of a purchase of incriminating information, see *infra* Part I.B.1, the prosecutor could increase the offer from use immunity to "transaction immunity," which provides the witness immunity from all prosecution on any matter about which he testifies.

31. The proposition that a monopsonist's purchase price tends to be "lower" than it would be in a competitive market is unexceptional. See Blair & Harrison, *Antitrust Policy and Monopsony*, *supra* note 1, at 301-03. The final price does depend, however, upon the characteristics of the seller's market for each monopsonized product. For example, if the monopsonist made his purchases in a market featuring competitive sellers, then the price would be lower than the competitive price, assuming that the monopsonist acted as a monopsonist, *simpliciter*. However, if the sellers' market were oligopolized or monopolized to some degree, then the issue of whether the market price was above, below, or equal to the putative competitive price would depend upon the classic "bilateral monopoly" analysis. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 54-55 (3d ed. 1986); see also *infra* Part I.A.4 (arguing that the defendant class is unlikely to form an effective monopoly). Whichever party had the superior bargaining position would tend to emerge with the greater gains of trade, and the market price would differ from the competitive price accordingly.

cutor will refuse to undertake plea transactions that clearly are "profitable" for law enforcement. In other words, even where the benefit of disposing of the case by plea exceeds the expected penalty that would result from trial, the prosecutor will sometimes refuse the bargain.

As monopsonists, prosecutors will accept fewer exchanges in return for the ability to extract sales at more favorable prices. Even though the monopsonist's refusal to agree to profitable exchanges appears paradoxical, the monopsonist perceives this trade-off as profitable because it represents an increase in total profits. To illustrate why a monopsonist would prefer to offer a lower price, and consequently purchase fewer goods, even where the goods are offered to the monopsonist at or below the competitive price, consider the following graph.



The desire of defendants to sell their plea is represented by curve S, the industry supply curve depicted in Table One. This curve slopes upward on the theory that a greater price will render an increasing number of defendants willing to sell. The downward sloping curve D represents the prosecutor's increasing disinclination to purchase pleas as the price increases.  $P_c$  represents the competitive price for pleas, the price at which the prosecutor would be willing to purchase the same number of pleas ( $Q_c$ ) as defendants in an industry would be willing to supply.

The monopsonist will decline to offer the competitive price, represented by  $P_c$ , preferring to offer a lower price and thus forgo apparently profitable plea exchanges because avoiding some quantity of profitable exchanges yields greater total profits. This paradox occurs because the monopsonist's marginal cost curve rises more sharply than the industry supply curve, as the following example illustrates.

Assume that the prosecutor wished to purchase but one conviction

by plea. The prosecutor could offer a package of plea benefits worth "10," represented as point A on the curve S, to obtain one plea. Assume that the prosecutor now wishes to purchase one additional plea. To induce two defendants to exchange their pleas, represented as point B on curve S, the prosecutor would have to offer 15. Because each of the two defendants would want to obtain the prevailing "market price" for their exchange, the prosecutor would have to pay 15 per defendant, or 30 total. Thus, in terms of the marginal cost to the prosecutor of acquiring one additional plea, the second conviction must have a discounted value (comprised of its trial sentence, discounted by its likelihood, plus trial costs saved) of at least 20 ( $30 - 10$ ), even though the second defendant was given plea concessions worth only 15. From the point of view of the prosecutor, the cost of purchasing the second plea was 20, even though its market cost was but 15. Assume now that the prosecutor wants to acquire three convictions, thus needing to pay defendants 20 each (point C on the horizontal axis). Now the prosecutor's total cost is 60, and the marginal cost of acquiring the third conviction is 30.

The marginal cost curve, line MC, has thus increased from 10 to 20 to 30, even though the actual price paid to each defendant, represented by the curve S, is only 20. The monopsonist's marginal cost curve increases at a much faster rate than does the industry supply curve. The monopsonist's marginal cost curve will thus intersect the monopsonist's demand curve D at a significantly lower quantity than does the competitive curve, at point X. The monopsonist will only pay price  $P_m$  because it is the lowest price at which the sellers are willing to provide quantity  $Q_m$ .

To justify the purchases of pleas in terms of marginal cost, the prosecutor will only be willing to purchase each additional plea at a price substantially below its market value.  $P_m$  represents this monopsonist-produced price. The difference between  $Q_c$  (the competitive quantity of pleas) and  $Q_m$  (the monopsony-produced quantity) represents the number of adjudications that would be resolved by plea in a competitive market but instead proceed to trial because of the presence of a monop-

sony.<sup>32</sup> Thus, unless the defendant's offered sale is sufficiently valuable<sup>33</sup> as to exceed the prosecutor's marginal costs, the prosecutor as monopsonist will forgo purchasing pleas.

### 3. Incentives to Discriminate

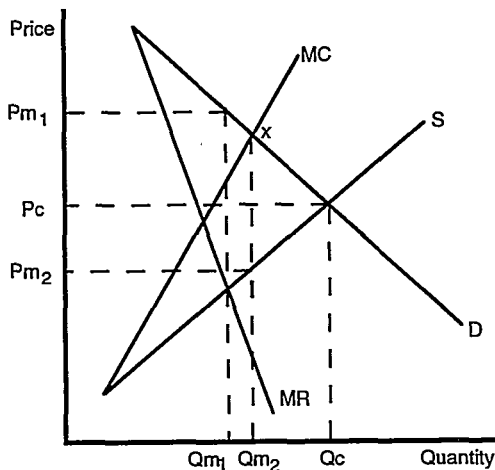
Thus, the prosecutor as monopsonist will offer fewer plea concessions and accept fewer plea agreements, even though additional exchanges would appear socially profitable. As a result, some defendants who would have preferred to avoid trial, and who would have received more favorable outcomes in the form of plea concessions had they not had to deal with a monopsonist, instead must undertake a trial to seek the best sentencing outcome.

Defendants wishing to avoid trial do have an option: they may encourage the prosecutor to discriminate against them; that is, they may offer to sell their plea for less than the price the prosecutor must offer to the other defendants. By encouraging the prosecutor to vary the price

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32. The graphical representation of the market for pleas alters as the seller approaches monopoly power, transforming the bargaining into a bilateral monopoly. If the defendant were a volume seller, then the market would appear as follows:

Table Three



The additional curve, curve MR, represents the monopolist's diminishing marginal revenue from a sale. The monopolist will restrict sales to output level  $Q_m$ , the point at which MR intersects S. Thus, both the monopolist and monopsonist prefer to restrict quantity; they differ over price, with the monopolist seeking to sell at price  $P_{m1}$ , the monopsonist to purchase at  $P_{m2}$ .

33. "Value" in this context might refer to the tendency that a particular defendant's incriminating information has to convict others. The value of a case might also be defined by a defendant's inclination to defend himself through making bail and hiring expert legal counsel. Thus, the wealthy might be able to "buy justice," see John R. Lott, Jr., *Should the Wealthy Be Able to "Buy Justice"?*, 95 J. POL. ECON. 1307 (1987) (arguing that allowing wealthy persons to influence trial outcomes through purchase of legal services is consistent with optimal penalty literature), because their ability to pay for expert legal counsel increases the marginal value of a plea agreement to the prosecutor.

downward, the defendant allows the prosecutor to diminish the prosecutor's marginal costs, rendering the defendant's plea exchange economically attractive.<sup>34</sup>

The monopsonist prosecutor must restrict the quantity of purchases only when obliged to offer the same market price to all similar sellers of pleas. The need to pay a uniform purchase price creates the sharp increase in marginal cost, represented as the curve MC on Table Two, and results in fewer exchanges for the monopsonist. To the extent that there are a substantial number of defendants who cannot otherwise sell their pleas, however, such defendants are likely to offer to sell their pleas at a self-discriminatory price.<sup>35</sup>

Not only do defendants have the incentive to encourage discrimination against themselves, but prosecutors, as agents of a monopsonist, share the incentives to seek opportunities to effect price discrimination. Discrimination among defendants in the allocation of plea concessions is in the monopsonist's interests. Assume that a prosecutor, as a faithful agent of his monopsonist employer, does not wish to forgo socially beneficial plea exchanges. If the prosecutor can isolate a particular defendant or group of defendants for discriminatory treatment, the prosecutor can lower marginal costs, purchase more convictions, and increase marginal revenue.<sup>36</sup> Consequently, the prosecutor can reap the full gains of trade from all defendants who would prefer to plead guilty than to litigate.<sup>37</sup>

The best candidates for price discrimination derive from two categories of defendants. First, indigent defendants supply ready targets for price discrimination if it is true that their indigence results in inferior

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34. Using the example from Part I.A.2, assume that the "competitive" price for the plea settlements for the third of three similar defendants is 20. As a monopsonist internalizing the industry marginal cost curve, however, the prosecutor's marginal cost of purchasing that additional plea of guilty is 30. Thus, the monopsonist will refuse the offer of sale at 20, even assuming that the value of the sale would be 25. The defendant may encourage the prosecutor to discriminate against him by offering to sell his conviction at 4, thus reducing the prosecutor's marginal cost to 24, or one unit below the value of 25. Alternatively, the prosecutor may attempt to induce several defendants to adjust their prices downward to accommodate the prosecutor's marginal cost. To the extent that the monopsonist is able to price discriminate in all transactions, then the monopsonist can, in effect, move the MC curve toward the S curve, allowing the monopsonist to reap all gains of trade available in the market.

35. Defendants will encourage this price discrimination until their expected penalty from going to trial is less than the offered plea concessions. Thus, the prosecutor will be able to extract the full available plea concessions from the defendant. *See supra* text accompanying notes 24-26.

36. Marginal revenue would increase both because of the additional purchase and because effective price discrimination allows the prosecutor to reap the gains of trade closer to the supply curve, represented on Table Two as the triangle between the price offered ( $P_m$ ) and the supply curve.

37. This proposition assumes that defendants are informed, self-interested, and rational. To the extent these assumptions are untrue, and defendants act irrationally, then in most cases the prosecutor's opportunities for discrimination would be enhanced. For example, a defendant, or defense counsel, who is ignorant of the market price for a particular variety of plea may unwittingly be the subject of price discrimination, permitting the prosecutor to lower his marginal cost where the defendant could have obtained a price closer to the market price.

representation.<sup>38</sup> Lower quality representation may take 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.<sup>39</sup> The presumed lower quality of representation should result in an increased ability of the prosecutor to exert the monopsonist's market power over the poor, leading to price discrimination in plea concessions.

The second group, white collar offenders, may be easy prey for the prosecutor because of the great collateral harm they might suffer from a public conviction and punishment,<sup>40</sup> despite their presumed ability to lower their expected penalties by retaining good counsel and making bail.<sup>41</sup> The prosecutor can use the threat of substantial collateral harms to effect price discrimination against white collar offenders in plea bar-

38. For empirical efforts to demonstrate that relative poverty results in harsher criminal penalties, see John Hagan, *Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint*, 8 LAW & SOC'Y REV. 357, 373-75 (1974); Lott, *supra* note 33, at 1310-11. Some have argued that public defenders, usually the counsel for the indigent, are under unique pressures which provide incentives to encourage their clients to accept plea bargains. See, e.g., Gifford, *supra* note 16, at 49-51.

39. *But see* Fred Kray & John Berman, *Plea Bargaining in Nebraska—The Prosecutor's Perspective*, 11 CREIGHTON L. REV. 94, 128-29 (1977) (reporting that one-third of prosecutors interviewed said they believed public defenders were better able to evaluate a case and make a reasonable bargaining proposal than were their private counterparts).

40. See Velmer S. Burton, Jr. et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, 51 FED. PROBATION 52, 52 (1987) (identifying legally mandated collateral consequences of the loss of voting rights, the holding of public office and offices of private trust, service as a juror, employment opportunities, professional licenses, and domestic rights); John R. Lott, Jr., *Do We Punish High Income Criminals Too Heavily?*, 30 ECON. INQUIRY 583, 584 (1992) (discussing magnitude of lost income); *infra* note 79 and accompanying text.

41. See Lott, *supra* note 33, at 1307. *But see* William M. Rhodes, *The Economics of Criminal Courts: A Theoretical and Empirical Investigation*, 5 J. LEGAL STUD. 311, 336 (1976) (contending that a lessened probability of conviction for the wealthy leads prosecutor to offer them lower sentences).

A further consideration is that these defendants might be characteristically risk-averse, preferring to avoid the unpredictability of a trial. The empirical evidence on the issue of whether criminals tend to be risk-preferrers or risk-avoiders is not definitive. See Isaac Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation*, 81 J. POL. ECON. 521 (1973). The data indicate that risk preferrers tend to commit certain types of crimes, such as robbery, and risk avoiders tend to commit crimes in other categories, such as burglary and theft. *Id.* at 552-53; see also Michael K. Block & Joseph G. Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?*, 68 GEO. L.J. 1131, 1135 n.25 (1980) (reviewing literature); A. Mitchell Polinsky & Steven Shavell, *A Note on Optimal Fines When Wealth Varies Among Individuals*, 81 AM. ECON. REV. 618 (1991) [hereinafter Polinsky & Shavell, *A Note on Optimal Fines*] (contending that the optimal fine is less than the wealth of most, assuming risk-neutrality); A. Mitchell Polinsky & Steven Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 AM. ECON. REV. 880, 880-81 (1979) [hereinafter Polinsky & Shavell, *The Optimal Tradeoff*] (arguing that, if individuals are risk-averse, "it may never be optimal to catch them with a very low probability and to fine them much more than the external cost," for to do so would "lower utility due to risk bearing and could more than offset the benefits from controlling participation in the activity"); Schulhofer, *supra* note 16, at 48 (asserting that presence of prosecutorial discretion can both increase and decrease deterrent effect of criminal sanctions, depending upon risk-aversion of offender). See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

gaining. Thus, white-collar offenders might also encourage this prosecutorial price discrimination to avoid trial.

It bears emphasizing that the picture presented here of a discriminating prosecutor does not assume malicious intent. Rather, prosecutors, as the faithful agents of their principal, simply seek to exploit opportunities to drive hard bargains. Further, market analysis suggests that many defendants, especially those who are poor or wealthy, have strong incentives to encourage the prosecutor to discriminate against them. They will accept substandard plea concessions to avoid the harsh alternative represented by trial.

#### 4. *Defendants Without Protection Against the Monopsonist*

The strongest antidote to the power of the monopsonist is the countervailing power of the monopoly: the unified control over the sales of the exchanged item. In most contexts, groups of sellers can achieve a monopoly by some collusive activity, including unionization (for laborers) or merger (for businesses). To a lesser extent, trade associations, occupational organizations, and other information-sharing arrangements can frustrate the monopsonist. It seems improbable, however, that criminal defendants will organize to resist the monopsony power of the prosecutor.<sup>42</sup>

Several inherent institutional factors in the criminal justice system militate against the development of a monopoly among criminal defendants. Defendants apparently lack sufficient self-identification as a criminal class to encourage unionization of criminal occupations.<sup>43</sup> Moreover,

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42. In some situations, however, defendants may have some market-generated power vis-à-vis the prosecutor. For example, defendants would be more empowered in a "bilateral monopoly," where each side of the transaction is a monopolist regarding the particular right to be exchanged. Jacobson & Dorman, *supra* note 21, at 19. Under a bilateral monopoly model, the question would be which party, the prosecutor or the defendant, would be more likely to reap the "gains of trade," that is, the range of available plea agreements not exceeding the maximum and the minimum to which both parties would agree, short of trying the case. The bulk of these gains would go to the party who employed the bargaining advantages from its monopoly more powerfully. In the context of the exchange of witness testimony, the prosecutors would most typically be the more powerful bargainer because the offers they proffer to witnesses are negative: refusal to accede to the grant of immunity will result in punishment. See *infra* Part I.B.1. Thus, unlike the prosecutor whose loss from an unconsummated transaction is merely the lost marginal benefit from the purchase of the information (measured by the savings of prosecutorial resources) over the cost of the price offered, the witness is in a sense left worse off than he was prior to the offer as an indictment for criminal contempt may be added to the existing charges. In this situation, the prosecutor would appear to have the upper hand.

As this Part argues, however, assuming that plea bargaining represents a bilateral monopoly may be factually mistaken. For example, the government often may enjoy the ability to choose other witnesses from whom it could purchase the information. In such cases, the holder of the information may not have monopoly power over price.

43. The apparent prevalence of gangs within prisons, however, demonstrates that the criminal class can organize, given conditions conducive to systematic self-identification, such as race, class, and ethnicity. See PETE EARLEY, *THE HOT HOUSE: LIFE INSIDE LEAVENWORTH PRISON* 78 (1992) (identifying prison gangs, largely organized along racial and ethnic lines, with such names as



the criminal justice system deals with each seller as a unique bargaining unit through individual indictments and dispositions, making joint action even less likely.<sup>44</sup> Criminal gangs and other organized crime groups do, however, provide vehicles for some collusive behavior by criminal defendants.<sup>45</sup>

An alternative means for offenders to prevent routine price discrimination by prosecutors is to work through intermediaries who can provide defendants with the information needed to encourage them to act in the best interests of the defendant class. The obvious intermediaries are defense lawyers, many of whom are funded by the public.<sup>46</sup> The organized criminal defense bar may serve a similar function.<sup>47</sup> However, rules against joint representation,<sup>48</sup> along with the lawyer's obligatory fidelity to the client's interests,<sup>49</sup> militate strongly against the potential for collu-

"White Aryan Brotherhood," "Black Guerrilla Family," "Mexican Mafia," and "Nuestra Familia"); Raymond Hernandez, *In Cities and Prisons, Hispanic Gang Grows*, N.Y. TIMES, Nov. 29, 1992, § 1, at 48 (describing the growing power of the Latin Kings organization, dedicated to "the advancement of Hispanic people").

44. The failure in many jurisdictions to require prosecutors to disclose information favorable to the accused, as required in *Brady v. Maryland*, 373 U.S. 83, 86-88 (1963), in conjunction with plea bargaining, see McMunigal, *supra* note 16, at 963, also arguably inhibits the ability of defendants as a class to counteract the prosecutor's monopsony. By hiding the facts and factual accuracy of particular guilty pleas, opportunities are diminished for their systematic study and for the creation of more uniform "price" information regarding guilty pleas. See *id.* at 969.

45. Criminal organizations or "gangs" at times achieve practical union status, bidding directly against prosecutors for the defendant's sale of his incriminating information. See *supra* note 43; *infra* note 55.

46. On the role of the public defender in plea bargaining, see generally Kray & Berman, *supra* note 39. There is some evidence that public defenders are able to obtain and disseminate to their clients useful information. Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1224-30 (1975).

47. Professor Alschuler has suggested that many defense attorneys prefer to strike plea bargains for all their clients, concomitantly forgoing trial preparation. Alschuler, *supra* note 46, at 1181-87. If true, this suggestion would indicate that some defense counsel will achieve less advantageous plea agreements for their clients because they cannot present a credible threat to force the prosecutor to try the case, *id.* at 1186, thus diminishing their ability to appropriate some of the gains of trade for their clients.

48. See, e.g., *Wheat v. United States*, 486 U.S. 153, 159-60 (1988) (noting that joint representation potentially creates a dangerous conflict of interest).

49. The rules of professional responsibility suggest that defense counsel must serve their clients' interests, narrowly defined. For example, the ABA Code of Professional Responsibility provides:

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

. . . .

The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1, 7-19 (1980). The ABA also warns against class-oriented representation at other junctures. In regard to plea discussions, the ABA states that defense counsel should not use one representation to serve the interests of another. STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE § 4-6.2(d) (ABA Supp. 1992).

sion of defendants through intermediaries.

Criminal defendants' strongest disincentive to organize is self-interest. The famous puzzle of the "prisoner's dilemma," depicting the plight of criminal defendants, assumes the inability of defendants to act in their joint interest.<sup>50</sup> If all defendants resisted the siren call of the prosecutor's discriminatory plea offer, the prosecutor would be compelled to accept an offer closer to the competitive price. Outside of the world of private retribution,<sup>51</sup> however, there appears to be no systematic incentive for defendants to act against their immediate self-interest.

Thus, it appears that the defendant class is unlikely to form an effective monopoly to counteract the prosecutor's monopsony. Although it permits some rudimentary formations of monopoly power, the criminal justice system generally precludes joint action by criminal defendants, suggesting that prosecutors can regularly exploit their monopsony power. In the absence of judicial oversight, the prosecutor may extend a price less attractive than the theoretical competitive price to defendants. Where the prosecutor can discriminate, the prosecutor can purchase all desirable pleas<sup>52</sup> and can also extract all possible gains of trade from criminal defendants without constraint.

### *B. Nonjudicial Constraints Do Not Impede Monopsony Power*

Even in a world without judicial sentencing discretion, certain rules governing plea bargaining might appear to serve as limitations on the prosecutor's wielding of monopsony power. Plea bargaining occurs in situations in which defendants may actually have two items to sell. Defendants may wish to sell their convictions,<sup>53</sup> their incriminating

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50. See Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 20-21 n.38 (1988).

51. The possibility of private retribution may induce individual defendants to decline plea exchanges, at least where those agreements include an exchange of information, and thus make defendants act in the interest of their coconspirators. See *supra* note 45; *infra* note 55. To the extent the prosecutor exploits his monopsony power to extract information, he encourages an increase in the severity of the coconspirators' retributory threats toward those who would confess. Thus, there appears to be a symbiotic effect between the power of the prosecutor and the power of the criminal organizations and conspiracies, each bidding, with a combination of threats and benefits, for the information held by the defendant.

52. The prosecutor can purchase all pleas that willing defendants would sell at the price offered. The prosecutor will not, of course, offer a price that constitutes a net loss on the transaction at issue (that is, he will offer no price above the competitive price) and thus will not endeavor to purchase all possible convictions. See *supra* notes 31-33 and accompanying text.

53. On several occasions, Professor Alschuler has examined plea bargaining as a system of trading guilty pleas for sentencing and other concessions. See Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983) [hereinafter Alschuler, *Implementing the Criminal Defendant's Right to Trial*]; Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652 (1981); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979); Alschuler, *supra* note 46.

information,<sup>54</sup> or both.

Because the government has monopolized the prosecution of criminal cases, it is the sole purchaser of each of these items.<sup>55</sup> In addition, the sale of these items is governed by distinct sets of rules. Plea bargains that involve sales of information require prosecutors to pay a constitutionally mandated "price" to effect an exchange.<sup>56</sup> Plea bargains that involve exchanges of convictions require prosecutors to adhere to various statutory rules that seek to bind their judgment to the public good. Finally, the prosecutor is obliged to act in the public interest in either case.

These various systems of rules governing plea bargaining might appear to constrain prosecutors' exercise of their bargaining advantages. In reality, however, the rules governing plea bargaining generally fail to do so and appear on balance to assist or encourage prosecutors to exploit their monopsony power more fully.

### 1. Rules Governing Sales of Information

When defendants invoke their Fifth Amendment privilege against self-incrimination, they in effect declare a property right in their incriminating information. After invoking the privilege,<sup>57</sup> the defendant may

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54. Vorenberg, *supra* note 17, at 1536-37. The pricing mechanism for the exchange of incriminating information illustrates the extent and scope of prosecutorial discretion and power within the plea bargaining context. See *infra* Part I.B.1.

Although it is simpler to regard guilty pleas as the sole exchanged item in plea bargaining, in fact, a substantial variety of items other than a plea of guilty from the defendant and a recommended or bargained-for sentence from the prosecutor are also exchanged. These other behaviors may be usefully gathered under the descriptive term "cooperation." Many forms of cooperation are exchanged routinely without the need for the formal rules that accompany the entry of a guilty plea. For example, a defendant may agree to return stolen property, to make restitution to the victim, or to assist police efforts. Although guilty pleas always involve the court, not all plea agreements do. See Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301, 314 nn.51-52 (1987). However, one aspect of "cooperation" does frequently involve the court and is circumscribed by a relatively coherent and well-adjudicated set of formal rules: the exchange of incriminating information, usually through witness testimony. See *infra* Part I.B.1. In addition, the exchange of incriminating information is subject to pricing mechanisms separate from the guilty plea. See *infra* notes 57-81. Because the guilty plea and the witness testimony are usually exchanged as a product of the same set of negotiations, commentators have apparently overlooked bargaining over incriminating information.

55. In cases where the exchange of incriminating information involves a seller who is a member of a criminal organization, then the seller in effect may have two potential buyers, the government and the criminal organization. See *supra* note 51. These two buyers compete and may unwittingly form a "collusive monopsony," see Blair & Harrison, *Cooperative Buying, Monopsony Power, and Antitrust Policy*, *supra* note 1, at 333-36 (describing purposeful collusive monopsonies in a market context), each threatening to visit increasingly greater harms upon the defendant should he not accept their offer. Thus, the defendant is placed in an ever-worsening Hobson's choice. See *infra* notes 65-68, 79 and accompanying text.

56. See *infra* Part I.B.1.

57. It appears that the suspect may invoke this privilege only in response to official questioning or after *Miranda* warnings but not prospectively. "We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation'. . . . Most

harbor or sell the information like any other form of property. The defendant's declaration of this property right initiates the possibility of a sale of information to the prosecutor.

The Supreme Court has held that the Constitution requires prosecutors who wish to purchase this information to provide the defendant with a grant of "immunity."<sup>58</sup> Under the federal immunity statute, prosecutors must obtain a court order granting immunity to the defendant.<sup>59</sup> The prosecution is not allowed to use the evidence gained from the immunity grant in a subsequent criminal prosecution of the informant.<sup>60</sup> Once immunity is granted, however, defendants can be compelled to reveal incriminating information,<sup>61</sup> the alternative to divulging the information is a contempt charge.<sup>62</sup>

The requirement that the prosecutor grant immunity to purchase the defendant's information does not inhibit the prosecutor's ability to exploit his monopsony power. Indeed, properly utilized by a competent prosecutor,<sup>63</sup> the requirement of immunity should rarely benefit the

rights must be asserted when the government seeks to take the action they protect against." *McNeil v. Wisconsin*, 111 S. Ct. 2204, 2211 n.3 (1991).

58. *Kastigar v. United States*, 406 U.S. 441 (1972). See generally Kristine Strachan, *Self-Incrimination, Immunity, and Watergate*, 56 TEX. L. REV. 791 (1978) (analyzing the practical operation of grants of immunity).

59. Witness Immunity Act of 1970, 18 U.S.C. § 6002 (1988).

60. *Id.* ("[N]o testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.").

61. There is little a defendant can do to preclude this exercise of prosecutorial power. A witness or criminal defendant has no standing to contest the grant of immunity, no right to obtain the identity of government witnesses or to be furnished copies of the orders granting immunity, and no right to be present at the immunity hearing. Defense counsel also has no right to be present at the immunity hearing. *United States v. Braasch*, 505 F.2d 139, 146 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975).

62. See *Kastigar*, 406 U.S. at 442, 462 (upholding a contempt charge for refusal to comply with an immunity order).

63. It is possible that a competent, skillful prosecutor will misuse immunities due to incomplete information as to the content and value of the incriminating information. The prosecutor's ability to evaluate the risk of buying useless information appears inadequate to the task, thus suggesting that at times defendants can get the better of the exchange. Several institutional mechanisms operate to assist the prosecutor in learning the content of the witness' information, including investigative mechanisms, such as police questioning of other witnesses, and bargaining mechanisms, such as discussions between the prosecutor and the defense lawyer about the possibility of a plea coupled with testimony. The former mechanism depends, of course, on the very cooperation demanded by the grant of immunity, and the well-counseled witness will not provide such information absent some concessions from the prosecutor either in terms of plea or charge modifications or immunity itself. The latter mechanism depends on truthful representations. At bottom, the prosecutor must rely on defense counsel's representations, or "proffer," as to the nature and extent of the information the particular defendant is able and willing to convey.

Defense counsel should have substantial reputation-related and ethical reasons to proffer accurately. The prosecutor, however, does take the risk that either defense counsel is mistaken or that the defendant is lying. A savvy criminal defendant who possesses little valuable information might exaggerate the importance of his information to his counsel in order to gain the benefit of a

defendant. Grants of immunity are one part of the greater plea bargaining system.<sup>64</sup> To be helpful to the defendant, the offer of immunity must be more beneficial to the defendant than the plea settlement that a willing prosecutor and willing defendant would reach. No rational prosecutor should be willing to offer the greater benefit of immunity where a lesser plea offer would accomplish the exchange.

One instance where, in the judgment of the prosecutor, a grant of immunity might be preferable to a plea concession is where the defendant's transfer of information is inhibited by substantial collateral costs, such as the threat of retribution from coconspirators.<sup>65</sup> Even in this situation, the grant of immunity will elicit the incriminating information from the defendant only where the defendant values avoidance of the expected collateral harms more than he values the most generous plea offer but less than he values a grant of immunity. This range of possible uses of statutory immunity should be very narrow given the flexibility with which the prosecutor can vary from the constitutional requirement of providing immunity.<sup>66</sup> Thus, except within this limited range of possible outcomes, the offer of immunity should be of limited practical value. Unless the value of the case is sufficiently less than the value of the information to the prosecutor, the prosecutor should rationally choose, as a faithful agent, to offer smaller plea concessions to the defendant.<sup>67</sup> Simi-

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desirable plea arrangement. At the same time, a defendant who truly is in possession of important information damaging to his coconspirators will have an incentive to minimize the importance (or lie as to the content) of his information to his counsel, because should the prosecutor offer the "knowledgeable" defendant immunity, the defendant will face the Hobson's choice of suffering imprisonment for contempt or risking collateral harms from his coconspirators. Thus, many defendants have strong incentives to misrepresent the nature of the information they possess, and these incentives may lead the prosecutor, at the extremes, to purchase the least valuable information instead of the most valuable information. The prosecutor, in seeking to bargain wisely, will tend to have trouble discriminating among potential sellers of information and may prefer to allocate plea benefits only after disclosure of the information is complete. See Yvette A. Beeman, Note, *Accomplice Testimony Under Contingent Plea Agreements*, 72 CORNELL L. REV. 800 (1987) (arguing that contingent plea agreements should be prohibited between accomplices and prosecutors because they encourage unreliable evidence and violate defendants' due process rights); Neil B. Eisenstadt, Note, *Let's Make a Deal: A Look at United States v. Dailey and Prosecutor-Witness Cooperation Agreements* (footnote omitted), 67 B.U. L. REV. 749 (1987) (arguing that contingent plea agreements violate defendants' due process rights and are fundamentally unfair); Christine J. Saverda, Note, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785 (1990) (advocating a corroboration requirement for accomplice testimony).

64. See, e.g., Note, *Judicial Supervision of Non-Statutory Immunity*, 65 J. CRIM. L. & CRIMINOLOGY 334, 334 (1974) (discussing the informal arrangements prosecutors make with defendants to obtain information).

65. See *supra* note 55.

66. See *infra* note 70 and accompanying text.

67. On the frequency with which immunity is nonetheless granted, see *Foreword to Symposium, The Granting of Witness Immunity*, 67 J. CRIM. L. & CRIMINOLOGY 129 (1976); Eisenstadt, *supra* note 63. The common use of immunity grants is probably traceable to one or more of the following causes. First, prosecutors may at times act unfaithfully and be willing to compromise cases by slight overpayments of immunity. Second and more plausibly, the desire to strike the best possible deal in each case may be too difficult and expensive to pursue, and thus,

larly, if the collateral harms the defendant expects to suffer from testifying outweigh the likely sanction from contempt for refusing to obey the court's immunity order,<sup>68</sup> then the grant of immunity will not accomplish the conveyance of information. Consequently, the constitutional requirement of immunity should provide little protection to the defendant engaging in plea bargaining.<sup>69</sup>

Not surprisingly, the evidence available suggests that the constitutional requirement of immunity fails to inhibit prosecutorial discretion and, in fact, augments it. The transmission of incriminating information occurs routinely both through formal grants of immunity and through one of the many available informal mechanisms of sale other than immunity grants.<sup>70</sup> These informal means of exchange include plea concessions, agreements not to prosecute,<sup>71</sup> and "non-statutory immunity."<sup>72</sup> In effect, the immunity rules grant to the prosecutor an option to condemn defendants' property interests in their testimony: the prosecutor

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prosecutors probably establish a range of outcomes that are sufficiently close enough in value to a grant of immunity that the grant is preferred. In other words, saving the principal the extra dime in every case would result in wasteful expenditures on negotiation. Third, defendants may mislead prosecutors about the value or usefulness of their incriminating information. See *supra* note 63.

68. See *infra* note 79 and accompanying text.

69. In theory, a prosecutor could choose to avoid granting immunity entirely in all circumstances by opting to offer ever more generous plea concessions, even beyond the upper range of discounted sentences, to seek the defendant's cooperation in exchanging information. Such extra-beneficial offers appear possible through the broad parameters of "witness protection." See 18 U.S.C. § 3521 (1988 & Supp. IV 1992).

70. See generally Warren D. Wolfson, *Immunity—How It Works in Real Life*, 67 J. CRIM. L. & CRIMINOLOGY 167, 170-01 (1976) (suggesting that many "voluntary" formal grants of immunity are entered for evidentiary purposes and not as a result of plea negotiations); Eisenstadt, *supra* note 63; Note, *supra* note 64 (advocating enforcement of nonstatutory promises of immunity); Casenote, *Accomplice Testimony Under Conditional Promise of Immunity*, 52 COLUM. L. REV. 138 (1952) (stating that immunity cannot be contingent on indictment/conviction of the codefendant); cf. John A. Darrow, Note, *Immunity*, 26 AM. CRIM. L. REV. 1169 (1989) (arguing for formal grants of immunity). The flexibility that informal grants of immunity give to the prosecutor seeking to purchase testimony is made explicit in the Department of Justice Manual that is provided to U.S. Attorneys.

An informal immunity agreement can be drafted to provide the witness with "use and derivative use" protection identical to that provided by 18 U.S.C. § 6002, either by quoting directly from the statute in the agreement, or simply by stating that "the immunity accorded under this agreement shall be identical to the immunity accorded under 18 U.S.C. § 6002." Indeed, it may be possible to negotiate an immunity agreement that gives the witness *greater* protection than a grant of statutory immunity would provide. . . . Another advantage of informal immunity is that it does not require the prosecutor to follow the procedures mandated by Department of Justice regulations for statutory immunity. . . . Accordingly, it is easier for the prosecutor to grant informal immunity.

In several respects . . . informal immunity provides the witness with significantly less protection than does statutory immunity.

Roger C. Spaeder & Nina S. Goodman, *Immunity Negotiations—Law and Practice*, reprinted in 8 THE DEPARTMENT OF JUSTICE MANUAL § 9-23.800A, at 9-494.2 to .3 (1992-1 Supp.).

71. *Id.* § 9-27.610, at 9-535 to 9-539 (1993-2 Supp.).

72. See WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 426-27 (2d ed. 1992) (stating that prosecutors may prefer nonstatutory immunity for purposes of avoiding cumbersome procedure and tailoring scope of immunity).

may decide, virtually unilaterally,<sup>73</sup> that the government will take defendants' incriminating information against their will.

This ability to condemn the defendant's constitutionally protected information represents a powerful prosecutorial tool.<sup>74</sup> The prosecutor's offer puts the defendant in the position of having to choose between forfeiting the "right to remain silent"<sup>75</sup> or risking punishment for criminal contempt of court.<sup>76</sup> The immunity order of the court is, thus, in effect a negative offer by the prosecutor to purchase the defendant's infor-

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73. The court's role in issuing the order of immunity is perfunctory, both by statute and practice. 18 U.S.C. § 6003(a) (1988) provides, "The United States district court . . . shall issue . . . upon the request of the United States attorney . . . an order requiring such individual to give testimony or provide other information . . ." The statute that requires the order be issued if the following prerequisites are satisfied: the witness is likely to refuse to testify based on his privilege against self-incrimination, 18 U.S.C. § 6003(b)(2) (1988), and the testimony may be necessary to the public interest, 18 U.S.C. § 6003(b)(1) (1988). Both prerequisites are to be determined in the judgment of the United States Attorney, not by the court. *Id.* As the legislative report accompanying the statute provides, "The court's role in granting the order is merely to find the facts on which the order is predicated. The statutory language is 'shall.'" S. REP. NO. 617, 91st Cong., 1st Sess. 145 (1969); see also *In re Lochiatto*, 497 F.2d 803, 804 n.2 (1st Cir. 1974) ("[A] fair reading of [the statute] does not indicate that the district judge has any discretion to deny the order on the ground that the public interest does not warrant it." (alteration in original) (citation omitted)); Wolfson, *supra* note 70, at 168 ("There is no other area in the law where a judge is told he must do so much to a person without pausing to determine if he should. The judge is, in reality, a rubber stamp for the prosecutor.").

74. Gary Humble, a federal prosecutor, terms the use immunity statute "the prosecutor's greatest weapon against white-collar crime." Gary S. Humble, *Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment*, 66 TEX. L. REV. 351, 351 (1987).

75. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). That threats of imprisonment for refusal to testify exist directly alongside the Fifth Amendment's privilege against self-incrimination illustrates the rigid narrowness of the constitutional right. Despite *Miranda's* promise of an undifferentiated "right to remain silent," no such right, inalienable except upon consent, is recognized. Instead, as long as the prosecution promises not to use the testimony against the accused in a criminal prosecution, the government may, with very few constraints, compel the defendant not to remain silent upon pain of imprisonment for refusal.

This reading of the Fifth Amendment enjoys a long but controversial life. Immunity statutes giving the federal prosecutor the power to compel otherwise incriminating testimony, provided an order of immunity is granted, have been repeatedly upheld, at least in principle. See, e.g., *Kastigar v. United States*, 406 U.S. 441, 448 (1972); *Ullmann v. United States*, 350 U.S. 422, 431, 438-39 (1956); *Brown v. Walker*, 161 U.S. 591, 610 (1896). "[T]he privilege against self-incrimination[,] . . . one of the great landmarks in man's struggle to make himself civilized," ERWIN N. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 7 (1955), appears to provide no substantial barrier to coercive prosecutorial action. See also IRVING BRANT, *THE BILL OF RIGHTS: ITS ORIGIN AND MEANING* 87-88 (1965); LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* 324 (1968).

An alternative understanding of the text of the Fifth Amendment is plausible, denying the government the power to coerce a citizen to place himself in "self-infamy," an evil reputation brought about by something grossly criminal, shocking or brutal. Mitchell Franklin, *The Encyclopedist Origin and Meaning of the Fifth Amendment*, 15 LAWYERS GUILD REV. 41 (1950).

76. The court has substantial discretion under the sentencing guidelines to punish the defendant for the failure to obey an order to testify. See U.S.S.G., *supra* note 10, § 2J1.1; 18 U.S.C. § 3553(b) (1988) (mandating "an appropriate sentence . . . [i]n the absence of an applicable sentencing guideline"). Assuming the sentencing judge considered the refusal to testify to be most analogous to obstruction of justice, see U.S.S.G., *supra* note 10, § 2J1.2, then the first-time offender, absent ameliorating or exacerbating circumstances, would receive a sentence of between 10 and 16

mation—negative in that it in part constitutes a substantial threat rather than simply the promise of some benefit in the form of a plea concession.<sup>77</sup> The defendant's choice becomes whether to undergo a substantial risk of even greater criminal punishment in order to insist on the constitutional right to remain silent.

Further, the prosecutor's offer may, in many cases, carry other troubling considerations for the defendant. Defendants who accede to the prosecutor's offer may experience enhanced prospects of conviction on the underlying charge.<sup>78</sup> On the other hand, defendants who refuse to accede to the prosecutor's offer may face, along with contempt, collateral

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months' imprisonment, some of which could be supervised release, including community confinement or home detention. U.S.S.G., *supra* note 10, § 5C1.1(c)(3), (d)(2).

Along with criminal contempt, the defendant also risks incurring the potentially harsher sanction of civil contempt, for which the common law remedy could be indefinite imprisonment until the witness agreed to speak. *See* United States v. United Mine Workers, 330 U.S. 258, 303-05 (1947). The purpose of coercive civil contempt is to encourage compliance, not to punish. In the federal system, civil contempt is governed by 28 U.S.C. § 1826 (Supp. IV 1992), which limits confinement for civil contempt to the life of the court proceeding or the term of the grand jury, but requires that confinement extend no longer than eighteen months. Confinement may be ordered summarily, and the contemnor has a limited right to be granted bail during appeal. *See* 28 U.S.C. § 1826(b) (Supp. IV 1992). For a discussion of civil and criminal contempt, see generally DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 97 (1973); Doug Rendleman, *Compensatory Contempt: Plaintiff's Remedy When a Defendant Violates an Injunction*, 1980 U. ILL. L.F. 971.

Some state cases also suggest some limitation on the theoretically limitless duration of imprisonment designed to compel the person to obey the court's order but only if the contemnor has demonstrated a continued unwillingness to change his mind. *See, e.g.,* Napoli v. Eld, 388 A.2d 946 (N.J. 1978) (ordering release of grand jury witness after six years' imprisonment on court's belief that the witness had adequately demonstrated his willingness to remain in jail for life rather than testify, thus rendering further imprisonment purposeless).

77. It appears somewhat hopeless to attempt to differentiate between "benefits withheld" and "threats." There is little difference between saying, "Speak, and your ten-year sentence shall be five" (a benefit that could be withheld) and saying, "Speak, or your five-year sentence shall be ten" (a threat). In either case, the defendant gets ten years for refusing to speak and five years for confessing. *See generally* Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984) (differentiating between governmental threats and offers and discussing a framework in which to analyze the constitutionality of threats); *cf.* Epstein, *supra* note 50, at 5-14, 104 ("[A] presumption of distrust should attach to all government action."). Nevertheless, it seems semantically useful to speak of this particular aspect of the prosecutor's offer as a "negative" one in order to differentiate it from ordinary plea offers, which are usually described as reductions from the usual sentence. *See* Easterbrook, *supra* note 17, at 311. Courts in other contexts act "negatively," threatening to withhold benefits if the defendant engages in continued noncompliance. *See, e.g.,* Delaware Valley Citizens' Council for Clean Air v. Pennsylvania, 678 F.2d 470 (3d Cir.) (affirming lower court's decision to enjoin state officials from accepting federal highway funds until the state passed legislation in compliance with federal environmental laws), *cert. denied*, 459 U.S. 969 (1982).

Other commentators have analyzed plea bargaining under the doctrine of unconstitutional conditions. *See* Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887 (1980); Kevin J. O'Brien, *Plea Bargaining and the Supreme Court: The Limits of Due Process and Substantive Justice*, 9 HASTINGS CONST. L.Q. 109 (1981).

78. *See* Kastigar v. United States, 406 U.S. 441, 468-69 (1972) (Marshall, J., dissenting) (arguing that some derivative use of the provided information is inevitable, and that the provision of information even under the promise of use immunity does create an enhanced risk of criminal



harms flowing from the contempt conviction.<sup>79</sup> More common incentives to cooperate, including the desire to confess guilt or to please one's captors,<sup>80</sup> also may encourage a recalcitrant defendant to reveal incriminating information.

Therefore, in many ways, the immunity rules that govern transactions in incriminating information add to the prosecutor's arsenal. All exchanges of information, whether elicited through plea concessions or through grants of immunity, occur at least in part in response to threats of punishment. In the fluid process of plea negotiations, the extant constitutional rules requiring use immunity in exchange for incriminating information fail to protect the defendant from the monopsonist prosecutor.<sup>81</sup> In fact, they empower prosecutors with the means to condemn defendants' property, thus subjecting defendants to painful alternatives when they prefer not to alienate their incriminating information.

## 2. Rules Governing Sales of Convictions

The "faithful" prosecutor will seek to exploit his principal's monopsony by purchasing convictions at reduced prices, but prosecutors also have incentives to preserve their own resources and serve their own interests at the expense of their principal. To resolve cases quickly, therefore, the prosecutor's self-interest may create an inclination to settle cases at a price more generous than that possible through the use of the monopsony power.<sup>82</sup>

In general, then, agency problems militate against the prosecutor's

conviction); Strachan, *supra* note 58, at 814-20 (arguing that the defendant must rely on assertions of prosecutorial good faith in guarding against derivative uses of immunized testimony).

79. Generated from both private and public sources, such collateral harms include loss of certain civil rights, loss of employment, opportunity costs of imprisonment, reputational losses, loss of human capital through depreciation while in prison, and post-imprisonment income reduction. See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 195-96 (1968) (discussing "value" of prison sentence); Lott, *supra* note 40 (arguing that high income criminals pay much more in lost income).

For example, in 1988 Congress increased the collateral consequences of a conviction for distribution or possession of narcotics. See 21 U.S.C. § 862 (Supp. III 1991). After the first conviction for drug possession, the court may make the defendant ineligible for any federal benefit for one year, require that the defendant complete a drug treatment program with periodic testing, and require the defendant to perform community service. *Id.* § 862(b). A third conviction for drug distribution renders the defendant ineligible for all federal benefits, including grants, contracts, loans, or licenses. *Id.* § 862(a).

80. It is well-accepted that police interrogators commonly appeal to witnesses' very human tendency to want to be liked and other similar predispositions in order to encourage the disclosure of testimony. See Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 668 (1986) (reviewing FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* (3d ed. 1986)); Fred E. Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 16, 19 (1961).

81. Statutory immunity benefits defendants by allowing them to claim to their coconspirators that they were compelled to speak and did not cooperate voluntarily.

82. See Schulhofer, *supra* note 16, at 50-53 (describing the prosecutor's self-interest as giving rise to "agency" costs); cf. Gifford, *supra* note 16, at 65-66 (contending that the prosecutor's

full exploitation of the monopsony because some of the benefits from exploiting the monopsony accrue to the public at large and not to the prosecutor directly.<sup>83</sup> The prosecutor, as an agent of a monopsonist, operates under a conflict of interest. The same plea that appears undesirable for his monopsonist employer because it is too lenient in terms of charge or sentencing reduction might appear desirable to the prosecutor because of the prosecutorial resources saved through its acquisition. Unless the prosecutor is a perfect agent, he will tend to overpurchase and overpay for plea convictions.

A related agency problem is that the resources the prosecutor spends in plea agreements are largely free to the prosecutor, who in essence exchanges public resources, most commonly a period of imprisonment, for prosecutorial resources. In some cases, this exchange may be socially beneficial for the prosecutorial resources gained may be more valuable than the public resources expended. However, the prosecutor has no obvious and systematic incentive to accept only socially beneficial trades.

In response to these agency problems, Congress occasionally attempts to limit the ability of prosecutors to ignore the interests of their principals by the enactment of mandatory minimum sentencing provisions,<sup>84</sup> sentencing guidelines,<sup>85</sup> and other devices.<sup>86</sup> These attempted delimitations on prosecutorial discretion enhance the incentives for prosecutors to exploit their monopsony power by requiring them to exercise greater faithfulness to the wishes of their principal.

To the extent prosecutors are exhorted by statute or custom<sup>87</sup> to

ambiguous role as a representative of the "public interest," as contrasted with the defense attorney's clear role as zealous advocate for his client, leads to a "defense bias in plea bargaining").

83. See Easterbrook, *supra* note 17, at 300. The prosecutor may share in the public's gain in prosecuting criminals in cases that attract much public attention because the prosecutor can gain public favor by engineering a pro-government plea bargain. In most cases, however, the prosecutor's alleged immediate concern is with maximizing the value of his services, usually expressed in terms of wins and losses, both to himself and to his employers, and he will examine the desirability of offering particular plea bargains from this rather narrow perspective. See Schulhofer, *supra* note 16, at 50. This "narrow" internalization helps to explain the perceived tendency of prosecutors to offer excessive concessions in plea bargaining. *Id.* at 52.

84. See, e.g., 18 U.S.C. § 924(c)(1) (Supp. IV 1992) (mandating an additional five years' incarceration for carrying a weapon during a crime involving violence or drug trafficking). See generally U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991).

85. See U.S.S.G., *supra* note 10, §§ 6B1.1, 6B1.2, 6B1.4.

86. Funding of prosecutors' offices also putatively exerts some control over prosecutorial decision-making. See Easterbrook, *supra* note 17, at 295-96 (noting that decisions are constrained by budgets). Further, when the legislature enacts statutes and determines whether a certain act will be considered a felony or misdemeanor, it in effect tells the prosecutor which crimes are more serious and thus deserving of more attention.

87. There is evidence that internal office standards help inculcate local customs into the novice prosecutor. See Vorenberg, *supra* note 17, at 1543-45. Apparently, some offices use supervising officers. See Frase, *supra* note 7, at 291. It appears these various internal mechanisms do help constrain the discretion of prosecutors. See Mellon et al., *supra* note 7, at 53; see also JACOBY ET

make only profitable trades, monopsony exploitation again is encouraged because a profitable trade for a monopsonist must include consideration of the available market price for the plea agreement. Other rules or customs pertaining to the sale of convictions, such as judicial review of the plea, may also tend to encourage the prosecutor to be faithful to his principal by exploiting his monopsony power. Therefore, it seems clear that legislative rules that structure sales of convictions do not appear to serve as a bulwark against the monopsony but rather tend to encourage prosecutors to capitalize on their superior bargaining position.

Ironically, then, the oft-noted problems of imperfect agency actually mitigate the exploitation of the government's monopsony power and militate in favor of leniency toward the defendant. But to the extent that the rules of plea bargaining, such as sentencing guidelines, compel the prosecutor to conform his decisions to the interests of his principal, the rules provide no bulwark against monopsonistic bargaining and instead encourage it. Despite the prosecutor's incentives to be lenient for self-interested reasons, therefore, the world of plea bargaining without a judge may properly be characterized by the image of an overreaching, dominant prosecutor, either intent on serving or compelled to serve the interests of his monopsonist principal.

### 3. *Rules Governing the Prosecutor's Public Trust*

Even though the rules governing exchanges of information and convictions do not appear to prevent exploitation of the government's monopsony, and indeed encourage it, the prosecutor's special ethical position as a servant of the public trust<sup>88</sup> could potentially serve this function. As a holder of a public trust, a prosecutor should avoid overusing grants of immunity to procure incriminating information<sup>89</sup> and avoid striking unnecessarily harsh or lenient plea bargains.<sup>90</sup> It seems likely, however, that prosecutors are systematically compelled not to fulfill these obligations despite their best efforts.<sup>91</sup>

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AL., *supra* note 7 (finding a strong consistency among prosecutors and across offices nationally in treatment of cases).

88. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1980) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. (1983) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

89. See 8 DEPARTMENT OF JUSTICE MANUAL § 9-23.210 (1992-1 Supp.) (identifying factors to be considered in granting immunity).

90. See *id.* § 9-16.300; *id.* § 9-27.420 (identifying considerations to be weighed in entering plea agreements); *id.* § 9-27A.200, at 9-1022.54 ("[S]entence bargaining should not result in a vastly different sentence as compared to a sentence following trial.").

91. It is unclear to what extent Justice Department guidelines do in fact constrain prosecutors to act according to their public trust. See, e.g., Leslie Donavan, Comment, *Justice Department's Prosecution Guidelines of Little Value to State and Local Prosecutors*, 72 J. CRIM. L. & CRIMINOLOGY 955, 958 (1981) (asserting that the guidelines are "too general and permissive" to

Fundamentally, prosecutors extend threats when plea bargaining. The grant of immunity gives the defendant a choice to either reveal information or face the threat of a trial for contempt.<sup>92</sup> Similarly, the offer of sentencing concessions in exchange for the defendant's plea of guilty, his information, or both, logically constitutes a threat of greater punishment for refusal.

These threats are not free. The government is restricted in the size of the penalty with which it can threaten the defendant. Should the defendant decline to obey the immunity order or refuse the offered settlement, the government must make good on its threat and bear the costs of both trial and punishment.<sup>93</sup> Thus, properly functioning buyers of convictions should consider the costs of their threats, weighing the social benefit of the anticipated post-trial sentence against the costs of the pre-trial settlement.<sup>94</sup> Only where the savings in prosecutorial resources and the marginal deterrence are greater than the various costs of accepting the plea or granting the immunity should the plea be offered or the immunity granted.

Despite the obvious interest of the government in having its agents consider the costs of the threats they make, it appears that prosecutors have no sustainable interest in this governmental objective. In purchasing information or convictions, prosecutors necessarily expend public resources.<sup>95</sup> But the immediate interest of prosecutors is to construe the

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ensure that the criminal law will be applied consistently by state and local prosecutors); *see also infra* Part III.A.2 (discussing problems with drafting specific guidelines).

92. *See supra* notes 73-81 and accompanying text.

93. Punishment by imprisonment requires housing and board. Extracting an individual from his home also causes the community to lose a member who is probably productive in some ways, perhaps in sustaining his family. The fact that punishment inflicts costs on the government and the community has formed the seminal insight giving rise to the considerable body of work on optimal penalties. This body of work recognizes that the costs of punishment constrain the amount of punishment that the government can feasibly visit upon any particular offender. Because of these costs, the government should take care to devote its punishment dollars in a way that will maximize the likely reduction of the harm from crime. *See generally* Becker, *supra* note 79 (determining the optimal level of resources for enforcing laws by measuring "social loss" from crime and setting expenditures in an attempt to minimize this loss); George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526 (1970) (arguing that sometimes the public has an interest in not enforcing its criminal laws due to the costs of enforcement and that apparent misallocations of funds fulfill this interest).

In granting immunity, the government should ideally also consider the total cost from the additional proof burdens that arise from a grant of immunity, along with the enforcement costs of making good on its threat to indict, convict, and punish the defendant who disobeys the immunity order. One commentator reports that some U.S. Attorneys have a policy against indicting immunized witnesses, suggesting that the benefit given by the government is not insubstantial. Wolfson, *supra* note 70, at 167.

94. The cost of accepting a plea is the sum of the reduced deterrent effect of the plea, measured by the reduction in the sentence discounted by its probability, and the costs of setting a potential recidivist free, offset by the savings in trial and punishment costs.

95. The prosecutor's spending of public resources for prosecutorial resources is unproblematic from an ethical perspective. The finiteness of prosecutorial budgets provides evidence that the public is willing, as a general proposition, to accept the risk of criminally caused harms by unconvicted or

value of the information or conviction as a function of the information or conviction's tendency to save prosecutorial and investigative resources.<sup>96</sup> The object of a plea purchase, the conviction or the information, is a tangible, useful good to prosecutors. Each conviction by plea bargain removes one case from a prosecutor's desk, freeing up prosecutorial resources for other matters. Thus, in the eyes of the prosecutor, the defendant's sale of a conviction or information is essentially a sale to the prosecutor of prosecutorial resources, as well as a function of law enforcement.

There are two considerations that constrain the prosecutor against purchasing all possible pleas. The first is the weak constraint of adverse publicity from being too soft on crime. This constraint is only sometimes important, especially if the prosecutor is not democratically accountable. The second constraint is available prison space, particularly the marginal cost of imprisoning a particular additional criminal defendant. Limited prison space does little, however, to inhibit prosecutorial discretion. The prosecutor's conservation of prosecutorial resources in exchange for expending prison time is skewed because the prosecutor is not accountable for the prison system. He is spending societal resources devoted to incarcerating prisoners to acquire or save societal resources devoted to the prosecution function. Plea bargaining allows the prosecutor to decide, on the public's behalf, that spending his time elsewhere inures to the public benefit.

In addition, prosecutors possess little information that would allow even the most faithful agents to make this fiduciary decision accurately. Although the redirection of prosecutors' time could be either socially beneficial or socially harmful when measured against the use of their time in cases in which they choose to accept pleas,<sup>97</sup> prosecutors have limited information with which to compare the gain in prosecutorial resources with the public costs attendant upon a plea exchange. These costs are rarely visited upon prosecutors.<sup>98</sup>

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released offenders in exchange for a sum of money. By performing this exchange, the prosecutor merely completes an exchange that the community has approved. Of course, the prosecutor may err, even grievously, in representing the public's wishes with regard to any particular exchange.

96. Cf. Schulhofer, *supra* note 16, at 46 (suggesting that prosecutors, in negotiating pleas, seek to maximize the deterrence obtained from the resources available).

97. A harmful case might be where the prosecutor purchases pleas (i.e., frees up his time) to focus on cases that might produce favorable publicity but that do not necessarily remove more harmful criminals from the community. On the other hand, if one accepts Professor Becker's contention that a substantial cost of crime is the social volatility it causes, then the prosecutor's self-serving desire to prosecute the high-publicity case might align his incentives perfectly with the common good by reducing social volatility. See Lawrence C. Becker, *Criminal Attempt and the Theory of the Law of Crimes*, 3 PHIL. & PUB. AFF. 262, 273-74 (1974). Judge Easterbrook posits that prosecutorial discretion serves to maximize the deterrent impact of public expenditures. Easterbrook, *supra* note 17, at 295-96.

98. It is possible for the prosecutor to internalize societal interests in plea settlements if the prosecutor suffers the harms from leniency directly. For the prosecutor to suffer harms from

This is not to say that prosecutors do not realize that they act on the public's behalf in forming plea agreements, nor that they fail to understand that a conflict exists between their self-interest in purchasing less work or redirecting work by accepting pleas and the public's interest in obtaining the maximum deterrence possible given the public's expenditures on criminal enforcement. Rather, it may ask too much of the best-intentioned prosecutor to overcome this conflict of interest on a daily basis and to learn of and comprehend the multiple considerations that would be relevant in attempting to maximize the public's anticrime expenditures. No other lawyers in our legal system are expected to act with such great insight and dispassion.

Although it is impossible to determine with certainty whether prosecutors fail to consider all the public costs and benefits involved in assessing a plea transaction, some evidence suggests that prosecutors do err in their assessments of the social good, tending to overpurchase prosecutorial resources. The fact that the prosecutor exchanges one variety of public resource for another might underlie the perennial complaint about prison overcrowding.<sup>99</sup> In other words, the shortage of prison beds might, in part, be a product of prosecutors' collective tendency to overpurchase prosecutorial resources, creating the perduring perception that there are more defendants who "should" be prosecuted and imprisoned than there is prison space to house them.<sup>100</sup> Given the prosecutor's

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excessively lenient plea agreements, outside of the attenuated harm each citizen suffers from the marginal diminishment in deterrence leniency causes, the following would have to occur: 1) the defendant commits a crime during the time he would have been in jail had the case gone to trial and had a greater sentence than the plea been awarded; and 2) that crime causes harm to the prosecutor, through social volatility, through unfavorable publicity, or by landing back on the prosecutor's desk.

99. The problem of prison overcrowding seems universal and perduring. See, e.g., Michael de Courcy Hinds, *But Does Punishment Fit the Budget?*, N.Y. TIMES, Jan. 22, 1993, at B16; Vlae Kershner, *Surge in California Prison Population*, S.F. CHRON., Jan. 6, 1993, at A13; *The Jail Problem Won't Go Away*, S.F. CHRON., Jan. 22, 1993, at A30.

100. It is easy to see how the prosecutor's desire to purchase prosecutorial resources contributes to the perpetual overdemand on prison space. Consider the case of a prosecutor who, faced with 10 possible prosecutions equal in terms of evidence, culpability, and expected penalty, decides because of limited prosecutorial resources to prosecute only the first three alleged offenders. Assume each prosecution is for a crime that carries a ten-year sentence on average, and that obtaining that sentence on average requires "10 units" expenditure of resources in each case. Assume also that the budget allocation within the criminal justice system is optimal, and thus the community is indifferent between expending 10 units of prosecutorial resources and incarcerating the offender for 10 years. Assume finally that the prosecutor settles each of these cases for a 50% reduction in sentence (five years), with a 70% savings in prosecutorial resources. In other words, the prosecutor settles these three prosecutions for a total of 15 years, with an expenditure of nine units of resources. The prosecutor is then left with 21 units of resources, enough to initiate the prosecution of two more offenders from the original set of 10. Assuming the same settlement terms, these latter two settlements leave resources of 15 units of the original remainder: enough to initiate one more prosecution, leaving 12 units for one more, leaving nine units. Assume that the prosecutor uses the remaining nine units to prevail at trial on a case involving a nine-year sentence. By trading sensibly, this prosecutor has, in sum, created a "demand" for the incarceration of eight offenders, not the "optimal" three, and has converted the 30 years of theoretically available prison space to a "demand" for 44. Thus, the prosecutor's difficulty at "internalizing" adequately the cost of

clear self-interest in overpurchasing prosecutorial resources and in undervaluing the cost of penalties, prison space should usually be in relatively short supply.

It appears that reliance upon prosecutors' ethical obligation to act in a fiduciary manner is insufficient to overcome the strong incentives inherent in plea bargaining that compel prosecutors to attempt to maximize their gain from plea exchanges. Even the best-intentioned prosecutor suffers from incomplete information in trying to fulfill the obligation not to misuse the costly threats that inhere in every plea offer. Thus, it is probably unwise to rely upon prosecutors' faithful adherence to their ethical duties to use their monopsonist principal's resources for the greatest possible public good.

Prosecutors dominate plea bargaining in a world without a judge. Unrestricted by the bargaining parameters of judicial sentencing, prosecutors are able to take advantage of their monopsonies, offering defendants less appealing settlements. Prosecutors seek to find defendants who are willing to accept, or who unwittingly accept, price discriminations. These monopolist tendencies are insufficiently controlled by existing non-judicial restrictions, such as the rules governing exchanges of information or convictions and ethical guidelines. Indeed, these rules on the whole appear to encourage, not discourage, full exercise of the monopsony power.

## II

### JUDGES VS. PROSECUTORS

Controlling the sentence is key to controlling plea bargaining. As demonstrated in Part I, prosecutors have incentives to act as monopsonists, faithless agents, price discriminators, exploiters of the immunity rules, and self-interested bargainers. However, if the outcome of the bargain is the "correct" or "just" one, then it is plausible to say that the prosecutor's actions are irrelevant, as neither the defendant nor the community has been injured.

Before the institution of the sentencing guidelines, the judge's role in sentencing tended to ensure that "correct" sentences resulted from plea bargaining. Although judges seldom took an active role in plea bargain-

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incarceration leads to its excessive demand. Of course, in real life the situation is worse, as it is unlikely that the prosecutor's budget is connected in an optimal relationship with the available prison space. Thus, when the prosecutor makes the initial determination that his resources allow for three prosecutions, the prosecutor does so without any real idea that this particular prosecutorial expenditure reflects a desire on the part of the community to incur an equivalent additional incarceration expenditure. However, one interesting effect of the introduction of the sentencing guidelines is that the prosecutor's internalization of the costs of imprisonment may be facilitated, effectively giving prosecutors a proprietary interest in allocating prison space. *See infra* notes 165-66 and accompanying text.

ing itself,<sup>101</sup> their constraining influence permeated the bargaining. Judges had the power to control the bargaining by giving "due consideration" to the plea settlement in passing on guilty pleas,<sup>102</sup> and more generally, by the "market price" their past sentences created for the crime charged. Therefore, past sentences for crimes created the parameters that dictated the range of permissible bargaining for prosecutors; the judge's control over the sentence mollified the effects of the prosecutor's monopsony.

Today, judges no longer control sentences, and thus no longer control prosecutors. Instead, prosecutors control sentences and in turn control judges. This Part argues that prosecutors have this power because the sentencing guidelines embody an essentially "charge-offense based" sentencing scheme. Thus, the key determinant of the sentence is the charge of conviction: by controlling the charge, prosecutors control the sentence. Plea bargaining as a negotiation over appropriate discounts from extant sentencing outcomes is a thing of the past. The prosecutor now controls the sentence by controlling the charge, and the judge is largely powerless to object.

#### A. *Before the Guidelines: Judges Control Prosecutors*

Prior to the introduction of the sentencing guidelines, plea bargaining took place in the shadow of judicial sentencing, which restricted the ability of the prosecutor to act as a monopsonist, to be a faithless agent, or to use the rules of plea bargaining to his advantage.<sup>103</sup> The prosecutor's impetus to maximize monopsony profits and his inability to be a perfect agent were tempered because the outer limits of the prosecutor's threatened sanction, either in purchasing information or in procuring convictions, were a function of the judicial sentence discounted according to its probability and the costs of obtaining it.<sup>104</sup> An offer of a less

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101. See Easterbrook, *supra* note 17, at 321. *But cf.* Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1061 (1976) (noting that in some systems judges participate actively in plea bargaining).

102. LAFAVE & ISRAEL, *supra* note 72, at 930-31.

103. [The prosecutor] resembles a seller of grain futures who has no direct competitors, but who must price her futures contracts against the backdrop of a working spot market whose price is not within the seller's control. If the outcomes generated by that market — here, trial verdicts and sentences — amount to sensible social policy, the prosecutor's bargaining behavior should be generally sensible as well, because those outcomes constrain the prosecutor's pricing decisions.

Scott & Stuntz, *supra* note 16, at 1961-62 (contending that the guidelines adequately serve to constrain the prosecutor).

104. Because the judicial sentence formerly set only the bargaining parameters, within these parameters the prosecutor could still use his advantages to secure a more favorable price for the guilty plea than that available in a perfectly competitive market. However, it is likely that the bargaining parameters reflected a price consistent with the community interest, *see infra* text accompanying notes 107-09, and thus, the final plea-bargained sentence was more just.



attractive package would lead the rational defendant to reject the offer and thus risk contempt or proceed to trial.

As a result, the market for sentences created what is usefully thought of as the market parameters for plea bargaining. Both before and after the institution of the guidelines, the magnitude of the available sentence for a particular crime frequently established the limits of the prosecutor's ability to trade prison resources for prosecutorial resources. In other words, the probable sentencing outcome created both upper and lower parameters for plea bargaining, constraining prosecutors both in their exercise of their monopsony power on the upper side and in their disloyalty to their principal through excessive leniency on the lower side.<sup>105</sup>

It is difficult to discern to what extent the judge's influence actually constrained plea outcomes. The main objection to such a hypothesis would appear to be that judicial sentences were inconsistent, and thus, no one judicial sentence was available to set parameters. Logic suggests, however, that these bargaining parameters, although formed through the accretion of thousands of individual case dispositions, did in fact create sufficiently discernable parameters to restrict plea outcomes. Although the individual decisions of judges may have been, at times, somewhat random, ill-reasoned, or disparate,<sup>106</sup> the sentences featured sufficient predictability and uniformity to permit widespread plea settlements. The very fact that so many cases have historically been adjudicated by plea implies that judicial sentences did establish sufficiently precise parameters to allow for bargaining in their shadow.

Moreover, the parameters these judicial sentences set were likely desirable in terms of appropriate penalties for the conduct in question. Judicial sentencing probably was informed by consideration of the various purposes of sentencing, including retribution, deterrence, incapacitation, and rehabilitation.<sup>107</sup> Sentencing also likely took into account more

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105. For an experiential account of how attorneys come to assess the "worth" of a crime in light of judicial sentencing, see FEELEY, *supra* note 9, at 158-67; see also Norman Lefstein, *Plea Bargaining and the Trial Judge, the New ABA Standards, and the Need to Control Judicial Discretion*, 59 N.C. L. REV. 477, 489-94 (1981) (describing how judges set market parameters for crimes, and thus for plea bargains, and how quickly lawyers react).

106. There is a large literature describing the disparity among judicial sentences. See, e.g., Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 4-10 (1972) ("Given the sure combination of substantially unbounded discretion and decision-makers unrestrained by shared professional standards, it is not astonishing that the commonplace worry in any discussion of sentencing concerns 'disparity.' The factual basis for the worry is clear and huge; nobody doubts that essentially similar people in large numbers receive widely divergent sentences for essentially similar or identical crimes."); see also Whitney N. Seymour, Jr., *1972 Sentencing Study for the Southern District of New York*, 45 N.Y. ST. B.J. 163, 169 (1973) (discussing disparities in sentences among offenses, among individual judges, among districts, and among individual cases, and urging "a more even-handed approach to the sentencing process").

107. One study found, however, that judges disagreed as to the relative priority of these goals. INSLAW, INC. & YANKELOVICH, SKELLY AND WHITE, INC., *FEDERAL SENTENCING: TOWARD A*

varied interests, including that of the prosecutor in maximizing the deterrent value of prosecutorial resources,<sup>108</sup> the defendant in mitigating punishment due to individualistic factors and in avoiding collateral harms,<sup>109</sup> and the prison authorities in managing the costs of punishment. Other actors in the drama, including perhaps the victim of the crime or some form of public opinion, might have added to the wealth of considerations and interests relevant to the judicial sentence. Thus, it is plausible that judicial sentencing created, through its continual and slow accretion, a range of sentencing parameters that were socially desirable. It is also likely that the gradual, individualistic development of these judicial sentences created a more "correct" range of appropriate penalties than the alternative in use today: the declaration of uniform penalties by bureaucratic agency.

The following example illustrates how, prior to the sentencing guidelines, judicial sentencing constrained bargaining outcomes. Consider an instance where the prosecutor and the defendant wished to bargain over incriminating information. Prior to the sentencing guidelines, the bargaining that the prosecutor and defendant undertook was highly restricted by a complex, ever-varying formula that considered the costs and benefits of the information in several contexts: to the parties, to the community, and to the judge. These various interests and preferences all revealed themselves in a potential sentence a judge would issue for contempt of the immunity order. This potential sentence, substantially a product of past sentences, constrained the bargaining.

A prosecutor, in tendering the offer of immunity to entice the sale of incriminating information, could threaten no more than the penalty that the judge would impose. The defendant similarly, in assessing the perceived likelihood of individual collateral harms from his peers and the public, also had to assess the likely judicial response to his conduct. The judge considered the needs of law enforcement, fairness to the defendant, the costs and availability of punitive sanctions, and the interests and good of the community in meting out the appropriate penalties for a refusal to waive one's "right to remain silent."

In this manner, the exchange of incriminating information was accomplished by virtue of plea bargaining. This bargaining was not unfettered; rather, the offers and acceptances were made within a range constrained by external considerations. The range of discretion within which the parties could act solely according to their self-interest was limited by the authority afforded the judge to establish the market parameters. The authority of the judge to determine the sentence served to

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MORE EXPLICIT POLICY OF CRIMINAL SANCTIONS at III-4 (1981). See 18 U.S.C. § 3553 (1988) (identifying the various aims of sentencing).

108. See Easterbrook, *supra* note 17, at 295-96.

109. See *supra* note 79 and accompanying text.

inhibit the self-interest that would tend to lead the prosecutor to act unfaithfully toward his principal. As importantly, the parameters produced by the judicial sentence reduced the ineluctable tendency of the government and its agent, like any monopsonist, to exploit its market position.

### B. *Under the Guidelines: Prosecutors Control Judges*

The strong market parameters imposed on plea bargaining by judicial sentences restricted the ability of prosecutors to extract or grant undesirable bargains when purchasing information and convictions from criminal offenders. Although this control was accomplished by a system of sentencing based on judicial discretion, in theory it might appear that judicial discretion is not required to effect this control. If the essential condition for the maintenance of market parameters on plea bargains is the presence of some independent means to control the bargains of prosecutors, then conceivably, external and independent sentencing guidelines could replace judicial sentencing discretion.

Unfortunately, the substitution of guidelines for judicial sentences has failed because the sentencing guidelines do not control prosecutorial discretion. Instead, the sentencing guidelines give the prosecutor the power to establish the parameters of plea bargaining.<sup>110</sup> This result was predictable. Although the sentencing guidelines curtail judicial discretion, wide discretion remains with the legislature to define crimes and the prosecutor to charge defendants with crimes. As a result, the drafters of the guidelines were required to devise penalties in a context of broadly defined crimes and unconstrained prosecutorial charging discretion. Attaching specific sentences to criminal statutes so amorphous that any one of several can apply to a given course of criminal conduct yields a system in which the prosecutor, through his ability to control the charge, controls the sentence.

This result is not attributable to the particular guidelines chosen by the U.S. Sentencing Commission. The federal sentencing guidelines do not, on the whole, give the prosecutor discretion that the prosecutor did

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110. See Albert W. Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*, 117 F.R.D. 459, 462 (1987) [hereinafter Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*] (describing the "leverage" the guidelines give a prosecutor who can "offer[] to lower a . . . charge one notch"); Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 563-76 (1978). Professor Alschuler suggests that guilty pleas carry an automatic reduction in the fixed sentence, *id.* at 575, a suggestion that the U.S. Sentencing Guidelines apparently include as a nonbinding "policy statement." U.S.S.G., *supra* note 10, § 6B1.2. Even if this reduction of sentence is followed by courts, however, it would operate no differently than other sentence mitigators: i.e., it does not mitigate the power of the prosecutor to select the guideline base from which any reductions will be taken. Thus, automatic sentence reduction fails to curb prosecutorial discretion.

not have historically.<sup>111</sup> Rather, because the guidelines constrain the discretion of the judge, they render prosecutorial discretion much more significant. The market parameters that largely precluded prosecutors from exploiting their monopsony or failing to serve their principal are now gone.<sup>112</sup>

### 1. Charging and Sentencing Under the Guidelines

The introduction to the United States Sentencing Guidelines states that the guidelines create what is in part a "charge-offense" based sentencing system, one which derives the sentence primarily from the crime of conviction.<sup>113</sup> The fact that the sentencing outcome depends substantially on the crime charged permits the prosecutor's charging decisions to control plea bargaining. The following example, involving an unexceptionable application of the sentencing guidelines, illustrates the extent to which the guidelines' sentence depends on the prosecutor's charging choices.<sup>114</sup>

Suppose an officer of a publicly held corporation has committed a

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111. *But cf.* Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*, *supra* note 110, at 459 (asserting that unless judges use the sentencing discretion and control over prosecutorial power that the sentencing guidelines provide, the power of prosecutors to set sentences will be greatly enhanced); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1723-24 (1992) (asserting that U.S.S.G. § 1B1.3, defining "relevant conduct," unnecessarily broadens prosecutorial discretion); Kimberly S. Kelley, Comment, *Substantial Assistance Under the Guidelines: How Smitherman Transfers Sentencing Discretion from Judges to Prosecutors*, 76 IOWA L. REV. 187, 189 (1990). Kelley argues that U.S.S.G. § 5K1.1, which provides a policy in favor of departures from the applicable guidelines sentence for "substantial assistance in the investigation or prosecution of another person who has committed an offense," *id.* at 189 n.34, allows prosecutors too much discretion, particularly insofar as it is construed to bar departures without a motion by the prosecutor. However, U.S.S.G. § 5K1.1 does not appear to add to prosecutorial power; it merely embodies historical practice. "Substantial assistance" is part of the larger context of sales of information, and such sales have always been consensual, thus requiring prosecutors to agree to any concessions to be exchanged for information. The sentencing guidelines do not explicitly add to the discretion of prosecutors but instead render the prosecutor's traditional exercises of discretion more influential in the final disposition of the case.

112. *See* *United States v. Kikumura*, 918 F.2d 1084, 1119 (3d Cir. 1990) (Rosenn, J., concurring) (expressing concern that the guidelines have "replaced judicial discretion over sentencing with prosecutorial discretion").

113. *See* U.S.S.G., *supra* note 10, at 5; *see also* U.S. SENTENCING COMM'N, *supra* note 12, at 25 ("[T]he sentencing guidelines primarily depend upon the offense of conviction and the presence or absence of relevant factors as defined by the guidelines."); *cf.* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8-12 (1988) (arguing that the guidelines reflect a compromise between a real- and charge-offense system). Whether one prefers to characterize the guidelines as generally "charge-offense" or "real-offense" in nature is less important than recognizing that the sentence depends to a very great degree on the charge of conviction.

114. This example examines the opportunities that charging decisions provide for prosecutorial control over sentences. In a more complex environment, the prosecutor's control could be enhanced by "date bargaining" and "[g]uideline factor bargaining." *See* Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 260-63 (1989).

course of insider trading over a period of years, involving numerous stock purchases by the officer based on nonpublic, material information. The officer has secreted his profits of \$105,000 by a series of small transfers of monies through a domestic bank account. This offender might be indicted for mail fraud,<sup>115</sup> securities fraud,<sup>116</sup> racketeering,<sup>117</sup> some type of money laundering,<sup>118</sup> conspiracy to commit any one of these substantive offenses,<sup>119</sup> or any combination of these charges.

Under the sentencing guidelines, the ultimate sentence is a precise function of which of these charges, singularly or in combination, form the count or counts of conviction. Assume first that the sentence of conviction is on the count of mail fraud. Under the applicable sentencing guideline,<sup>120</sup> the likely guidelines penalty for this first-time offender would be level 14, or a range of 15 to 21 months' imprisonment.<sup>121</sup> If securities fraud forms the count of conviction, the sentencing outcome would not change.<sup>122</sup> Even if the securities fraud count is added to the mail fraud conviction the sentencing outcome would not change because these counts would be "grouped" together.<sup>123</sup> Thus, the guidelines are apparently somewhat sensitive to the power of prosecutors and appear to alleviate the effects of some charging discretion.

Assume next, however, that the prosecutor wishes to avoid plea bargaining within the range established by a charge of fraud, even with multiple counts. The prosecutor need only seek an indictment on a count of racketeering. If the racketeering charge forms the likely count of conviction, then the probable punishment is level 19, or 30 to 37 months' imprisonment.<sup>124</sup> This sentence represents an increase of almost 100% over the sentencing parameters established by a fraud charge.

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115. 18 U.S.C. § 1341 (Supp. IV 1992).

116. Securities and Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j (1988); 17 C.F.R. § 240.10b-5 (1992).

117. 18 U.S.C. §§ 1961-1968 (1988 & Supp. IV 1992).

118. The Money Laundering Control Act of 1986, 18 U.S.C. §§ 1956-1957 (1988 & Supp. IV 1992), codified money laundering.

119. 18 U.S.C. §§ 371, 1962(d) (1988).

120. U.S.S.G., *supra* note 10, § 2F1.1.

121. This conclusion rests on the assumption that the appropriate measure of loss under § 2F1.1 is \$100,000, the defendant's gain. *See id.* § 2F1.1 application note 8 ("The offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss."). Two levels were also added because the fraud either was perpetrated against two or more individuals or required more than minimal planning. *Id.* § 2F1.1(b)(2). Sentences are actually computed using the table in § 5A.

122. *Id.* § 2F1.2.

123. *Id.* § 3D1.2(d). These counts are grouped because both the fraud count and the securities fraud count are listed in the grouping table in § 3D1.2(d). They could also be grouped under § 3D1.2(b).

124. Racketeering is sentenced under U.S.S.G. § 2E1.1, which provides for a level 19 sentence or application of the guideline applicable to the "underlying" (predicate) racketeering activity, whichever is the greater. Since neither securities fraud nor fraud is sentenced at a level greater than 19, the level 19 sentence would be employed.

Assume next that the prosecutor wishes to substitute a charge of money laundering, which can be charged under several different statutes,<sup>125</sup> each receiving different treatment under the guidelines. Specifically, the prosecutor could choose to expose the defendant to a sentencing level of 24 (51 to 63 months),<sup>126</sup> 20 (33 to 41 months),<sup>127</sup> or 18 (27 to 33 months).<sup>128</sup> The choice to use one of these money laundering counts in lieu of a fraud count gives the prosecutor access to a possible penalty of 63 months, three times the maximum penalty under a single fraud count.

This example is a relatively simple one. Utilizing the complexity of the guidelines, a creative prosecutor could produce an even greater range of possible sentencing outcomes. Assume that the prosecutor wishes to prosecute more leniently. By granting a reduction of two levels for acceptance of responsibility pursuant to the defendant's agreement to plead guilty,<sup>129</sup> the sentence could be as low as level 12, with a minimum sentence of ten months, possibly consisting of imprisonment for one half that time, coupled with a term of supervised release, including community confinement or home detention.<sup>130</sup>

If the prosecutor wished to prosecute somewhat more vigorously, however, he could charge a count of racketeering along with a count of money laundering. These sentences would likely not be grouped,<sup>131</sup> thus yielding a sentencing guideline level of 25, which mandates a sentence of 57 to 71 months.<sup>132</sup> The guidelines create numerous other instances where the sentencing outcome depends entirely on the prosecutor's selection of the count of conviction.<sup>133</sup>

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125. 18 U.S.C. §§ 1956-1957 (1988 & Supp. IV 1992).

126. This sentence presumes a conviction under 18 U.S.C. § 1956(a)(1)(A). U.S.S.G., *supra* note 10, § 2S1.1. If the count of conviction is 18 U.S.C. § 1956(a)(1)(B), then the sentencing level would reduce to level 21, or 37 to 46 months' incarceration. *Id.*

127. This sentence presumes a conviction under 18 U.S.C. § 1957. U.S.S.G., *supra* note 10, § 2S1.2.

128. This sentence presumes a conviction under one of the statutory provisions identified in U.S.S.G. § 2S1.3.

129. U.S.S.G., *supra* note 10, § 3E1.1.

130. *Id.* § 5C1.1.

131. U.S.S.G. § 3D1.2 does not resolve the issue of whether a racketeering count sentenced under § 2E1.1 should be grouped with a money laundering count sentenced under § 2S1.1. The more plausible answer is that the counts should not be grouped because fraud, not money laundering, forms the predicate act for the racketeering conviction in this example. Thus, no considerations about multiple punishment under the Double Jeopardy Clause are present to militate in favor of grouping the sentences.

132. U.S.S.G., *supra* note 10, § 3D1.4(a). The racketeering count results in a one-level increase to the money laundering offense level. *Id.*

133. See, e.g., *United States v. Montoya*, 945 F.2d 1068, 1075 (9th Cir. 1991) (noting that the defendant subjected himself to a possible additional sentence under the federal sentencing guidelines of four years and nine months by depositing the \$3000 bribe he received in the bank); Amy G. Rudnick, *Cleaning Up Money Laundering Prosecutions: Guidelines for Prosecution and Asset Forfeiture*, 16 RICO L. REP. 294, 295-96 (1992) (noting that a defendant is exposed to an additional

This example demonstrates the prosecutor's heightened control over sentencing under the guidelines. In the example, the prosecutor, through his charging discretion, enjoys the choice of presenting the defendant with exposure to criminal liability of various points on the range from less than one year to almost six years. All of these sentencing outcomes are the result of straightforward, noncontroversial applications of the guidelines. All of these counts of conviction represent plausible charges for the conduct at issue and thus possess a substantial likelihood of success were the case to go to trial.<sup>134</sup> These sentences, the products of the prosecutor's charging decisions, define the defendant's exposure and form the parameters for any discounting that might produce a plea agreement.<sup>135</sup> Given the breadth of most federal statutes,<sup>136</sup> the prosecutor commonly has the discretion to charge a course of criminal conduct under a variety of statutes carrying widely different sentencing outcomes.

In preguidelines practice, the sentencing judge had the power to sentence according to the nature of the criminal conduct without regard to the charging decisions. Constrained only by broad statutory penalty ranges,<sup>137</sup> judicial sentencing discretion was frequently attacked for the

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23-month sentence when a prosecutor adds a money laundering count to a simple bank embezzlement count involving just \$11,000).

Sentencing is also manipulable in nonfinancial contexts. For example, a participant in a conspiracy involving 500 grams of cocaine in which the participant carried a firearm either could be charged under one of the provisions of 18 U.S.C. § 922, producing a sentencing level of 18 (27 to 33 months), U.S.S.G., *supra* note 10, § 2K2.1; could be charged under 21 U.S.C. § 841, producing a likely sentencing level of 38 (235 to 293 months), U.S.S.G., *supra* note 10, § 2D1.1; or could be charged under 21 U.S.C. § 848, producing a likely sentencing level of 42 (360 months to life imprisonment), U.S.S.G., *supra* note 10, § 2D1.5. All of these sentencing levels may be reduced by two levels for "acceptance of responsibility." U.S.S.G., *supra* note 10, § 3E1.1; *see also* Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 918-24 (1991) (providing examples of nonuniform results under the guidelines); Schulhofer & Nagel, *supra* note 114, at 278-82 (describing charge bargaining in drug convictions); Michael H. Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 J. CRIM. L. & CRIMINOLOGY 1550, 1555 (1981) (acknowledging prosecutors' "enhanced influence" under determinate sentencing); Vorenberg, *supra* note 17, at 1524-32 (discussing range of prosecutorial charging choices).

134. The actual likelihood of a guilty verdict under each of the various counts used in the example would of course determine the discounted expected penalty. Although each of these counts seems reasonably likely to succeed should the case go to trial, the precise likelihood of success, and thus the discount that allows for rational, pretrial resolution of this case through bargaining, is unimportant to the analysis. The likelihood of conviction has always created room for a discounted plea sentence.

135. What is important is who sets the starting point for plea negotiations. Formerly, the expected judicial sentence set the point at which discounts could be applied. Today, the prosecutor's charging decisions supply the starting point, or "guideline range," from which any reduction in penalty for pleading guilty is taken. The guidelines express a policy on the level of reduction available for a plea of guilty, preferring that the final sentences be within the applicable guideline range. U.S.S.G., *supra* note 10, § 6B1.2. Further, reductions for "acceptance of responsibility" might be available. *Id.* § 3E1.1.

136. *See infra* Part III.A.1.

137. Prior to the guidelines, a judge sentencing an armed robber could have selected a sentence anywhere from probation to 25 years. *See* Alschuler, *supra* note 133, at 901.

disparities it created.<sup>138</sup> The judge was not required to give reasons for his sentence, and the sentence was unappealable.<sup>139</sup> The judge was largely free to enhance or reduce penalties to accommodate favored sentencing goals or to punish for recalcitrance.<sup>140</sup> In short, judicial sentences over time set both the parameters for plea bargaining surrounding specific criminal conduct and the informal guidelines for judges reviewing recommended sentences.

In the world of the sentencing guidelines, the judge has little power to check prosecutorial charging decisions.<sup>141</sup> The application of the guidelines in the earlier money laundering example is reasonable and noncontroversial, leaving no close questions of fact or interpretation that would reasonably permit a judge to alter the sentence outcomes described above. The prosecutor's choice of charge dictates the narrow sentencing range from which the judge could select a sentence.<sup>142</sup> Moreover, this example does not contain grounds for a departure from the guidelines.<sup>143</sup> As if to underscore the relative helplessness of the

138. See generally ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, *THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT* (1974); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 19-26 (1976).

139. *Dorszynski v. United States*, 418 U.S. 424, 441 (1974) (holding that appellate courts cannot review sentences that fall within statutory limits); *Gore v. United States*, 357 U.S. 386, 393 (1958) (stating that the Supreme Court has no power to revise sentences).

140. See Easterbrook, *supra* note 17, at 323 n.73 (citing cases). Professor (now Judge) Easterbrook did suggest, however, that judicial discretion might not be completely unconstrained. He noted that "an inveterate policy of giving the statutory maximum" might lead to sentence review. *Id.* at 323.

141. Judges retain the power to reject plea agreements under Rule 11 of the Federal Rules of Criminal Procedure. And, in fact, the sentencing guidelines, by way of a nonbinding policy statement, provide that if a plea agreement is coupled with an agreement to dismiss certain charges, the judge "is to determine whether or not dismissal of charges will undermine the sentencing guidelines." U.S.S.G., *supra* note 10, § 6Ba.2 commentary. However, the guidelines do appear to limit the judge's Rule 11 discretion to reject plea agreements by directing him to accept plea-bargained sentences falling within the applicable guideline range. The guidelines provide that the court "may accept" a plea agreement if the recommended or agreed sentence "is within the applicable guideline range," or "departs from the applicable guideline range for justifiable reasons." *Id.* § 6B1.2(b), (c). The commentary to this provision explains:

[T]he court should accept a recommended sentence or a plea agreement requiring imposition of a specific sentence only if the court is satisfied either that such sentence is an appropriate sentence within the applicable guidelines range or, if not, that the sentence departs from the applicable guideline range for justifiable reasons (i.e., that such departure is authorized by 18 U.S.C. § 3553(b)).

U.S.S.G., *supra* note 10, § 6B1.2 commentary. Departures are allowed under 18 U.S.C. § 3553(b) (1988) only if the court finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." The commentary to U.S.S.G. § 6B1.2 also warns that under Rule 11, "the judge should defer to the government's position except under extraordinary circumstances."

142. It should be noted that the prosecutor has even more power to dictate the sentence if he charges under a statute that carries a mandatory minimum penalty.

143. Departures are only available if the court finds circumstances present that the Sentencing Commission has not adequately taken into account in formulating the applicable guideline. 18 U.S.C. § 3553(b) (1988); see also U.S.S.G., *supra* note 10, § 5K2.0; *supra* note 141.



judge, the sentencing guidelines caution that the sentencing judge should not "intrude upon the charging discretion of the prosecutor" and that the plea agreement on a count should be accepted if the contemplated sentence is within the guideline range.<sup>144</sup> The judge has no choice but to impose a sentence as required by the guideline applicable to the count of conviction.

It bears repeating that the prosecutor's control over the resulting sentence does not result from a defect in the guidelines. There are presumably good reasons why the "heartland" sentencing range<sup>145</sup> for racketeering, for example, should be higher than that for mail fraud or why money laundering warrants escalating the punishment. Rather, prosecutors control sentencing because prosecutors control the use of the statutes, and the statutes control the guidelines.<sup>146</sup> As a result, prosecutors can choose the statute that will produce the desired guideline parameters for the plea negotiation.<sup>147</sup> The prosecutor has always had discretion in

144. U.S.S.G., *supra* note 10, § 6B1.2 commentary.

145. The introduction to the U.S. Sentencing Guidelines states:

The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.

*Id.* at 5-6.

146. Under the guidelines, the only remaining limitations on the prosecutor's charging discretion arise when the defendant chooses to proceed to trial: the uncertainty of a conviction and the resources necessary to try the case. At trial, the finder of fact must be convinced that the charge is appropriate to the crime. In reference to the money laundering example in the text, the jury's only option, should the defendant choose to try the case, would appear to be to "nullify" an otherwise valid charge. The case does not, in any of its combinations, appear to represent an obvious instance of overcharging. *See supra* notes 115-33 and accompanying text.

147. Despite the paucity of information available on the full effects of guidelines sentencing, there is some early indication that prosecutors are using their charging power to manipulate sentencing outcomes. *See Schulhofer & Nagel, supra* note 114, at 262. The prosecutorial guidelines specifically provide that the prosecutor's decisions over charging are to "enjoy a degree of latitude that is not present when the plea bargain addresses only sentencing aspects," and advises that "prosecutors may wish to give greater consideration to charge bargaining . . . than in the past." 8 THE DEPARTMENT OF JUSTICE MANUAL § 9-27A.200, at 9-1022.53 (1988 Supp.); *see also* Schulhofer & Nagel, *supra* note 133, at 252-56.

Few data are yet available to indicate whether or not prosecutors have begun to take advantage of their ability to manipulate sentences under the guidelines. *See infra* notes 156, 161, 206. There is some indication, though, that prosecutors may be manipulating statutory mandatory minimum sentences more frequently. About 60 federal statutes provide for mandatory minimum penalties. *See* U.S. SENTENCING COMM'N, *supra* note 84, at 38-41. Prosecutors, through their charging decisions, have some ability to invoke or avoid these mandatory penalties. Data reveal that from 1984 to 1990, use of minimum penalties has increased remarkably. *Id.* at 41.

The disparate impact of these sentencing decisions on certain groups might reflect prosecutorial bias. *Id.* at 76-86 (finding increasing differences in penalty as measured by race, with African Americans, in particular, increasingly sentenced at or above the mandatory minimum). This disparate impact may also indicate that, in a regime of prosecutor-controlled sentencing, some defendants have an incentive to encourage sentencing discrimination, and prosecutors have an incentive to seek it. *See supra* Part I.A.3.

Although prosecutors enjoyed the power to manipulate outcomes by prosecuting under a

charging, but now he has discretion that makes a great deal of difference.

## 2. *The Consequences of Prosecutors Who Sentence*

Before the guidelines, the boundaries of bargaining were controlled by the established market parameters of the judicial sentence.<sup>148</sup> Prosecutors and defense counsel were, in theory, price takers and thus did not engage in bargaining over the sentence, which was a product of the multitude of judicial sentences that had been meted out for conduct of the type in question. Rather, during plea bargaining the parties bargained over their disagreement as to the likely sentence and its probability.

In a world without guidelines but with perfect information and costless trials, there would be little need for bargaining over plea agreements. Each party would know clearly the sentence for the conduct, would discount the sentence by its evident probability of occurrence, and the plea agreement would be promptly entered at that point.<sup>149</sup> Plea bargaining constitutes the chief means of dispute resolution in the criminal

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statute containing a mandatory minimum penalty prior to the guidelines, the prosecutorial power engendered by mandatory minimum penalties may be greater under the guidelines. Prior to the guidelines, a defendant tried under a statute carrying a mandatory minimum sentence enjoyed, if he prevailed, the alternative of either complete exculpation or conviction under another statute. The sentence for conviction under this other statute was set by the judge. Under the guidelines system, the sentence for this other statute is set by guideline and thus is substantially under the control of the prosecutor. By controlling alternatives, prosecutors can give the defendant a less attractive alternative than they could before and thus may be able to exert greater coercion to induce a conviction by plea or by trial under one of the statutes with mandatory minimums. One Assistant United States Attorney quoted in the Sentencing Commission's report stated in regard to statutory minima, "They have a positive effect. They induce people to cooperate and the ability to bargain around them enables us to dispose of a lot of cases at an early stage." U.S. SENTENCING COMM'N, *supra* note 84, at 99 (emphasis omitted).

148. *See supra* Part II.A.

149. Other factors could also be considered in arriving at a settlement. For example, the prosecutor could consider the costs of not resolving a particular case by settlement; such costs include the costs of trial and the opportunity costs vis-à-vis other cases of having to try a particular case. Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 444-46 (1971). However, these costs might be included in the more pristine equation outlined in the text because if the prosecutor is able to reindict on a more serious charge if the case is proceeding to trial, then opportunity costs can be recouped in the form of added deterrence. Similarly, the prosecutor probably includes in the offer of a plea a discount for the probability of his being compelled to try the case. Of course, proceeding to trial is not costless for the defendant, who may have to undergo defense costs; nor is it costless for defense counsel, who faces caseload constraints similar to the prosecutor's. It may be that these costs are roughly the same for each party, and thus essentially "wash out" in many cases, because they draw the sentencing parameters in opposing directions. *See* Lott, *supra* note 33, at 1309 ("The probability that the penalty will be imposed . . . varies negatively with the level of defense expenditures and positively with the level of the state's prosecution expenditures . . ."). Regardless, these other factors seem to pale in significance when compared to the likely sentencing outcome from trial. *See* Forst & Brosi, *supra* note 16, at 190 (concluding that empirical research provided "strong support" for the hypothesis that the prosecutor focuses on the seriousness of the offense and the strength of evidence in directing prosecutorial resources); White, *supra* at 445 (contending that the likelihood of conviction is "very important" in determining plea concessions offered by the prosecutor).

justice system because of the information costs that lead to reasonable disagreements over the likely outcome. These information costs create uncertainty as to the likelihood of conviction and the likelihood of any particular judicial sentence.

The sentencing guidelines create a world much like the costless world of rapid plea agreements. The prosecutor's charging decision yields a narrow sentencing range that forms the parameters of the plea bargaining. Moreover, for the great majority of cases for which the guidelines were designed,<sup>150</sup> the likely sentence range for the charge brought is clear. Assuming that the case is charged in a reasonable way and that conviction appears likely, the numerical information necessary to arrive at a plea bargain is complete. The prosecutor and the defense attorney, indeed even an outsider to the entire legal system, could easily choose a midpoint within the clearly applicable sentencing range and propose a bargain to which both sides in many cases should agree. Information costs are drastically reduced, and both prosecutors and defense counsel more nearly approximate the theoretical price takers of a costless world.

As the full import of guidelines sentencing becomes evident, the entire process of plea negotiation will change. The prosecutor, clearly now the most powerful player in the criminal justice system, will choose as the sentence some point on the range according to the count on which he wishes to convict. The defendant, if he is acting rationally, will be inclined to agree. Not to agree is to undertake the expense of a trial and the risk of prosecution under other counts, even though the proposed settlement is a reasonable prediction of the likely guidelines sentence.

Therefore, the prosecutor is no longer the price taker but the price setter. Within the broad constraint of filing a charge upon which a jury will probably convict, the prosecutor may set the bargaining parameters as high or low as the facts permit, unrestricted by the prospect of a judge re-examining the same course of conduct and making an independent determination. The bargaining that follows will not take place in light of the broad range of possible outcomes from sentences set independently by judges but instead according to the narrow, legislatively created sentencing range that attaches to the prosecutor's charge.<sup>151</sup>

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150. See *supra* note 145.

151. Under this new system of nonbargained case resolutions, the remaining question is whether the prosecutor's choice of the sentence will be unilateral, or if instead he will, out of a sense of fairness or from a need to save resources, be inclined to bargain with defense counsel in framing his indictment. Although fair-minded prosecutors who perceive their control of sentencing may be inclined to discuss charges with defense counsel, this is not necessarily the case. Even fair-minded prosecutors probably believe themselves fully capable of framing an appropriate indictment, and the breadth of the laws are such that, short of a due process violation, the same course of criminal conduct may be prosecuted under laws that differ markedly in their penalties.

Prosecutors' charging discretion may, however, be somewhat constrained by other factors, especially public opinion. Vorenberg, *supra* note 17, at 1526-27, 1531. The prosecutor's desire to

By making the range of sentencing outcomes more narrow and closely tied to the count of conviction, the sentencing guidelines permit and even encourage the prosecutor to exercise his monopsony power.<sup>152</sup> Unconstrained by independent judicial sentencing, prosecutors may now depress plea concessions offered defendants to monopsony levels through charge manipulation and may restrict the quantity of pleas accepted, thereby permitting discrimination against the most vulnerable defendants.<sup>153</sup> In addition, the socially harmful ways in which the prosecutor's agency problems arise now likewise go unchecked by judicial supervision.<sup>154</sup> Finally, some of the benefits of efficient outcomes derived from agreed upon plea settlements will be lost.<sup>155</sup>

In today's world of guidelines sentencing, the prosecutor's discretion

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conserve resources will lead, as it always has led, to discounts to induce the defendant to forego trial. Nothing has changed in this regard, except that the initial point or sentence from which the parties discount, the rough "worth" of the case, *see* FEELEY, *supra* note 9, at 149-50, is now to be substantially determined by the prosecutor's unfettered charging decision. *See supra* Part II.B.1.

152. For a discussion of the prosecutor's monopsony power, *see supra* Part I.A.

153. One pair of commentators has suggested that the present sentencing guidelines not only constrain judicial discretion but also restrict prosecutorial discretion in charging. *See* Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 504-06 (1992). Nagel and Schulhofer refer primarily to two aspects of the guidelines in support of their contention: 1) the "real offense" considerations of sentencing determinations and 2) the policy statement in U.S.S.G. § 6B1.2 advising judges not to accept plea agreements that include charge reductions unless the remaining charges "adequately reflect the seriousness of the actual offense behavior." *Id.* at 505 (quoting U.S.S.G. § 6B1.2(a)).

With sentencing outcomes substantially a product of charging decisions, *see supra* Part II.B.1, the selection of charges is clearly the most important aspect of the prosecutor's discretion. Neither of the features of the guidelines referred to in this article restricts the selection of charges. As the example in the text demonstrates, *see supra* text accompanying notes 115-44, the initial prosecutorial characterization of the defendant's course of conduct remains largely unfettered. It is this act of discretion that dictates in a guidelines regime the sentencing parameters of any bargaining that follows, be it fact, charge, or guideline bargaining.

Moreover, to the extent that the guidelines' features cited by Nagel and Schulhofer do relate to a significant aspect of prosecutorial discretion, they impinge on that discretion to a very slight degree. The guidelines are fundamentally charge-based, *see supra* note 113; "real offense" characteristics are much less important to sentencing outcomes. Real offense characteristics typically adjust the expected sentence from the "base" of the charge-generated sentence and do so in a uniform direction. Thus, it is the fact that a charge of larceny receives a "4" base level, U.S.S.G., *supra* note 10, § 2B1.1, and burglary receives a "17" base level, *id.* § 2B2.1, that matters most to the ultimate guidelines sentence and not that each carries a two-level increase if the "real" conduct involved "more than minimal planning," *id.* §§ 2B1.1, 2B2.1. It is the prosecutor's ability to choose the offense that presents the opportunity for oppressive use of prosecutorial discretion, and the incidence of certain real offense factors in the sentencing guidelines does not restrict this ability at all. Similarly, the policy statement found in U.S.S.G. § 6B1.2 only affects explicit charge reductions, which by definition would occur only after the prosecutor's initial charging decisions. Thus, this guideline does not affect the most important aspect of the prosecutor's discretion: the discretion to choose the charges filed. *See* David N. Yellen, *Two Cheers for A Tale of Three Cities*, 66 S. CAL. L. REV. 567, 569-70 (1992) (suggesting that preindictment charge bargaining has increased under the guidelines, contributing to guideline circumvention and hidden sentencing disparity).

154. *See supra* note 17.

155. Judge Easterbrook has best expressed the benefits derived from the "efficiency" produced by plea bargained case settlements. Easterbrook, *supra* note 17, at 308-22. With the prosecutor able

to charge is also the discretion to sentence.<sup>156</sup> Combining the prosecutorial function and the judicial function frustrates the goals Congress espoused when it passed the act establishing guidelines sentencing.<sup>157</sup> Congress sought to create an "honest" sentencing system wherein offenders served the time sentenced unmitigated by hidden parole decisions.<sup>158</sup> Congress also sought to end perceived disparities in sentences among offenders, attempting to ensure that similar crimes were punished similarly.<sup>159</sup> By giving prosecutors substantial control over sentencing, however, the guidelines simply shift the locus of disparity from judges and parole commissions to prosecutors' offices. By their largely unreviewed charging decisions,<sup>160</sup> prosecutors have the power to treat like cases differently, frustrating Congress' goals.<sup>161</sup>

The contention that, despite prosecutorial charging discretion, sen-

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to set monopsony prices, public benefits will be lost to the extent the prosecutor's rent-seeking is self-serving.

156. The guidelines have not imbued the prosecutor with any additional discretion over charging decisions. Rather, the combination of sentencing guidelines with charging discretion has produced a new degree of prosecutorial control over sentences. See Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 753 (1980) ("[P]rosecutorial power and bargaining leverage would be sharply enhanced by guidelines restricting judicial discretion."). Perhaps sensing this shift in control over sentencing outcomes, the Department of Justice issued an admonition to its prosecutors cautioning on the use of this new power under the guidelines:

[A] federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct. Charges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned in an effort to arrive at a bargain that fails to reflect the seriousness of the defendant's conduct.

U.S. Dep't of Justice, Office of the Attorney General, *Plea Bargaining Under the Sentencing Reform Act* (Mar. 13, 1989) (memorandum), quoted in Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 190 (1991) (alteration in original). One commentator has noted that it is common knowledge that this policy is sometimes ignored. Tony Garoppolo, *Confusion and Distortion in the Federal Sentencing Process*, 27 CRIM. L. BULL. 3, 15 (1991).

157. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1988 & Supp. IV 1992) and 28 U.S.C. §§ 991-998 (1988 & Supp. III 1991)).

158. See U.S.S.G., *supra* note 10, at 2.

159. See *id.*

160. On the scope of charging discretion, see generally *Wayte v. United States*, 470 U.S. 598, 607 (1985) (explaining that government has "broad discretion" regarding whom to prosecute); *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (recognizing that although it has constitutional limits, prosecutorial discretion is broad); *United States v. Redondo-Lemos*, 955 F.2d 1296, 1299 (9th Cir. 1992) (holding that prosecutorial power cannot be subject to more than limited oversight); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379-80 (2d Cir. 1973) (stating that federal courts do not review prosecutorial decisions); *Cox*, *supra* note 7 (providing an overview of prosecutorial discretion); *Frase*, *supra* note 7 (examining the prosecutor's decision whether or not to prosecute).

161. For empirical and experiential support for the contention that prosecutorial discretion does in fact create "hidden disparity" in sentencing under the guidelines, see Alschuler, *supra* note 133, at 918-24 (criticizing drug offense guidelines); Heaney, *supra* note 156, at 190-200 (describing sources of disparity).

tencing results under the guidelines have so far been nondisparate<sup>162</sup> is misleading. The guidelines are mandatory: once the charging statute is selected, the range of possible sentences is set. The resulting uniformity is illusory because the prosecutor's freedom to select which charge will be applied to which offender hides the myriad opportunities to treat like cases differently. Thus, the fact that all offenders similarly charged receive similar sentences does not demonstrate parity. Rather, it represents a masking of the discretion, with its unavoidably disparate results,<sup>163</sup> that is exercised by prosecutors when they decide how to charge a particular course of criminal conduct. Disparity persists, simply hidden within the prosecutor's exercise of charging discretion.<sup>164</sup>

Today it is a practicing lawyer, not a judge, who exercises the power and the responsibility to set sentences. It is unwise to give prosecutors this power, particularly based upon the incomplete information often available at the charging stage. Defendants and other subjects or targets of investigations should be concerned about the unalloyed power the prosecutor unavoidably wields in deciding their fates. The guidelines in effect give sentencing power to those our criminal justice system asks to represent the defendant's adversary.

Surprisingly, the same sentencing guidelines that give prosecutors the power over sentencing could have a desirable effect on prison population problems if prosecutors receive sufficient information and use it well. In the past, the prosecutor exacerbated prison population problems by trading punishment resources for prosecutorial resources. There always appeared to be more wrongdoers to prosecute than prison space to house them.<sup>165</sup> Because the judge and the parole board have been removed as intermediaries between the prosecutor's charge and the defendant's period of incarceration in the federal system, prosecutors now directly allocate prison space to defendants according to their best judgment about crime severity and culpability.<sup>166</sup> Ideally, prosecutors should have

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162. 1989 U.S. SENTENCING COMM'N ANN. REP. 46-48 (reporting that 82% of sentences imposed are within the guidelines' range).

163. It was the premise of the act that created the Sentencing Commission that discretion produces disparity. See S. REP. NO. 223, 98th Cong., 1st Sess. 37 (1983).

164. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 138 (1990); *supra* note 161; see also Alschuler, *supra* note 133, at 915-18 (arguing that the guidelines achieve "equality" only in the sense that unlike cases are treated alike and suggesting that measures of disparity are relative to the normative criterion from which one measures); Garoppolo, *supra* note 156, at 15-17 (maintaining that prosecutorial discretion distorts sentencing); Heaney, *supra* note 156, at 190-200 (discussing how prosecutorial discretion circumvents the goal of the guidelines and leads to continuing disparity); cf. Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1, 9 (1987) (suggesting that categorizing criminal sentences by guidelines creates undesirable uniformity).

165. See *supra* notes 99-100.

166. There is some early indication that prosecutorial charging decisions are having a direct effect on prison populations. This evidence comes from the U.S. Sentencing Commission's study of recent data on the use of mandatory minimum statutory penalties. See U.S. SENTENCING COMM'N,

firm information, not just perceptions, about the availability of prison space. Fortunately, with the "middlemen," the judge and parole board, now substantially removed from the sentencing function, the information costs of transmitting quick and accurate information from prison authorities to today's sentencing authority, the prosecutor, might be reduced.

Unwittingly created by the sentencing guidelines, this potentially efficient method of managing prison population problems does, however, engender many troublesome issues for criminal justice. The most significant issue is that the solution disregards individualized sentencing, at least as that phrase connotes particularized findings of facts by a jury in a court of law. Instead, it is the prosecutor, an advocate, who makes these individualized judgments of severity and culpability, allocating prison space accordingly.

The introduction of the sentencing guidelines has occasioned a substantial and largely undesirable change in the way that criminal cases are resolved. The traditional understanding of plea bargaining is now antiquated. No longer do prosecutors and defense counsel negotiate settlements in the shadow of relatively broad, neutral judicial sentences pertinent to the criminal conduct in question. Rather, prosecutors now select the bargaining parameters by shaping the charge. Thus, bargaining today falls in the shadow of relatively narrow, nonneutral sentences that are pertinent to the charge in question. No independent party has the chance to examine the same set of facts as the prosecutor and to decide upon an appropriate sentence. Our criminal justice system once relied on discretion piled on top of discretion to avoid unjust outcomes; today, the system quite alarmingly places almost complete discretion in the hands of one person.

### III

#### CONTROLLING DISCRETION IN THE WORLD OF THE GUIDELINES

The combination of the prosecutor's charging power and the mandatory sentencing guidelines has replaced the judge with the prosecutor and brought to life fears of the prosecutor's monopsony power. There are three chief means of addressing the problem of prosecutorial discretion, each of which represents an attempt to eliminate prosecutorial charging discretion: (1) the creation of "better" or more specific criminal laws, (2) the establishment of prosecutorial charging guidelines or some

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*supra* note 84, at 92-117. Many practitioners and judges told the Commission that prosecutorial charging decisions respecting statutes with mandatory penalties exacerbated prison overcrowding, and the Commission's data showed that the increased use of these statutes, *see id.*, has led to increased prison populations. Because the sentencing guidelines themselves attach defined sentencing ranges to all statutes, they in effect function like statutory minima. Therefore, it is probable that the same phenomenon which accompanies statutes with minimum penalties will occur, or perhaps is occurring, with regard to the many statutes which are subject to guidelines penalties. *See Freed, supra* note 111, at 1723-24.

similar means of judicial review of charging decisions, and (3) the adoption of a "real offense" sentencing scheme.<sup>167</sup> Each of these proposals to eliminate prosecutorial discretion carries unintended effects that would frustrate their success, similar to the frustration of Congress' intent to bring nondisparity to sentencing in the guidelines.<sup>168</sup> Section A suggests that attempts to mollify the problem of prosecutorial sentencing by eliminating prosecutorial discretion over charging will fail.

Section B argues that instead of attacking the problem of prosecutorial discretion by attempting to eliminate it, prosecutorial discretion should be regarded as one aspect of systemic discretion. Systemic discretion, the pervasive discretion wielded by everyone from police officers to probation officers, is an inevitable result of congressional law-making. Its dangers are best inhibited by its dispersal. Plans to eliminate the discretion of one actor in the system while retaining the discretion of others simply concentrate discretion and allow the remaining discretionary decisions to go unchecked. Thus, the best means to counteract prosecutorial discretion is to enable judges to exercise sentencing discretion again. The sentencing guidelines should be informational and should not serve to provide mandatory outcomes for specified plea arrangements.

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167. One could also attempt to limit the abuses made possible by the conjunction of the sentencing guidelines and the prosecutor's monopsony power by abolishing plea bargaining. See, e.g., Raymond I. Parnas & Riley J. Atkins, *Abolishing Plea Bargaining: A Proposal*, 14 CRIM. L. BULL. 101 (1978). The practical possibility of such a ban is questionable. See Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265, 265 n.2 (1987) ("Most scholars assume that bargaining is inevitable."). But see Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 53, at 937 (arguing that plea bargaining can be limited); Schulhofer, *supra* note 5, at 1037 (contending that "effective containment of plea bargaining is realistically possible").

One could also employ guidelines for the conduct of plea bargaining. See Lefstein, *supra* note 105, at 479 nn.5-7 (identifying methods used by state legislatures, federal courts, and national organizations to implement policies and guidelines for plea bargaining); Raymond I. Parnas, *Proposed Legislation Facilitating Discussion of Statutory Regulation of Plea Bargaining*, 13 AM. J. CRIM. L. 381 (1986) (proposing plea bargaining regulations); White, *supra* note 149, at 453-62 (suggesting regulation of plea bargaining to be controlled by the prosecutor's office).

Beyond the issue of the practical possibility of eliminating or regulating plea bargaining is the issue of the desirability of its elimination. Professor (now Judge) Easterbrook has demonstrated the efficiency of bargained-for resolutions of criminal adjudications. Easterbrook, *supra* note 17, at 308-22. On the other hand, some argue that efficiency is insufficient to outweigh other considerations, such as the concern that defendants systematically strike bad bargains or the desire to vindicate society's interest in defendants' exercising their constitutional right to a jury trial. See Gifford, *supra* note 16, at 37-41.

Assuming that the elimination or regulation of plea bargaining in the manner described by these commentators were both possible and desirable, its effect would simply be equivalent to the introduction of charging guidelines. See *infra* Part III.A.2.

168. See *supra* text accompanying notes 157-59.



### A. *Proposals to Check Prosecutorial Discretion*

#### 1. *Better Statutes*

Federal criminal statutes are remarkably broad<sup>169</sup> and frequently overlapping.<sup>170</sup> Most undesirable discretion in the criminal justice system could be eliminated if Congress could or would write more specific statutes.<sup>171</sup> Carefully and narrowly drafted statutes would provide a secure anchor for sentencing guidelines, would limit opportunities for manipulation by prosecutors in their charging, and would require criminal offenders who wish to lower or eliminate their expected punishment to alter their behavior either to conform with the law or cause less harm.<sup>172</sup> More precise statutes could remove a great deal of undesirable discretion from the criminal justice system.<sup>173</sup>

The recurrent efforts at creating a federal criminal code out of the miasma of federal statutes<sup>174</sup> implies some acknowledgment of the drastic reduction of discretion that would come from specific, nonoverlapping statutes.<sup>175</sup> That Congress has declined to enact a criminal code,<sup>176</sup>

169. For example, the federal mail fraud statute, 18 U.S.C. § 1341 (Supp. IV 1992), broadly prohibits use of the mails to carry out a scheme to defraud. "The fraudulent aspect of the scheme to 'defraud' is measured by a nontechnical standard. . . . Law . . . condemns conduct which fails to match the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" *Blachly v. United States*, 380 F.2d 665, 671 (5th Cir. 1967) (citation omitted). The general federal conspiracy statute, 18 U.S.C. § 371 (1988), prohibits conspiring to commit an offense against the United States and conspiring to defraud the United States. The federal false statements statute, 18 U.S.C. § 1001 (1988 & Supp. IV 1992), punishes making or using a false statement in any matter within the jurisdiction of any department or agency of the United States.

170. See *infra* note 176; see also *Reform of the Federal Criminal Laws: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 102 (1971) [hereinafter *Hearings*] (statement of Hon. Richard H. Poff, Vice Chairman of The National Commission on Reform of Federal Criminal Laws) ("[W]e have innumerable statutes dealing with such basic offenses as theft and fraud. They are scattered about hither and yon among various titles of the United States Code, and, although they may deal with essentially the same kind of misconduct, it is rare to find two that read alike. This results in conflicting court interpretations as the judiciary grapples with differing statutory formulations of the same underlying offense, and, of course, this makes for uncertainty in the law.").

171. See Vorenberg, *supra* note 17, at 1567-68. See generally TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976) (proposing to limit the discretion of judges and parole boards through legislatively determined presumptive sentencing).

172. See *infra* notes 190-202 and accompanying text.

173. See Frase, *supra* note 7, at 290-91.

174. See *Hearings*, *supra* note 170, at 102; see also *infra* note 176.

175. It is difficult for scholars to study the workings of the federal criminal statutes without resort to some rubric for organization, such as the Federal Bureau of Identification's "index" crimes. See U.S. SENTENCING COMM'N, PRELIMINARY REPORT TO THE CONGRESS: STATUTORY PENALTIES PROJECT DESCRIPTION AND COMPILATIONS OF FEDERAL CRIMINAL OFFENSES AT v (1989) (organizing federal criminal statutes by "generic crime group"); Hussey & Lagoy, *supra* note 10, at 212-13.

176. Unlike most states and most other countries of the world, the United States has never enacted a unified criminal code. See S. REP. NO. 307, 97th Cong., 1st Sess. 4 (1981). Although periodic major revisions of the federal criminal law have been performed, such corrections were

however, suggests that Congress may prefer a criminal justice system that is dominated by ambiguous and overlapping statutes.

Congress' reluctance to enact narrower statutes is understandable once one appreciates the degree of perfection required. To eliminate the problem of discretion from criminal justice without eliminating some criminal justice in the process, Congress must draft statutes with two attributes: they must be seamless and they must not overlap. Seamlessness is necessary so that the great variety of human conduct that is or should be deemed criminal is proscribed. Without seamlessness, some patently harmful and malicious conduct would go unproscribed by statute. At the same time, the elimination of overlapping statutes is necessary to eliminate discretion: when definitions overlap, someone must exercise discretion. The only remaining choice for policymakers is which actor or actors should wield that discretion.

Thus, the call for better statutes is in effect a call that the legislature write seamless, nonoverlapping statutes. These requirements pull the drafter in precisely opposite directions. Clearly, if one is worried about

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limited to addressing flagrant inconsistencies. Thus, "[f]ederal criminal law has always remained a consolidation—a body of law drafted by different groups to deal with diverse problems on an ad hoc basis—rather than a uniformly drafted, consistently organized code." *Id.* Consider also the congressional testimony of Professor Herbert Wechsler, the chief reporter for the American Law Institute in its development of the Model Penal Code:

Preliminary studies left no doubt to us that the central challenge of the penal law inhered in the state of our penal legislation. Viewing the country as a whole, criminal law consisted of an uneasy mixture of fragmentary and uneven and fortuitous statutory articulation, common law concepts of uncertain scope and a miscellany of modern enactments passed on an ad hoc basis and frequently producing gross disparities in liability or sentence.

*Hearings, supra* note 170, at 522 (testimony of Herbert Wechsler, Director of the American Law Institute, Co-Reporter for the ALI's Model Penal Code).

As President Nixon once stated:

Over two centuries the Federal criminal law of the United States has evolved in a manner both sporadic and haphazard. Needs have been met as they have arisen. Ad hoc solutions have been utilized. Many areas of criminal law have been left to development by the courts on a case-by-case basis—a less than satisfactory means of developing broad governing legal principles.

Not unexpectedly with such a process, gaps and loopholes in the structure of Federal law have appeared; worthwhile statutes have been found on the books side by side with the unusable and the obsolete. Complex, confusing and even conflicting, laws and procedures have all too often resulted in rendering justice neither to society nor to the accused.

Laws that are not clear, procedures that are not understood, undermine the very system of justice of which they are the foundations.

*Id.* at 5 (statement of President Richard M. Nixon).

The Model Penal Code was the initial comprehensive attempt to reform and rationalize the federal criminal laws. Adopted by many states, at least in part, the code was never adopted by Congress, despite the efforts of the National Commission on Reform of Federal Criminal Laws (the Brown Commission) to institute reform. For more detailed accounts of the history of federal criminal code reform, see John L. McClellan, *Codification, Reform, and Revision: The Challenge of a Modern Federal Criminal Code*, 1971 DUKE L.J. 663; Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968); see also S. REP. NO. 225, 98th Cong., 1st Sess. (1983); S. REP. NO. 307, 97th Cong., 1st Sess. 14-16 (1981); NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE at xix-xx (statement of Hon. Edmund G. Brown).

seamlessness, then broad, overlapping statutes provide the easiest and safest method to be sure that no bad conduct goes unpunished. If one is more concerned about overlap, however, the obvious solution is narrow statutes that clearly do not and could not punish the same conduct. It is conceivable, in theory, that a brilliant legislature could devise statutes that are entirely seamless, or a code that has no overlaps. To expect any legislature to meet both goals in one legal system is unimaginable.<sup>177</sup>

In choosing between these two incompatible goals, Congress repeatedly has enacted broad criminal statutes. This preference is understandable. It is probably better to ignore one problem and address the other rather than to try to do both.<sup>178</sup> There is great danger in devising a second-best statutory system that only partially meets each goal, for discretion would coexist with the additional problem of insufficient criminal liability. Indeed, the tremendous breadth of our criminal statutes probably represents a rather sophisticated attempt by Congress to err on the side of overinclusion, accepting discretion as a concomitant evil.<sup>179</sup>

Thus, as long as Congress continues to write statutes that overlap, discretion will exist in the criminal justice system.<sup>180</sup> Repeated efforts to devise better statutes will tend to fail as a remedy for the problem of discretion.

## 2. Charging Guidelines

A second means of limiting the discretion and power of the prosecutor in the post-guidelines world would restrain prosecutorial discretion

177. See KENNETH C. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 15-21 (1969); H.L.A. HART, *THE CONCEPT OF LAW* 121-32 (1961) (noting that discretion is inevitable because of "the open texture of law").

178. Congress' apparent preference to write broad statutes not only gives the prosecutor power, with guidelines sentencing, to determine sentencing outcomes but may also, in the case of extreme breadth, raise due process problems. See, e.g., John C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 211-12 (1985).

179. Those who decry Congress' tendency to write overlapping statutes, see, e.g., Vorenberg, *supra* note 17, at 1567-68, may overlook the soundness reflected in Congress' preference to err on the side of overinclusion. Assuming that Congress understands its inability to write seamless statutes without risking leaving criminal conduct unproscribed, Congress' preference for ambiguity and breadth favors erring toward inclusiveness, thus leaving no harmful conduct unproscribed.

Even given this understandable preference, however, it may be true that Congress prefers to write unnecessarily broad statutes, particularly since it appears that Congress lacks any apparent incentive to write more narrowly. In other words, Congress could probably write more narrow statutes without seriously risking leaving loopholes for criminal activity. To arrive at a more narrow set of statutes, Congress should look to the work of the U.S. Sentencing Commission in revising statutory maxima to create more uniform sentences for similar crimes. See, e.g., U.S. SENTENCING COMM'N, *supra* note 175, at i-ix. This aspect of the Commission's mission has been mostly overlooked by commentators, yet could prove to be of lasting significance to criminal justice, in that the development of uniform statutory penalties for similar offenses could help eliminate the prosecutors' incentives to manipulate charges.

180. See Cox, *supra* note 7, at 387-89 (asserting that the "[o]vercriminalization," "[d]uplication," "[m]oral [e]xtremism," "[s]ocial [c]ontrol," and "[a]ntiquated [l]aw" inherent in criminal codes contribute to the breadth of prosecutorial discretion).

directly by using charging guidelines.<sup>181</sup> Charging guidelines could be implemented in basically one of two forms.<sup>182</sup>

First, charging guidelines could be prescriptive or regulatory in construction, similar to the sentencing guidelines.<sup>183</sup> Charging guidelines in this form would provide detailed considerations characterizing criminal conduct by type, seriousness, harm, and other notions.<sup>184</sup> Like judges under the sentencing guidelines, prosecutors would be required to adhere to the guidelines in devising charges except in extraordinary cases. Presumably, opportunities for exploitative or faithless behavior would be minimized and disparity diminished.<sup>185</sup>

The second method of instituting charging guidelines would be by adjudicated rules developed by courts through judicial review of prosecutorial charging decisions.<sup>186</sup> Because the standard of review for a

181. See, e.g., DAVID E. AARONSON ET AL., *THE NEW JUSTICE: ALTERNATIVES TO CONVENTIONAL CRIMINAL ADJUDICATION* 37 (National Inst. of Law Enforcement & Criminal Justice 1977); DAVIS, *supra* note 177; Schulhofer, *supra* note 156, at 755-57; James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651, 681-83; Donavan, *supra* note 91, at 991.

182. Various other specific forms of instituting controls on prosecutorial charging also have been proposed. These proposals include the imposition of formal or informal rules or customs devised by prosecutorial offices, Vorenberg, *supra* note 17, at 1543, or the direct supervisory review of subordinates' decisions, Frase, *supra* note 7, at 292-96. Whatever the source of the constraints on prosecutorial discretion, the constraints would fundamentally operate either as a prophylaxis, prohibiting abusive or wrongful charging decisions by channeling prosecutorial choices according to predetermined standards, or as a remedial tool, through judicial decisions directing that a wrongful exercise of the prosecutor's broad discretion is either punishable or requires restitution to its victim. Thus, for analytic purposes, it is useful to classify proposals to delimit prosecutorial discretion as either prophylactic or remedial.

183. See DAVIS, *supra* note 177, at 188-96 (discussing Germany's system of "obligatory" charging); NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, COURTS 20-26 (1973) (providing detailed criteria for screening defendants out of criminal prosecution); CALIFORNIA DIST. ATTORNEYS ASS'N, UNIFORM CRIME CHARGING STANDARDS (1974); Schulhofer, *supra* note 156, at 823-28 (providing "Model Sentencing Guidelines"); see also Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 25 (1971) (calling for publication of prosecution guidelines); Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 537-39 (1970) (discussing the need for structured controls on prosecutorial discretion). Professors Schulhofer and Nagel have also argued that the sentencing guidelines provide for close judicial analysis of a sentence imposed as a result of a plea negotiation in order to check prosecutorial charging discretion. Schulhofer & Nagel, *supra* note 114, at 239-41.

184. See NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, *supra* note 183, at 20-23; Charles W. Thomas & W. Anthony Fitch, *Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 507, 513-15 (1976).

185. See LaFave, *supra* note 183, at 535-39.

186. See NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, *supra* note 183, at 26 ("[T]he Commission does not believe that the reviewing court should address itself to the same issue that the prosecutor resolved; that is, whether under the applicable criteria, formal proceedings should be pursued. Rather, the reviewing court should merely determine whether the prosecutor's resolution of the matter was so unreasonable as to constitute an abuse of discretion. The Commission contemplates that courts would be reluctant to overturn a prosecutor's decision to screen a defendant and that it is unlikely that the opportunity to appeal to the court would be used frequently.").

lower court's factual findings would ordinarily be very deferential,<sup>187</sup> attempting to regulate prosecutorial discretion through the accumulation of judicial, case-by-case condemnation would develop quite slowly and at great expense.<sup>188</sup>

Proposals to reduce prosecutorial charging discretion might serve to control or channel prosecutorial conduct,<sup>189</sup> but they would not tend to eliminate discretion from the criminal justice system. Rather, charging guidelines would simply shift discretion to offenders. Just as the reduction of judicial discretion embodied in the sentencing guidelines carried the unintended effect of qualitatively increasing the power of the prosecutor to affix sentences, the contraction of prosecutorial discretion to charge would impart new significance to the discretion exercised by the criminal offender. Although offenders have always and desirably had complete discretion in choosing whether to engage in criminal conduct, charging guidelines would allow offenders to determine sentencing outcomes: the conduct chosen by the offender would translate automatically into a particular charge under the charging guidelines, which charge would in turn translate into a particular sentence under the sentencing guidelines.<sup>190</sup>

Inbuing the offender with determinative discretion in affixing sentences is both appealing and unappealing from a systemic perspective. The advantage of broadened offender discretion is that marginal deterrence might be enhanced. Assuming that would-be offenders consider the consequences of their actions prior to engaging in them,<sup>191</sup> specific

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187. *Id.*

188. This approach could also engender constitutional problems in maintaining the separation of powers between the branches. See Frederick Alexander et al., Project, *Sixteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1985-1986*, 75 GEO. L.J. 713, 859-69 nn.1044-45 (1987).

189. Many of these proposals to review prosecutorial charging decisions adopt an administrative model of review. See, e.g., DAVIS, *supra* note 177, at 219; Gifford, *supra* note 16, at 74-95.

190. Greater control over sentencing by offenders would also result from adoption of proposals to abolish plea bargaining. See, e.g., Alschuler, *Implementing the Criminal Defendant's Right to Trial*, *supra* note 53; Parnas & Atkins, *supra* note 167; *supra* note 167, for a discussion of proposals to abolish plea bargaining. Implicitly, such proposals include the idea that the prosecutor's charging discretion should be curtailed and thus unwittingly give the power over sentencing to the offender. If the converse is true, and plea bargaining is to be abolished while retaining prosecutorial charging discretion, then the prosecutor's ability to choose the defendant's sentence would be constrained solely by his power to convince a grand jury to indict and a petit jury to convict. See Parnas & Atkins, *supra* note 167, at 114-21 (suggesting a judicial hearing on "charge-setting" to address the problem of prosecutorial charging discretion after abolishment of plea bargaining). Therefore, abolishing plea bargaining without confronting prosecutorial and other discretion in the criminal justice system would lead to multiple undesired effects. See *infra* Part III.B.

191. Economists and sociologists have tested the ability of expected penalties to deter would-be offenders; it appears that the clear majority of studies have found that penalties do have measurable marginal deterrent effect. See NATIONAL RESEARCH COUNCIL, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 3-14 (Alfred Blumstein et al. eds., 1978) (offering cautious conclusion that the risk of sanctions does deter crime); Gordon Tullock, *Does Punishment Deter Crime?*, PUB. INTEREST, Summer 1974, at 103, 109

charging guidelines written in conformity with the extant sentencing guidelines would enable the would-be offender to predict accurately the punishment attached to particular behavior. Assuming that the punishments were sufficient to deter, as they should be,<sup>192</sup> then the rational criminal would choose not to engage in the criminal activity or would opt to commit a marginally less serious or harmful crime. Thus, to the extent charging guidelines would provide accurate information to the would-be offender, the message of deterrence that criminal penalties convey would be communicated more specifically and perhaps more effectively.

Charging guidelines would, however, be unappealing for several reasons. First, if charging guidelines are to enhance deterrence, they cannot leave room for offender manipulation because in combination with the extant sentencing guidelines, imperfect charging guidelines would render the offender's discretion unchecked. Offenders, particularly members of criminal organizations, would be able to exploit any discrepancies, drafting errors, or ambiguities in either of the two guidelines systems.

It is unlikely the guidelines' drafters could eliminate the overlaps and gaps that would allow manipulation by criminal offenders. As has been shown, the sentencing guidelines, despite their enormity and detail, have failed to curtail significantly the ambiguity of outcome in even a

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("Even granting the fact that most potential criminals have only a rough idea as to the frequency and severity of punishment, multiple regression studies show that increasing the frequency or severity of the punishment does reduce the likelihood that a given crime will be committed."). Much of this inquiry has centered on the deterrent effect of the death penalty, with differing results. Compare Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975) (supporting deterrence hypothesis) and Isaac Ehrlich, *Deterrence: Evidence and Inference*, 85 YALE L.J. 209 (1975) (same) with Hans Zeisel, *The Deterrent Effect of the Death Penalty: Facts v. Faiths*, 1976 SUP. CT. REV. 317.

It is not an exaggeration to claim that our entire system of criminal enforcement is based on the belief that would-be offenders do in fact behave according to perceived schedules of expected penalties. Hence, deterrence is an important reason why more damaging crimes are punished more severely, thus leading the offender to choose to commit less serious crimes. Differences in penalties create marginal deterrence. How offenders come to act according to these schedules of expected penalties is uncertain, there being no obvious "signallers" or intermediaries to communicate the expected differentials to the offenders, unlike the post-arrest context, where signallers are plentiful. Potential offenders probably acquire the information to shape their behavior from three sources: first, from the lore and legend of the street, *cf.* Tullock, *supra* at 109 (noting the prevalence of newspaper crime stories); second, for the recidivist, from experience; and third, by means of deliberate information acquisition. This last method appears to be a hallmark of organized crime, which seeks to maintain accurate information on the expected risks of behavior. The remarkable way in which drug dealers, for example, appear from popular accounts to structure their behavior to fit within certain legal definitions bears witness to the ability and self-interest law breakers have in acquiring and disseminating accurate legal information. Organized criminals also show their capacity for acquiring and using legal information by deliberately structuring their transactions in ways that reduce the risk of incarceration for the most valuable members of their organization. The economic basis for the formation of criminal organizations lies in the conjoining of interests for the purpose of maximizing benefits (through specialization) and minimizing risks (through the manipulation of legal outcomes).

192. See *infra* notes 195-202 and accompanying text.

simple case involving easily described conduct.<sup>193</sup> The drafters of charging guidelines would be hard-pressed to improve on the sentencing guidelines.

Second, even assuming that charging guidelines were well-drafted, they would probably, like the sentencing guidelines, derive their categories from the criminal code. The criminal statutes are broad and overlapping, and they form the link from the charge to the sentence through which all criminal prosecutions must pass. Specific sentencing guidelines are manipulable at bottom because they refer to statutes that permit prosecutors broad discretion in charging selection. Similarly, specific charging statutes would direct the prosecutor to the same broad statutes. Although the charging guidelines would restrict the prosecutor's discretion to choose among statutes, the offender could now manipulate the overlapping areas among statutes. Specifically, the offender could manipulate the charging guidelines to expose himself to conviction under a particular statute, and derivatively a particular sentence, when his conduct could have been punished under a number of different statutes greater in severity if the prosecutor retained the discretion to select the charge. Thus, the offender would enjoy the same discretion that the prosecutor now enjoys regarding charging with the identical opportunity for manipulation.<sup>194</sup> With the discretionary power of the judge and prosecutor largely terminated through mandatory guidelines, the offender could shape his criminal conduct to establish the parameters of the bargaining.

Offender control over sentencing carries several undesirable ramifications. First, by empowering the offender, the imposition of charging guidelines would encourage the offender to monetize crimes. They would give the offender more precise information regarding the cost of an offense discounted by the likelihood of detection. The would-be offender would be encouraged to act with economic rationality, weighing costs against benefits in deciding whether to commit the crime.<sup>195</sup>

This monetization process is the essence of the deterrence model.<sup>196</sup> It relies heavily on the adequacy of the deterring sanction.<sup>197</sup> Inadequate penalties would literally make crime pay.<sup>198</sup> Similarly, if the offender

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193. See *supra* Part II.B.1.

194. See *id.*

195. See Becker, *supra* note 79, at 176; Harvey S. Perlman & Carol G. Stebbins, *Implementing an Equitable Sentencing System: The Uniform Law Commissioners' Model Sentencing and Corrections Act*, 65 VA. L. REV. 1175, 1189 (1979).

196. See GERHARD O.W. MUELLER, SENTENCING: PROCESS AND PURPOSE 47-51 (1977); Becker, *supra* note 79, at 176-79; Stigler, *supra* note 93, at 530-31.

197. See JEFFREY S. PARKER, CRIMINAL SENTENCING POLICY FOR ORGANIZATIONS 36-40 (U.S. Sentencing Comm'n Staff Working Paper, 1988).

198. According to Thomas Hobbes,

If the harm inflicted be lesse than the benefit . . . that naturally followeth the crime committed . . . [it] is rather the Price . . . than the Punishment of a Crime: Because it is of the nature of Punishment, to have for end, the disposing of men to obey the Law; which

expects to extract atypically high gains from his crime, takes measures to reduce his chances of detection below the average,<sup>199</sup> or manipulates the guidelines,<sup>200</sup> the offender can render a generally adequate deterring sanction inadequate as it applies to him.<sup>201</sup> This danger of offenders' monetizing their criminal activities is of course present with any system of graduated penalties, but its likelihood of becoming a reality increases when costs are made more precise and are communicated to offenders. In part, deterrence in the criminal justice system may rely on the relative indeterminacy of sentencing outcomes, which is in large part a product of the intervening discretion of the prosecutor and judge.<sup>202</sup> Allowing offenders to determine outcomes without intervening discretion provides palpable incentives for offenders to shape their behavior to increase their gain to a degree substantially greater than in a system which allocates discretion to prosecutors and judges. It threatens to transform the criminal penalty system from one that "prohibits" to one that "prices."<sup>203</sup>

Finally, granting offenders the authority to determine their sentences would mean that offenders would control the allocation of prison space. The size of prison populations would be a direct product of the offenders' cumulative decisions to incur the risk of incarceration. Charging guidelines, in combination with sentencing guidelines, would render prosecutors and judges powerless to exercise discretion to refuse to charge, to modify charges, or to shape sentences so as to control prison populations. They would instead serve as executors of the offenders' decisions, automatically following administratively established and offender-initiated charging and sentencing outcomes.

Creating a system in which offenders control prison populations could have very damaging results. For example, if gross overcrowding required that prisoners be freed, the deterrent effect of incarceration

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end (if it be lesse than the benefit of the transgression) it attaineth not, but worketh a contrary effect.

THOMAS HOBBS, *LEVIATHAN* 215 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

The textual conclusion assumes that offenders are risk-neutral in regard to the combination of punishment and the probability of detection. See Polinsky & Shavell, *A Note on Optimal Fines*, *supra* note 41, at 618; Polinsky & Shavell, *The Optimal Tradeoff*, *supra* note 41, at 884-85 (discussing various detection and sanction combinations to account for the possibility that offenders may be risk-averse). To the extent that offenders are risk-preferring, then the supply of offenses might be more sensitive to a change in the probability of detection. See Schulhofer, *supra* note 16, at 48.

199. Lott, *supra* note 33, at 1311-12.

200. See *supra* text accompanying note 194.

201. See *supra* text accompanying note 194.

202. *But cf.* Easterbrook, *supra* note 17, at 293-94 (arguing that ambiguity may cause overdeterrence, causing wasteful avoidance of legal activity); Schulhofer, *supra* note 16, at 48 n.8 (summarizing inconsistent findings on the issue of whether ambiguity in fact encourages or discourages criminal activity); Vorenberg, *supra* note 17, at 1549-51 (questioning whether ambiguity does increase deterrence).

203. See John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 195-97 (1991).



would be alarmingly reduced: city-wide looting in situations where widespread lawlessness precludes routine law enforcement provides poignant evidence that would-be offenders react swiftly to the offer of punishment-free crime. With offenders controlling prisons, the market for crime would thus become like the classic economic "hog cycle," where all farmers react to price fluctuations in a similar manner, exacerbating those fluctuations through periods of glut and shortage. In terms of criminal markets, the supply of crimes would range from periods of relative stability to periods of extraordinarily high lawlessness.<sup>204</sup>

Thus, charging guidelines could remove discretion from the prosecutor but not from the criminal justice system. Charging guidelines would leave significant discretion with potential offenders. This development would desirably aid in the goal of communicating expected punishments to the offender, thus enhancing deterrence. However, this development would also carry more substantial undesirable ramifications, giving offenders the ability, by their chosen behavior, to fix sentencing outcomes, set bargaining parameters, and control prison populations. This powerful offender discretion, largely unbridled by prosecutorial or judicial discretion, would create opportunities for manipulation of the guidelines,<sup>205</sup> monetization of penalties, and exploitation of overpopulated prison conditions. After the introduction of charging guidelines, one could expect a spate of journal articles testifying to the abuses and unjust cases that pass through prosecutors' frustrated and powerless hands.<sup>206</sup>

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204. In periods of widespread lawlessness, probably the only way for the supply of crimes to be reduced would be if the public chose means other than traditional public law enforcement to procure protection. It would be difficult to control crime in high-crime periods by devoting more resources to traditional public enforcement methods because the supply of offenses might be very great, extending well beyond the public's capacity to build additional prisons quickly.

205. The prospect of offender discretion, brought about by charging guidelines to curtail prosecutorial discretion, would place an enormous burden on the guidelines' drafters to appreciate and eliminate the possibilities for manipulation by offenders. The chances that such a burden could be successfully carried are not good. As has been shown, the sentencing guidelines, despite their enormity and detail, have failed to curtail significantly the ambiguity of outcome in even a simple case involving easily described conduct. See *supra* Part II.B.1. The drafters of charging guidelines would be hard-pressed to improve on the sentencing guidelines' product. Moreover, in a regime featuring offender discretion, there is by definition no good faith of the would-be offender, tantamount to prosecutorial good faith, upon which the criminal justice system may rely to preclude egregious results.

206. Many federal judges have been quite critical of the guidelines, bearing witness to the unjust results the guidelines sometimes produce. See generally *United States v. O'Meara*, 895 F.2d 1216, 1222-23 (8th Cir.), *cert. denied*, 498 U.S. 943 (1990); *United States v. Roberts*, 726 F. Supp. 1359, 1367-68 (D.D.C. 1989) ("The real allocation now takes place in the back rooms of the U.S. Attorney's Office where typically a young prosecutor, sometimes with limited experience, decides on such subjects as whether to charge the defendant with a five-year or a twenty-year felony; whether to indict on a count calling for a consecutive sentence, or one without such a requirement; whether to include in the record, or not, that the defendant had a weapon at the time of the offense; and the like."), *rev'd sub nom.* *United States v. Doe*, 934 F.2d 353 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 268 (1991); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 164, at 133-43

### 3. "Real Offense" Sentencing

Another method<sup>207</sup> of addressing the problem of prosecutorial discretion in the shadow of the sentencing guidelines is to sever the connection between the statute of conviction and the penalty.<sup>208</sup> Overlapping statutes imbue the criminal justice system with discretion, but this discretion matters only if it affects the offender's punishment. If the connection between the statute and the sentence were severed, discretion would still be as prevalent in the criminal justice system, but the consequences of its exercise would essentially be avoided.

The connection between the offense and the penalty could be severed by adopting sentencing guidelines that affix penalties solely in response to the defendant's "real" or actual conduct regardless of the statute which comprised the charge and conviction.<sup>209</sup> Implementation of a real offense guidelines system may be impractical, however, given the

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(acknowledging that the sentencing guidelines are problematic and recommending consideration of modifications); Heaney, *supra* note 156 (arguing that guidelines sentencing raises due process and disparate impact concerns); Donald P. Lay, *Rethinking the Guidelines: A Call for Cooperation*, 101 YALE L.J. 1755 (1992) (urging reevaluation of the guidelines); Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 SYRACUSE L. REV. 681, 692 (1992) (noting that the guidelines foreclose consideration of individual differences and "abandon[ ] the rehabilitative model"); Steve Y. Koh, Note, *Reestablishing the Federal Judge's Role in Sentencing*, 101 YALE L.J. 1109 (1992) (arguing that the sentencing guidelines minimize judicial responsibility for consecutive sentencing).

207. There are ideas other than the three textual "solutions" for addressing the problem of prosecutorial discretion. See Cardenas, *supra* note 2 (advocating a role for crime victims in initiating prosecutions); Kenneth L. Wainstein, Comment, *Judicially Initiated Prosecution: A Means of Preventing Continuing Victimization in the Event of Prosecutorial Inaction*, 76 CALIF. L. REV. 727 (1988) (proposing a procedure to allow judges to initiate prosecution where the prosecutor fails to file charges).

Another idea is to use an "arbitration" system similar to that used to resolve salary disputes in major league baseball. In baseball, if a ballplayer files for arbitration in a dispute over his compensation, both the player and the club submit a price to the arbitrator. The arbitrator adjudges these bids in light of the market for ballplayers and the player's relative performance. Then, the arbitrator selects a price. This process could be implemented in the criminal context rather easily. In arbitrating criminal penalties, it would be the judge's job to select which of the sentencing offers better addresses the conduct in question and impose a sentence accordingly. By this method, the defendant would have a chance to characterize the case as would the prosecutor. Moreover, both sides would have incentives to select reasonable outcomes.

The problem with this approach in the criminal context might be the paucity of sentencing outcomes arrived at outside of this arbitration process. Unlike baseball, where arbitration of salaries is the exception and most contracts are arrived at through relatively unencumbered market transactions, in the criminal justice game, adjudications by plea are the rule and trial outcomes the exception. In addition, lacking a sensible market price for the sentence, judges would be largely unfettered and uninformed when picking a sentence, producing the very disparity the sentencing guidelines were designed to eliminate.

208. See, e.g., Tonry, *supra* note 133. For an overview of three models of criminal sentencing, see Alan M. Dershowitz, *Background Paper in TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING*, *supra* note 171, at 79-82 (classifying sentencing choices into a "legislatively fixed model," a "judicially fixed model," and an "administratively fixed model").

209. Professor Schulhofer has suggested a modified real offense sentencing scheme with the offense of conviction to "play some role in determining actual punishment." Schulhofer, *supra* note 156, at 758.

complexity of criminal conduct.<sup>210</sup> The Sentencing Commission attempted to construct such a sentencing system and, by its own admission, failed, citing "no practical way to combine and account for the large number of diverse harms arising in different circumstances."<sup>211</sup> Such a system would likely have produced very complicated and lengthy sentencing processes.<sup>212</sup> In fact, the Commission's effort produced sentencing schemes that "required the use of, for example, quadratic roots and other inathemathical operations that the Commission considered too complex to be workable," and that risked a "return to wide disparity in sentencing practice."<sup>213</sup>

Along with these considerable practical problems,<sup>214</sup> any plan to implement a real offense sentencing system would have constitutional ramifications. Sentencing that primarily hinges upon "real offense" factors is necessarily based on some conduct that has not been proven to a jury beyond a reasonable doubt. Rather, these sentencing factors are proven to a judge during the sentencing phase<sup>215</sup> and typically must meet only the preponderance of evidence standard of proof.<sup>216</sup> Due to this

210. For example,

[a] bank robber . . . might have used a gun, frightened bystanders, taken \$50,000, injured a teller, refused to stop when ordered, and raced away damaging property during his escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

U.S.S.G., *supra* note 10, at 4-5.

211. *Id.* at 5.

212. Breyer, *supra* note 113, at 11.

213. U.S.S.G., *supra* note 10, at 5.

214. For examples of other objections raised to "real offense" sentencing, see Tonry, *supra* note 133, at 1564-80.

215. See generally Breyer, *supra* note 113.

216. See *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986) (noting that sentencing courts traditionally have made findings with no prescribed burden of proof). The judge may make these findings without many of the usual procedural safeguards: "In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." U.S.S.G., *supra* note 10, § 6A1.3(a). Further, in light of *McMillan* and after the adoption of the sentencing guidelines in 1987, the great majority of federal circuits that have addressed the issue have ruled that the preponderance standard at sentencing satisfies constitutional standards. See, e.g., *United States v. Blanco*, 888 F.2d 907, 909 (1st Cir. 1989); *United States v. Guerra*, 888 F.2d 247, 250-51 (2d Cir. 1989), *cert. denied*, 494 U.S. 1090 (1990); *United States v. Urrego-Linares*, 879 F.2d 1234, 1237-38 (4th Cir.), *cert. denied*, 493 U.S. 943 (1989); *United States v. Angulo*, 927 F.2d 202, 204-05 (5th Cir. 1991); *United States v. Carroll*, 893 F.2d 1502, 1506 (6th Cir. 1990); *United States v. White*, 888 F.2d 490, 499 (7th Cir. 1989); *United States v. Frederick*, 897 F.2d 490, 491-93 (10th Cir.), *cert. denied*, 498 U.S. 863 (1990); *United States v. Alston*, 895 F.2d 1362, 1372-73 (11th Cir. 1990). Additionally, nearly every district court that has addressed the question has adopted the preponderance standard. See *Frederick*, 897 F.2d at 493 & n.2 (citing the results of the court's research on this issue).

Only one circuit has held, see *United States v. Kikumura*, 918 F.2d 1084, 1098-102 (3rd Cir. 1990), and only two have suggested, *United States v. Townley*, 929 F.2d 365, 369-70 (8th Cir. 1991); *United States v. Restrepo*, 946 F.2d 654, 661 & n.12 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1564

lower burden of proof on sentencing factors, defendants sentenced under a real offense system may receive additional prison time for uncharged prior criminal activity,<sup>217</sup> for counts that were dismissed prior to trial,<sup>218</sup> or even on counts on which the defendant was acquitted by the jury,<sup>219</sup> provided that the sentencing judge finds to the requisite degree of certainty that the defendant acted as alleged. In addition, serious sentencing factors, such as the possession of a weapon, may provide ample additions to the penalty even though the possession of a gun was not part of the prosecution's proof at trial.<sup>220</sup>

Any system of criminal sentencing that pervasively relied upon these nonadjudicated real sentencing factors to determine outcomes would implicate the defendant's constitutional due process rights.<sup>221</sup> Due pro-

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(1992), that a clear and convincing standard is appropriate when the relevant conduct offered at sentencing would dramatically increase the sentence. However, these circuits recognize that the preponderance standard ordinarily applies. See *Kinder v. United States*, 112 S. Ct. 2290, 2291-92 (1992) (White, J., dissenting from denial of petition for writ of certiorari) (citing *United States v. McDowell*, 888 F.2d 285, 290-91 (3rd Cir. 1989); *United States v. Sleet*, 893 F.2d 947, 949 (8th Cir. 1990); *United States v. Wilson*, 900 F.2d 1350, 1353-54 (9th Cir. 1990)).

217. *United States v. Wright*, 873 F.2d 437, 441-42 (1st Cir. 1989) (upholding trial court's consideration in sentencing allegations that defendant had "held" cocaine for pay on prior uncharged occasions).

218. *Blanco*, 888 F.2d at 909 (upholding inclusion of quantities of drugs from dismissed counts in determining base offense level for counts to which defendant pled guilty).

219. *United States v. McKenley*, 895 F.2d 184 (4th Cir. 1990) (holding that a prior insanity-based acquittal on other charges may be used as the basis for an upward departure because such verdicts establish that the defendant did commit the act charged); *United States v. Isom*, 886 F.2d 736, 738 (4th Cir. 1989) ("A verdict of acquittal demonstrates only a lack of proof beyond a reasonable doubt; it does not necessarily establish the defendant's innocence. Therefore, we cannot conclude that Isom's acquittal of the counterfeiting count established that he lacked any intent to defraud.") (footnote omitted); *United States v. Miller*, 874 F.2d 466, 469 (7th Cir. 1989) (predicting that "it will become the usual practice to include in presentence reports sufficient detail about prior criminal conduct, including that not resulting in conviction, in order to assist the court in determining 'the variations in the seriousness of criminal history that may occur.'") (citation omitted). See generally William J. Kirchner, Note, *Punishment Despite Acquittal: An Unconstitutional Aspect of the Federal Sentencing Guidelines?*, 34 ARIZ. L. REV. 799 (1992). But see *United States v. Brady*, 928 F.2d 844, 851 (9th Cir. 1991) ("We would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted.").

220. The pervasive problems posed by the reduced standard of proof at sentencing continue under the guidelines. To the extent that sentencing under this proposal would be based more on "real offense" factors, as opposed to the elements of the statutory offense which must be proved beyond a reasonable doubt, then the problematic use of unproven factors to punish offenders would be increased. To the extent that the sentencing guidelines allow sentencing based on factors not established beyond a reasonable doubt, they simply embody past practice. See *United States v. Grayson*, 438 U.S. 41, 50 (1978) ("Of course, a sentencing judge is not limited to the often far-ranging material compiled in a presentence report. '[B]efore making [the sentencing] determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.'" (quoting *United States v. Tucker*, 404 U.S. 443, 446 (1972))) (alteration in original).

221. Other constitutional rights might also be transgressed. See Benjamin E. Rosenberg, *Criminal Acts and Sentencing Facts: Two Constitutional Limits on Criminal Sentencing*, 23 SETON HALL L. REV. 459 (1993) (considering defendants' right to a jury trial in addition to due process concerns).

cess requires that "the accused [be protected] against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."<sup>222</sup> The Supreme Court has stated that a legislature may not redefine the elements of a crime and characterize them as sentencing factors to avoid due process proof requirements.<sup>223</sup> The Supreme Court has found a constitutional violation where the sentencing factor increased the maximum punishment from eighteen months to six years in a case involving a juvenile.<sup>224</sup> The massive redefinition of statutory elements as sentencing factors that would result from the adoption of a real offense sentencing scheme might create sufficient additional penalties to violate due process.<sup>225</sup> Thus, due process concerns weigh in favor of a requirement that federal sentencing be substantially statutory-offense based.<sup>226</sup>

In addition to due process concerns, imposition of a real offense sentencing system could pose other threats to the integrity of the judicial process. Under real offense sentencing, legislative choices in devising statutes, or prosecutorial choices in indicting under them, bear little rela-

222. *In re Winship*, 397 U.S. 358, 364 (1970). This protection includes the requirement that every element of the crime be similarly proven. *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

223. *Mullaney*, 421 U.S. at 698; see also *McMillan v. Pennsylvania*, 477 U.S. 79, 89 (1986). *Mullaney* involved a Maine statute that created a presumption that a defendant charged with murder acted with malice aforethought. The state argued that once a defendant is convicted of homicide, the determination of whether the crime was murder or manslaughter is merely a sentencing inquiry, unconstrained by the conviction standard of proof beyond a reasonable doubt. In finding the Maine statute unconstitutional, the Supreme Court held that malice aforethought is a primary element of murder and is thus subject to the criminal proof requirement.

[The government's] analysis fails to recognize that the criminal law of Maine, like that of other jurisdictions, is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. Maine has chosen to distinguish those who kill in the heat of passion from those who kill in the absence of this factor. Because the former are less "blameworthy," they are subject to substantially less severe penalties. . . .

The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly . . . [and] may be of greater importance than the difference between guilt or innocence for many lesser crimes.

Moreover, if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. *It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.*

*Mullaney*, 421 U.S. at 697-98 (emphasis added) (citation omitted) (some alteration in original).

224. *Winship*, 397 U.S. at 360-61.

225. See *United States v. Restrepo*, 946 F.2d 654, 664-79 (9th Cir. 1991) (Norris, J., dissenting).

226. An advantage of hinging the penalty on the crime of conviction is that one is confident beyond a reasonable doubt that the defendant performed all the conduct that is punished. These "elements" of the crime are proved to the highest standard of the law. "[A] person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." *Winship*, 397 U.S. at 363 (citation omitted) (some alteration in original).

tion to the penalty imposed. Unfortunately, curtailing the importance of the statute also curtails the importance of the conviction and thus is a major inroad into the role the jury plays in protecting defendants from the government. The rational prosecutor could indict and seek conviction under the least serious statute, waiting until the sentencing phase with its low burden of proof to prove the facts necessary to ensure an ample penalty against the defendant. These sentencing determinations would not be bound by the rules of evidence,<sup>227</sup> the criminal burden of proof,<sup>228</sup> or other criminal trial protections.

The locus of discretion after the introduction of a real offense sentencing system would depend upon the guidelines' specificity. If broad and overlapping, discretion would again rest with the judge.<sup>229</sup> If detailed, control over the sentence would move to the offender, bypassing the prosecutor, whose charging decisions would be rendered of little significance, as with the introduction of proposed charging guidelines.<sup>230</sup> In short, real offense sentencing would prevent prosecutors from exercising meaningful discretion. However, it would provide no remedy to the problem of systemic discretion in the criminal justice system.

### B. *A Proposal for Doing Justice in a Fallen World*

Discretion inheres in the criminal justice system not only because Congress is inclined to devise overlapping statutes but also because it is simply impossible to draft a seamless, nonoverlapping code. The question that remains is who shall exercise that discretion. Currently, sentencing guidelines constrain judicial discretion, making prosecutorial discretion in charging paramount in most instances. In the shadow of the sentencing guidelines, the prosecutor's power to affix sentencing ranges reigns untrammelled.

Because imprecise statutes make discretion unavoidable, the problem with prosecutorial control over plea bargaining and sentencing outcomes lies not simply in the mere existence of discretion but in the allocation of discretion. As Part III.A demonstrates, however, commonly suggested remedies to the concentration of discretion in the prose-

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227. See FED. R. EVID. 1101(d)(3); *United States v. Jarrett*, 705 F.2d 198, 208 (7th Cir. 1983), *cert. denied*, 465 U.S. 1004 (1984).

228. See, e.g., *McMillan v. Pennsylvania*, 477 U.S. 79 (1986); *United States v. Fatico*, 603 F.2d 1053 (2d Cir. 1979) (observing that applying a criminal burden of proof to sentencing hearings would turn those hearings into "second trials"), *cert. denied*, 444 U.S. 1073 (1980).

229. This discretion would rest with the judge if the "real offense" sentencing guidelines were ambiguous, as would likely be the case. See *supra* text accompanying notes 210-13. If they were written without ambiguity or with very little ambiguity, then the imposition of "real offense" sentencing guidelines would transfer discretion to the prosecutor unless the prosecutor were restricted by charging guidelines, whereupon meaningful discretion would be transferred to the offender.

230. See *supra* Part III.A.2.

ctor either are impracticable or simply shift discretion to other actors, providing opportunities for exploitative behavior.

The most effective and realistic method of dealing with discretion in the criminal justice system is to disperse it among the relevant actors so that no one actor is able to set sentences unilaterally. Because concentration of discretion has resulted from the introduction of guidelines, dispersal of discretion should result from the elimination or relaxation of those same guidelines.<sup>231</sup>

The best way to disperse discretion is to abolish the requirement that judges adhere to sentencing guidelines. Restoring judicial discretion would allow the discretion exercised by offenders in choosing their crime, prosecutors in charging, and judges in sentencing, to influence the final disposition of the case. In sentencing prior to the guidelines, judges apparently did consider the offender's conduct along with the prosecutor's charge.<sup>232</sup> Likewise, offenders selected a course of criminal conduct in light of expected harms,<sup>233</sup> a product of prosecutorial reaction and judicial pronouncement. Finally, prosecutors considered conduct and potential sentences in making charging decisions.<sup>234</sup> In short, the discretionary decisions of all three actors<sup>235</sup> played a significant role in determining outcomes. All were relevant to resolving adjudications by plea settlement. Reestablishing such a dispersal of discretion would preclude any single actor from manipulating plea outcomes.

A return to judicial discretion in sentencing offers several other

231. As Professor Zimring noted presciently in 1977:

The paradox of prosecutorial power under determinate sentencing is that exorcising discretion from two of the three discretionary agencies in criminal sentencing does not necessarily reduce either the role of discretion in sentence determination or the total amount of sentence disparity. Logically, three discretions may be better than one. The practical lesson is that no serious program to create a rule of law in determining punishment can ignore the pivotal role of the American prosecutor.

FRANKLIN E. ZIMRING, *A CONSUMER'S GUIDE TO SENTENCING REFORM* (1977), *quoted in* ZIMRING & FRASE, *supra* note 2, at 933-37.

232. See U.S. SENTENCING COMM'N, *supra* note 12, at 48 (stating that, prior to the guidelines, "[a]lthough they may heavily influence him, the agreements that are reached [between prosecutors and defendants] usually do not materially constrain the judge"). This study sampled over 11,000 criminal adjudications in the federal system, finding that sentences and time served tended to vary according to the "real" offense factors and not just according to the charge of conviction. *Id.* at 27-39; see also STANTON WHEELER ET AL., *SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 19-22* (1988) (finding that judges consider a wide range of factors in sentencing, including both blameworthiness and utilitarian concerns); Schulhofer & Nagel, *supra* note 114, at 239-40 ("[A] charge reduction plea agreement rarely constrained the judge's ability to consider all the background circumstances of the 'real offense,' and to set an appropriate sentence accordingly. In short, the single most important feature of the plea agreement process in federal courts, prior to the Federal Sentencing Guidelines, was the judge's principal role of fixing the sentence after the guilty plea.") (footnote omitted).

233. See, e.g., Steven Shavell, *Deterrence and the Punishment of Attempts*, 19 J. LEGAL STUD. 435, 438-42 (1990).

234. See, e.g., 8 THE DEPARTMENT OF JUSTICE MANUAL §§ 9-27.300, 9-27.320 (1992-1 Supp.).

235. Other actors also exercise discretion in the system, most notably police officers. See DAVIS, *supra* note 177, at 222.

advantages over mandatory sentencing guidelines.<sup>236</sup> First, judges may collectively set better sentences than the guidelines. When set by the judiciary, sentences are established incrementally, involving the decisions of many judges considering offenses in a variety of circumstances. Judges can consider the offender's culpability and the offense's gravity and harm in individual cases. Collectively, judges can also establish a broad price for each crime, creating the parameters for plea bargaining. The apparent superiority of judge-made sentences is demonstrated most poignantly by the Sentencing Commission's decision to use the averages of existing judicial sentences as its starting point when called upon to devise appropriate and fair criminal penalties.<sup>237</sup>

Second, judge-made sentences are flexible. Judges' sentences can evolve in response to the changing needs of deterrence as the incidence of a particular crime increases or decreases. Judges can also allow sentences to vary as community opinion shifts and as prosecutorial initiatives change. The guidelines preclude such evolution and flexibility. Instead, they represent a snapshot of that evolution: the sentencing averages at one point in time are now permanent law. Although Congress and the Sentencing Commission can certainly amend the guidelines, the drafters of amendments cannot avail themselves of the accretional evolution of sentences established in a market shaped by a large body of geographically and temperamentally diverse federal judges. This market is gone, replaced by judges who dutifully sentence in accordance with prescribed outcomes. Today, changes in the length of criminal sentences occur not by evolution but by decree,<sup>238</sup> at the behest of, and informed by, the judgments of a panel of seven people, the majority of whom may have little practical experience dealing with criminal defendants.<sup>239</sup>

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236. This Article does not address the impact of sentencing guidelines on the amount of judicial time they require for administration. A recent study reports ambiguous findings. Terence Dunworth & Charles D. Weisselberg, *Felony Cases and the Federal Courts: The Guidelines Experience*, 66 S. CAL. L. REV. 99 (1992). A comprehensive examination of the issue of the administrative cost of guidelines sentencing should include consideration of the savings to the system brought about by the guidelines' streamlining of plea negotiation.

237. See U.S.S.G., *supra* note 10, at 3-4.

238. See Breyer, *supra* note 113, at 18; Freed, *supra* note 111, at 1720, 1725. For additional criticisms on the methodology that the Commission has employed in devising the guidelines, see Michael K. Block, *Corporate Sentencing Guidelines: A Troubled Future*, in THE SENTENCING GUIDELINES TAKE HOLD (Roger Pilon & John R. Lott, Jr. eds., forthcoming 1994); David A. Lombardero, *The United States Sentencing Guidelines: Evolution of the Initial Set of Guidelines and Early Revisions*, in THE SENTENCING GUIDELINES TAKE HOLD, *supra*; John R. Lott, Jr., *Will Consumers Be Haunted by the U.S. Sentencing Commission Corporate Guidelines?*, in THE SENTENCING GUIDELINES TAKE HOLD, *supra*; Jeffrey Standen, *Prolegomenon to Corporate Punishment*, in THE SENTENCING GUIDELINES TAKE HOLD, *supra*. These papers were given at a conference entitled "Corporate Sentencing: The Guidelines Take Hold," held by the Cato Institute's Center for Constitutional Studies on October 31, 1991.

239. The membership of the Sentencing Commission must always include three Commissioners who are also federal judges. 28 U.S.C. § 991(a) (1988). For a discussion of the Commission's initial



Third, returning sentencing discretion to judges would allocate equal plea bargaining advantages to both prosecutors and defendants. Within the broad parameters set by judicial sentences, each party to the plea bargaining process could determine the market penalty for the case and discount it according to its likelihood. The parties could then negotiate freely and vigorously to resolve any dispute over the likely outcome while relying on judicial determination of the price to preclude substantially the other party from oppressive or faithless behavior in bargaining.

Judicial sentencing need not be completely unguided, however, to realize the benefits of dispersed discretion. Thus, this Article proposes abolishing only the mandatory nature of the guidelines, not the guidelines themselves: a complete return to the past is unnecessary.<sup>240</sup> Far from being useless, the snapshot provided by sentencing guidelines informs judges of the collective judgments of their peers in cases of substantial similarity. Thus, the guidelines serve a valuable informational function. They could be even more useful if they were recalculated and revised periodically to reflect judicial evolution. In short, the sentencing guidelines should be descriptive, not prescriptive.

Two commentaries, that of the Federal Courts Study Committee and that of Professor Alschuler, have suggested that the sentencing guidelines could be altered to be less mandatory, permitting somewhat broader room for judicial departures from prescribed sentences.<sup>241</sup> These intermediate proposals, however, would fail to remedy the serious problems that motivated them.

The Study Committee's report calls for "serious consideration" of the notion that the guidelines "not be treated as compulsory rules but rather, as general standards that identify the presumptive sentence."<sup>242</sup> It does not appear likely, however, that rendering the mandatory guidelines "presumptive" would resolve the problems to which the Committee referred in support of its proposal.<sup>243</sup> Sentencing under presumptive guidelines would likely require the same amount of judicial time as sentencing under the mandatory guidelines, perhaps even more given the

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membership, see Freed, *supra* note 111, at 1741-45 (criticizing the original membership, which did not include anyone who had extensive, "high-volume" experience sentencing offenders or other significant experience in sentencing reform).

240. Prior to the passage of the Sentencing Reform Act of 1984, federal district courts had virtually unfettered discretion in imposing criminal sentences and were constrained only by statutory maxima and minima. *Dorszynski v. United States*, 418 U.S. 424, 436-45 (1974). The courts of appeals rarely required the trial courts to state reasons for the sentences they imposed. *United States v. Bazzano*, 712 F.2d 826, 838-39 (3d Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984); *United States v. Vasquez*, 638 F.2d 507, 533-34 (2d Cir. 1980), *cert. denied*, 450 U.S. 970, and *cert. denied*, 454 U.S. 847, and *cert. denied*, 454 U.S. 975 (1981); *United States v. Garcia*, 617 F.2d 1176, 1178 (5th Cir. 1980).

241. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 164, at 133-39; Alschuler, *supra* note 133, at 941-49.

242. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 164, at 135-36.

243. *Id.* at 137-39.

need to articulate reasons for departures sufficient to withstand appellate review. Indeed, if departures became more frequent, appeals would probably become more difficult as the reasons justifying a departure would be particularly unsusceptible to resolution as a matter of law. Just as the mandatory guidelines create undue "rigidity,"<sup>244</sup> the institution of presumptive guidelines and the concomitant body of appellate decisions would eventually lead to a body of binding legal rules as complete and complex as the guidelines themselves.

Finally, presumptive guidelines and the probable complex body of appellate decisions interpreting them would not alleviate the "disruption" and "hidden bargaining"<sup>245</sup> caused in part by the current mandatory guidelines. Even if the rules were less specific, prosecutors could wield much the same control over sentences and plea bargaining as under the present regime, assuming that legislative rules or appellate precedent would dictate a relatively narrow sentencing range for each charge. In short, even regulations which somewhat loosely dictate the outcomes of judicial sentencing would engender the same problems that motivated the Committee to decry mandatory guidelines and probably to the same degree.

In a proposal substantially similar to that of the Federal Courts Study Committee, Professor Alschuler has suggested that the Sentencing Commission describe a series of "normal" cases and sentencing outcomes to bind judges. Judges who depart from the prescribed sentence would have to explain why their case differed from the "normal" one, and the decision would be reviewable on appeal.<sup>246</sup> It is difficult to see how this system would differ significantly from the present one. The present sentencing guidelines purport to describe "heartland" cases;<sup>247</sup> judges may depart from these guidelines where the guideline fails to take into account some particular unusual factor;<sup>248</sup> and sentencing decisions under the guidelines are appealable.<sup>249</sup>

In fact, to the extent that Alschuler's proposal does involve a change, it might present a change for the worse. In his vision, the Sentencing Commission would be called upon to describe and sentence a hypothetical offender, all without the benefit of adversarial presentation, witnesses, live appearances, or experienced judgment. The resulting hypothetical case resolutions would probably not be any more helpful in solving difficult sentencing problems in actual courtrooms than the present guidelines. In addition, the impersonal pronouncements of specific

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244. *See id.* at 137.

245. *See id.* at 137-38.

246. Alschuler, *supra* note 133, at 941-49.

247. *See supra* note 145.

248. U.S.S.G., *supra* note 10, § 5K2.0.

249. 18 U.S.C. § 3742 (1988 & Supp. IV 1992).

sentences might underestimate the importance of trial judges' observations in selecting sentences along a range. Like the Study Committee's proposal, Alschuler's idea to broaden initial sentencing rules would lead first to difficult fact-centered appeals and later to a group of detailed rules governing departures from the "normal" case. Moreover, affixing sentencing outcomes, even by virtue of somewhat broader standards, entails a substantial loss of the virtues of judicial sentencing outlined in the text, including its incremental nature, its flexibility to meet changing needs, and its encouragement of fair resolution of adjudications through bargained-for guilty pleas.

Despite these proposals' shortcomings, which would lead to substantial constraints on judicial sentencing discretion, both the Study Committee and Alschuler argue that judges should have greater latitude to depart from guidelines sentences.<sup>250</sup> Although greater judicial discretion than currently exists is generally a good idea, and might temporarily mollify some of the harsh effects evident in the current regime, the proposals for "presumptive standards" or "normal" sentencing schemes would become fundamentally mandatory. Thus, these proposals would leave discretion largely in the hands of prosecutors with the deleterious results observed today.

If discretion is unavoidable, then its dispersal provides the best means of alleviating its potential for doing harm. Returning discretion to the judge would accomplish this goal. But retaining informational sentencing guidelines would help bring structure and consistency to sentencing, while diminishing disparity by the moral force they would exert on judges to adhere to their parameters or state reasons for a departure. Rendering the guidelines just guides, and not fetters, would significantly disperse the system's discretion in the best manner practically possible.

### CONCLUSION

In the shadow of the sentencing guidelines, traditional plea bargaining will soon be an historical curiosity. When judges controlled sentences, prosecutors and defense counsel bargained within a predictable range of judicial sentencing outcomes. They still bargain today, except that now the prosecutor, not the judge, decides in which range the bargaining will occur. Thus the prosecutor, through his charging decisions, has the power to determine the possible sentence. The outcome of the bargaining game is fixed before the first ball is thrown.

It was predictable that an attempt to control the discretion inherent

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250. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 164, at 135 (noting that critics have suggested to the Committee that the guidelines be made presumptive and not mandatory); Alschuler, *supra* note 133, at 945 ("When a judge could reasonably distinguish the case before him or her from a 'normal case' treated in the guidelines, he or she should be permitted to choose a different sentence.").

in the criminal justice system by trying to eliminate one facet of it, as was attempted with the Sentencing Guidelines, would have the harmful consequence of merely concentrating its exercise in the hands of another actor. The guidelines transfer the power of the judge to the prosecutor. Today the situation is ripe for the full realization of the problems that inhere in the prosecutorial function, including the problems of agency, and more importantly the problems of monopsony. Proposals to address this problem by limiting prosecutorial discretion would merely, and unfortunately, transfer abusive discretion to the offender.

Rather than essaying vain attempts to eliminate discretion, the better approach is to disperse it. It would be better to return to the past, to a system where the accumulated decisions of judges set the parameters of plea bargaining, precluding prosecutors from exploiting their monopsonies. It would be better to accommodate and disperse the discretion that ineluctably inheres in any body of statutes that must, for the sake of completeness, describe conduct in ways that overlap, than to live with a system of criminal justice that, in the name of eliminating discretion, enables those hired to prosecute criminals also to judge them.

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