

PROSECUTORIAL DISCRETION, JUSTICE, AND COMPASSION: REESTABLISHING BALANCE IN OUR LEGAL SYSTEM

Anna D. Vaynman* & Mark R. Fondacaro**

I. INTRODUCTION

The decentralized balance of power between the judiciary, prosecution, defense, law enforcement, and jury is a significant strength in the design of our criminal justice system. A fair and balanced division of power serves to promote stability and legitimacy.¹ The division itself limits the potential for abuse by individuals, individual institutions, or branches of government. In our highly adversarial criminal justice system, there exists a delicate balance of powers, one that has in recent years begun to tilt in one direction. Specifically, scholars and practitioners alike

* © 2022, All Rights Reserved. Ph.D. Candidate at John Jay College of Criminal Justice, CUNY. The author holds a Master's degree in Psychology from John Jay College, and a Bachelor of Arts degree in Psychology from Barnard College, Columbia University.

** © 2022, All Rights Reserved. Ph.D., Clinical Psychology, Indiana University-Bloomington; J.D., Columbia University School of Law; B.A., Psychology with a concentration in Biological Sciences, Stony Brook University. The author is a Professor of Psychology at John Jay College of Criminal Justice and former Director of the Doctoral Training Program in Psychology & Law at John Jay College of Criminal Justice and the Graduate Center, CUNY. Before joining the faculty at John Jay, he was an Associate Professor of Psychology at the University of Florida and an Associate Director of the Levin College of Law's Center on Children and Families. He also pursued post-doctoral training in Social Ecology at Stanford University. During the spring 2022 semester, he was on sabbatical leave with research appointments at both Vanderbilt and Yale Law Schools. We would like to express our gratitude to Christopher Slobogin for his insightful comments and feedback on an earlier draft of this Article. We would also like to thank Tommi Mandell for her assistance with bluebooking the footnotes for this Article.

1. See generally Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375 (2006); Richard Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1, 54 (1973) (arguing that "overcriminalization and overcentralization are linked"); Eryn M. Elliot & Frank P. Williams III, *When You No Longer Need Maslow: Exchange, Professionalism, and Decentralization in the Management of Criminal Justice Agencies*, 19 PUB. ADMIN. Q. 74 (1995) (arguing from a behavioral perspective that decentralization encourages professionalism, improves performance and productivity, and increases employee satisfaction, despite the potential disadvantage of fragmentation and isolation which could potentially weaken communication).

are growing increasingly concerned that prosecutorial discretion has grown unfettered, giving prosecutors far more power than would be expected in a balanced system.² With the rise of plea bargaining,³ which is notoriously shrouded in secrecy, power has shifted away from the judiciary and has become concentrated in the hands of individual prosecutors. Because pleas are not subject to the same level of scrutiny as trials, a jury's power to prevent government overreach and a judge's power to demand thorough and meticulous examination of evidence are fading—and more importantly, tipping the balance of power toward the prosecution.⁴

The reason that this imbalance is raising alarm bells is not specifically a concern with prosecutorial discretion, per se. We argue that the imbalance itself is a threat to the legitimacy of the justice system as a whole because legitimacy is a natural outgrowth of trust, and trust is an outgrowth of perceived balance and fairness within the system.⁵ We suggest that concerns about prosecutorial discretion should *not* push reformists to campaign to

2. See Lauren O'Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394, 395–97 (2010) (discussing the pivotal role of prosecutorial discretion and reviewing the limited research on certain prosecutorial charging behavior); Robert H. Jackson, Sup. Ct. Just., Address at Conference of United States Attorneys: The Federal Prosecutor (Dec. 1, 1940), in 24 J. AM. JUD. SOC'Y 18 (1940), <https://www.roberthjackson.org/speech-and-writing/the-federal-prosecutor/> (“The prosecutor has more control over life, liberty, and reputation than any other person in America”); Brian Forst, *Prosecution*, in CRIME: PUBLIC POLICIES FOR CRIME CONTROL 509, 515–19 (James Q. Wilson & Joan Petersilia, eds., 2002); Derek A. Jordan, *The Potential Dangers of Prosecutorial Discretion*, BARNES LAW LLP (July 5, 2016), <https://www.barneslawllp.com/blog/potential-dangers-prosecutorial-discretion> (discussing the potential dangers of prosecutorial discretion from the perspective of a constitutional, civil trial, and criminal tax lawyer).

3. According to the Bureau of Justice Assistance in the Department of Justice, the overwhelming majority of cases are resolved through plea-bargaining. See Lindsey Devers, *Plea and Charge Bargaining, Research Summary 1* (2011), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf> (providing data to show that approximately 90%–95% of cases are resolved through pleas instead of trials).

4. See generally Michael A. Simons, *Prosecutorial Discretion in the Shadow of Advisory Guidelines and Mandatory Minimums*, 19 TEMP. POL. & C.R. L. REV. 377 (2010) (discussing the growth of prosecutorial discretion in light of sentencing guidelines).

5. Legal scholars describe trust as a cornerstone of legitimacy. See Mike Hough et al., *Procedural Justice, Trust, and Institutional Legitimacy*, 4 POLICING: J. POL'Y & PRAC. 203, 204–05 (2010) (arguing that public trust in policing is needed because it results in institutional legitimacy and public commitment to rule of law); J. A. Hamm, R. Trinkner & J. D. Carr, *Fair Process, Trust, and Cooperation: Moving Toward an Integrated Framework for Police Legitimacy*, 44 CRIM. JUST. & BEHAV. 1183–212 (2017) (describing trust as a critical contributor to administration of justice); MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 1* (1981) (explaining the logic of the “triad” of courts (i.e., three independent parties) as central to trust in and legitimacy of the system: “The root concept employed here is a simple one of conflict structured in triads. . . . And from its overwhelming appeal to common sense stems the basic political legitimacy of courts everywhere.”).

eliminate discretion, but rather to redistribute and guide it in an effort to regain balance. The purpose of this Article is not to blame one side of the adversarial system or to suggest that prosecutors are poorly doing their jobs. Truly, there is plenty of blame to go around. Rather, the purpose of this Article is to highlight the importance of prosecutorial discretion as a potentially valuable tool, to try to understand how and why it creates potential for abuse, and to provide suggestions for recreating a balance of power.

Part II of this Article defines the scope and history of prosecutorial discretion and how it relates to other branches of government. Part III outlines potential abuses of prosecutorial discretion and the inefficacy of primarily focusing on the personal shortcomings of prosecutors to understand and remedy the abuse of prosecutorial discretion. Part IV takes a more systematic approach and examines how sentencing reforms helped tip the balance of power in the criminal justice system away from judges and juries and towards the prosecution. Part V analyzes concerns about a “trial penalty” and examines factors contributing to why most cases (approximately 95%) never make it to trial and are instead resolved through a guilty plea.⁶ Part VI identifies the balance of power between the prosecution, defense, judges, and juries as an essential feature of the public trust and legitimacy of the criminal justice system. Part VII closes with recommendations for guidelines aimed at recentering the balance of power such that the tension between the powers of all those involved promotes just outcomes.

II. WHAT IS PROSECUTORIAL DISCRETION AND HOW DOES IT AFFECT OTHER BRANCHES OF GOVERNMENT?

Defining prosecutorial discretion is tricky because it is often defined in relation to its context. Discretion is not the same as unlimited power, *per se*; it is the ability to choose from an array of options.⁷ Understanding discretion as an ability to choose only from available options makes it impossible to think of discretion

6. Mirko Bagaric, Julie Clarke & William Rininger, *Plea Bargaining: From Patent Unfairness to Transparent Justice*, 84 MO. L. REV. 1, 25 (2019).

7. See Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 175–76 (2019), for comprehensive analysis of the difference between power and discretion, and discussion of discretion in comparison to other actors in the legal system.

outside the context of those options. For example, in terms of case selection, prosecutors have the discretion to select cases to investigate and pursue, and to decide not to pursue other cases at all. In terms of charging decision, they can choose which charges to bring forward and which to drop (within legal bounds, of course).⁸ Essentially, they choose “whom to charge, and for what.”⁹ When it comes to plea bargaining, prosecutorial discretion refers to the latitude that prosecutors have in negotiations, and the autonomy they possess in making offers.¹⁰ Since strength of evidence is a major determinant in plea decisions, and only the prosecutor has access to the complete case file, the decision as to what information to share with the defendant and his attorney based on the prosecutor’s own determination of relevance and exculpatory value significantly impacts the plea decision.¹¹ Overall, prosecutors hold tremendous power over charging and plea outcomes.¹² With the proportion of cases being resolved through plea bargaining rising to 97% at the federal level and 94% at the state level,¹³ the power of prosecutorial discretion is clearly far-reaching and pervasive.

Prosecutors’ discretion impacts not only their own decisions but also compels the other branches of the judicial system to adapt accordingly.¹⁴ With the expectation that prosecutors may moderate the harshness of the law, legislators may in turn tend towards overcriminalization, erring on the side of caution.¹⁵ But part of the role of criminal law is to signal to society what is and is not socially acceptable,¹⁶ and overcriminalization resulting from presumptions about prosecutorial discretion weakens the law’s ability to

8. Peter Krug, *Prosecutorial Discretion and its Limits*, 50 AM. J. COMP. L. 643, 645 (2002).

9. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001).

10. See Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 38 (1983), for a discussion of pleas as non-consensual agreements, with prosecutors holding unilateral power in negotiations.

11. Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713, 713 (1988).

12. Cassia Spohn, *Reflections on the Exercise of Prosecutorial Discretion 50 Years After Publication of The Challenge of Crime in a Free Society*, 17 CRIM. & PUB. POL’Y 321, 322 (2018).

13. Bagaric, Clarke & Rininger, *supra* note 6, at 2.

14. See generally K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285 (2014).

15. Stuntz, *supra* note 9, at 524.

16. See ERIC A. POSNER, *LAW AND SOCIAL NORMS* 88 (2009).

accurately and fairly set those cultural normative standards.¹⁷ As such, the law is no longer a projection of societal norms; instead it reflects what lawmakers believe about how prosecutors will enforce the rules. This may be an unintended and unexpected consequence of the discretion awarded to prosecutors at every step of a criminal case.

Prosecutorial discretion is also mirrored in police discretion because enforcement of law is somewhat subjective by necessity: how many miles over the speed limit should lead to a police stop? How to handle public drunkenness or disorderly conduct? Which witness to speak to? Which witness to believe? Many questions like these need to be decided by police.¹⁸ These are questions that leave much room for leniency or strictness—judgment calls often made by individual officers, perhaps individual precincts.¹⁹ Since prosecutors work closely with police to investigate and charge criminal cases, it follows that the increased discretion of one would lead to the increased discretion of its partner.²⁰ It may be hard to identify which came first, but it is clear that these two divisions of law enforcement follow a similar trend of independently asserting discretion.²¹

For the purposes of this Article, we will think about prosecutorial discretion as an overarching term that encompasses prosecutors' ability to make decisions regarding case selection, investigation, charging, and plea bargaining, without oversight or challenge, with no requirement to remain within specific parameters. Although prosecutorial discretion is gaining a negative reputation among scholars, it is not necessarily contrary

17. See MICHAEL HECHTER & KARL-DIETER OPP, *SOCIAL NORMS*, at xi (2001) (“The state . . . is also responsible for regulating behavior in modern society. Its principal instrument in this respect is the law. . . . Legal norms are created by design—usually through some kind of deliberative process. . . . Social norms, by contrast, often are spontaneous.”).

18. Stephen D. Mastrofski, *Controlling Street-Level Police Discretion*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 100, 102 (2004); Katherine Beckett, *The Uses and Abuses of Police Discretion: Toward Harm Reduction Policing*, 10 HARV. L. & POL'Y REV. 77, 78 (2016). See Howell, *supra* note 14, at 313, for a discussion of how overburdened prosecutors cannot engage in sufficient analysis, such that “[f]ailure to exercise this primary discretionary responsibility improperly delegates charging authority to the police.” *Id.*

19. Aleksander Tomic & Jahn K. Hakes, *Case Dismissed: Police Discretion and Racial Differences in Dismissals of Felony Charges*, 10 AM. L. & ECON. REV. 110, 111 (2008).

20. See Stuntz, *supra* note 9, at 579–80 (describing how enforcement discretion leads to overcriminalization which in turn encourages discretion, and generally describing the relationship between prosecutors and police).

21. Joshua Hegarty, *Who Watches the Watchmen? How Prosecutors Fail to Protect Citizens from Police Violence*, 37 J. PUB. L. & POL'Y 305, 335–36 (2017).

to proper execution of the law.²² A police officer can choose to speak with a suspect and let him go, or let a teenager off with a warning about safe drinking; a prosecutor can choose not to charge a struggling father who stole diapers for his newborn, or reduce drug charges upon hearing of the efforts a young mother is making to stay clean and find employment.²³ Discretion makes room for compassion. It allows law enforcement to acknowledge the fragility of the human condition.

Rigid laws do not always serve justice, but neither does unfettered discretion. Laws cannot possibly encompass every nuance of human behavior; they cannot consider background, intention, and motivation, which is why we need discretion.²⁴ But discretion without structure or guidance can be weaponized to further personal agendas or facilitate personal and institutional biases. Law without discretion can be cruel. Discretion without structure in a punitive system is pernicious.

III. THE INEFFICACY OF ASSIGNING BLAME TO PROSECUTORS

It seems easy and natural to point fingers at prosecutors and assign blame when conviction goes wrong. In fact, many do exactly that: blame prosecutors for all wrongful convictions, emphasizing systematic issues with prosecutorial discretion at the heart of the problems in the criminal justice system.²⁵ In 1940, Attorney General Robert Jackson stated that the “prosecutor has more control over life, liberty, and reputation than any other person in America,”²⁶ leading to a barrage of critiques of prosecutors and their far-reaching, all-encompassing power.²⁷ Critique turned into

22. Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 962 (2009).

23. See Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 821, 832 (2013), for a discussion of the role of the prosecutor in charging and sentencing decisions.

24. See *The Importance of Prosecutorial Discretion*, LONGWELLLAWYERS BLOG (Sept. 19, 2017, 4:11 PM), <https://www.longwelllawyers.com/Blog/2017/September/The-Importance-of-Prosecutorial-Discretion.aspx>, for an example of a law firm that attempts to influence prosecutorial discretion by encouraging prosecutors to drop charges in the pursuit of justice.

25. Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 403 (2006).

26. Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

27. See generally Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009).

blame, with prosecutors making an easy target in a complex legal system involving many actors and processes.

There is no question that in many wrongful conviction cases, prosecutors made inappropriate decisions, unchecked by transparency or by rules governing discretion, that cost innocent people their futures.²⁸ According to the National Registry of Exonerations, not only is there an extremely high incidence of prosecutorial misconduct represented in exonerations—65% of white-collar and 9% of drug crime exonerations²⁹—but there is also very little discipline of that misconduct.³⁰ Only 4% of prosecutors were even mildly disciplined for their roles in wrongful conviction cases.³¹ As upsetting as these numbers are, and they are indeed upsetting, we need to consider them in perspective.

First, it is possible that the representation of misconduct in exoneration cases is not actually reflective of egregious levels of misconduct in the entire prosecutor population. Arguably, there is a selection bias in our analysis of prosecutorial misconduct because we only view it through the lens of exonerations rather than in conjunction with all the cases that are properly decided. Analyzing prosecutorial discretion only by looking at its abuse fails to consider its potential strengths as well.

Additionally, prosecutorial misconduct is not *necessarily* an abuse of discretion. For example, a prosecutor who does not appropriately turn over discovery to the defense is simply acting illegally.³² That is not a matter of having unfettered discretion, but

28. See generally NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Aug. 15, 2022), for examples of cases that involved prosecutorial misconduct leading to wrongful conviction and incarceration of innocent individuals.

29. See NAT'L REGISTRY OF EXONERATIONS, GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT: THE ROLE OF PROSECUTORS, POLICE AND OTHER LAW ENFORCEMENT 13 (Samuel R. Gross et al., eds., Sept. 1, 2020), https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf.

30. Daniele Selby, *Only One Prosecutor Has Ever Been Jailed for Misconduct Leading to a Wrongful Conviction* (Nov. 11, 2020), <https://innocenceproject.org/ken-anderson-michael-morton-prosecutorial-misconduct-jail/>.

31. *Conviction Integrity Units*, NAT'L REGISTRY OF EXONERATIONS (June 14, 2022), <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx>.

32. Bennett L. Gershman, *Between Brady Discretion and Brady Misconduct*, 123 DICK. L. REV. 661, 663–68 (2019), <https://digitalcommons.pace.edu/lawfaculty/1125/> (analyzing eight hypotheticals of *Brady* dilemmas faced by prosecutors within our highly adversarial system (assuming no “open file” discovery) suggesting that there is often no clear-cut case for disclosure and drawing a distinction between discretion and misconduct); see also *id.* at

of feeling that one can act outside the bounds of the law—for whatever reason.

Moreover, perhaps by its very nature, prosecutorial discretion is a tool that may itself be contributing to bias or corrupt outcomes.³³ Perhaps the legislature and judiciary have given prosecutors an inappropriate and broken tool that is ripe for misuse, be it with or without any malicious intent. They may have created space for individual biases to color prosecutors' interpretation of the law itself, and consequently its application.³⁴ When it comes to the *Brady* doctrine, the Supreme Court “define[s] the prosecutorial duty to disclose favorable evidence” in a way that “gives the prosecution broad discretion to withhold favorable evidence.”³⁵ In an adversarial system like ours, asking the prosecutor to make a judgment call about the probative value of evidence and expecting him or her to err on the side of caution when it comes to disclosure can be an unrealistic expectation in the context of a criminal trial. Most of us are not wired to give our opponents ammunition to use against us.³⁶

And yet prosecutors continue to be blamed when they never should have been given this flawed gift in the first place. Perhaps, if the scope of that discretion were reigned in, malicious or ill-

687 (“[A] prosecutor likely understands that *Brady* was not intended to displace the adversary system.”).

33. See generally Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012) (discussing implicit racial bias and its effect on prosecutorial discretion).

34. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2467 (2004) (calling attention to cognitive biases of defendants involved in the plea process, including overconfidence, denial, and risk-aversion); see also Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 186, 206 (2007) (presenting the perspective and potential biases of attorneys—specifically prosecutors—involved in the plea process, using a framework of “prosecutorial passion” to explain possible instances of “discrimination, personal animosity, self-interest, or media attention”); Davis, *supra* note 23, at 834–35 (highlighting that if a prosecutor does not charge minority and similarly situated white defendants similarly, “they may be engaging in race-based selective prosecution,” suggesting that discretion misused can lead to racial disparities and can allow personal biases to leak into charging and sentencing discretion).

35. Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 DICK. L. REV. 1133, 1135 (2005).

36. The theory of self-preservation, or the self-preservation instinct as it was described by Sigmund Freud, suggests that humans—and even animals—behave in such a way that avoids injury to themselves and maximizes their chances of survival; this desire for self-regulation leads people to reduce threats to their well-being. See Stephen Lyng, *Edgework: A Social Psychological Analysis of Voluntary Risk Taking*, 95 AM. J. SOCIO. 851, 851 (1990) (describing risk-taking behaviors in the context of the social self).

intended prosecutors would not have the opportunity to abuse it.³⁷ Moreover, how can the vast majority of professionally responsible prosecutors be held solely responsible for using a tool provided to them by the legal system, one specifically designed in a way that allows for high levels of unaccountable exploitation?³⁸

IV. *HOW SENTENCING REFORMS SWUNG THE DISCRETION PENDULUM*

Historically, discretion was shared between judges who controlled sentencing and prosecutors who handled charging decisions.³⁹ In fact, the design of the entire American legal system necessitates some level of discretion. However, at the beginning of the 1970s, concerns arose about discrepancies between federal judges' sentencing decisions.⁴⁰ These concerns gave rise to the sweeping reforms outlined in the Sentencing Reform Act of 1984.⁴¹ And so, a new body of authority was created: the United States Sentencing Commission ("Commission") in Washington, D.C. The purpose of the Commission was to act as an independent group within the judicial branch to create "sentencing policies and practices for the Federal criminal justice system."⁴² By 1987, the Commission developed Sentencing Guidelines,⁴³ which left judges the formal sentencing authority but gave the discretionary power over to the Commission.⁴⁴

37. See generally Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & C.R. L. REV. 369, 373 (2010) (explaining that prosecutorial discretion is important because rules cannot fully achieve justice on their own since there is the need for morality in judgment—which cannot be achieved in the absence of discretion; Bibas makes the case for constrained discretion, which would be defined by significantly more transparency).

38. See Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L. J. F. 791, 805–07 (2019), for a description of the First Step Act passed in 2018 that has initiated positive change in the federal criminal justice system, and the potential for such progress to stagnate if federal prosecutors are not held accountable for their opposition to important reform.

39. Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L. J. 1420, 1422 (2008).

40. KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 11, 29–31 (1998).

41. Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 83–84 (1988).

42. *Id.* at 85.

43. Although the *Booker* decision made the Guidelines advisory instead of mandatory in 2005, we first discuss the impact of the mandatory Guidelines in the 1980s through the early 2000s. Below we will discuss the effect of making the Guidelines advisory.

44. Weigel, *supra* note 41, at 85–86.

In 1984, for example, Congress—with the ultimate authority over sentencing—created mandatory minimum sentences for some drug offenses, mandated prison sentences for serious felonies, and set a one-year minimum probationary period for less serious felonies.⁴⁵ With the rise of public fear of drugs and violence throughout the 1980s, Congress developed more stringent mandatory minimum sentences for use or carrying of firearms during a crime, even if the underlying crime was a drug crime.⁴⁶ And then in 1988, still targeting drug crimes, Congress instituted mandatory minimums for “possession of more than five grams of ‘crack’ cocaine.”⁴⁷

The content of the reforms, however, is less important than the impact of their implementation. “The Guidelines largely destroy[ed] [judges’] discretion by setting up a complex process which require[d] the sentencing judge to assign numerical weight to numerous aggravating and mitigating factors relating to the conduct attending the offense committed and the defendant’s criminal history.”⁴⁸ Sentencing became a technicality, a matter of awarding a pre-determined number of points based on the defendant’s history and the details of the crime.⁴⁹ It became a simple calculation with very little wiggle room. It was at this point that the balance of power began to shift, with judicial discretion severely limited.

Individual states soon followed suit, creating their own sentencing commissions in an attempt to standardize sentencing practices.⁵⁰ These commissions typically were designed to make legislative recommendations relating to sentencing, corrections, and probation. By 1994, all fifty states had some form of mandatory minimum sentencing laws.⁵¹ But did these sentencing

45. U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 8 (1991), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf.

46. *Id.*

47. *Id.* at 9.

48. Weigel, *supra* note 41, at 86.

49. U.S. SENT’G COMM’N, CALCULATING CRIMINAL HISTORY: AN OUTLINE 1–2 (2011), https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2011/004c_Calc_Criminal_History_Outline.pdf.

50. Neal B. Kauder & Brian J. Ostrom, *State Sentencing Guidelines: Profiles and Continuum*, NAT’L CTR. FOR STATE CTS. 1, 7–27 (July 2008), https://www.ncsc.org/_data/assets/pdf_file/0022/25474/state_sentencing_guidelines.pdf.

51. David Bjerck, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J. L. & ECON. 591, 591 (2005).

laws work? Was the goal of systematizing punishment achieved? And how did post-guidelines sentences compare in severity to sentences imposed before the guidelines?

One way to study the impact of sentencing reforms is to examine sentencing trends in jurisdictions with sentencing guidelines. If we examine how post-guidelines sentences compare in severity to sentences imposed before the guidelines, we begin to understand how the reforms shaped practice. One study looking at trends in Minnesota, Washington, and the federal system found an overall increase in the likelihood of incarceration in each jurisdiction from 1984 to 2006, and trends of more severe punishments post-guidelines.⁵² Another found that drug-related sentencing reforms in Washington State in 1988 and 1990 led to more severe sentences for delivery of narcotics.⁵³ Notably, the authors highlight that this affected defendants who went to trial far more than those who pled guilty.⁵⁴ But perhaps knowledge of the specific sentence associated with a guilty verdict at trial leads defendants to accept more guilty pleas to begin with, since they know that there is no legal flexibility and no opportunity to plead for the judge's mercy.⁵⁵ After all, pleas purportedly function in the "Shadow of Trial."⁵⁶

But more importantly, Engen and Steen suggest that sentencing reforms led to a reorganization of the courtroom workgroup.⁵⁷ Instead of a separation between charging and sentencing decision, a separation between judicial and prosecutorial discretion, charging decisions now carried with them an embedded, predictable sentence outcome.⁵⁸ And because the

52. CASSIA SPOHN, *HOW DO JUDGES DECIDE? THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT* 273–74 Ex. 7.1 (2d ed. 2009).

53. Rodney L. Engen & Sara Steen, *The Power to Punish: Discretion and Sentencing Reform in the War on Drugs*, 105 AM. J. SOCIO. 1357, 1364–65 (2000).

54. *Id.* at 1384–85 (discussing the effects of sentencing reforms on offenders who plead guilty, concluding that consequences for offenders are "contingent upon whether they pled guilty or were convicted in a trial and are consistently more severe for the latter group").

55. See Belinda R. McCarthy & Charles A. Lindquist, *Certainty of Punishment and Sentence Mitigation in Plea Behavior*, 2 JUST. Q. 363, 364, 369 (1985) (arguing that defendants choose to plea, in part, to reduce uncertainty; interestingly, the authors also argue that reduction in uncertainty drives prosecutors to offer pleas); see also JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* (1977) (discussing how complex organizations—such as courtrooms—seek to reduce uncertainty).

56. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 968, 997 (1979); Bibas, *supra* note 34, at 2464.

57. Engen & Steen, *supra* note 53, at 1357.

58. *Id.* at 1365.

charging decision remained in the hands of the prosecutor, the sentencing power followed.⁵⁹ The decision to file or not to file certain charges against a defendant translated directly into case outcome, such that charge bargaining necessarily contained sentence bargaining as well.⁶⁰ And so, another shift in power occurred, this time away from the Commission and towards prosecutors, who now held another very valuable bargaining chip in the plea-bargaining process.⁶¹

In 2005, the Supreme Court ruled that the Sentencing Guidelines could only be advisory, instead of mandatory.⁶² But the pendulum swing of the 1980s could not be reversed as instantaneously as the law. As described above, the implementation of the original Guidelines led to a huge reduction in the judges' power; it led to implementations of mandatory minimums at the state level and to major shifts in the dynamic of the courtroom workgroup, which by 2005 had solidified into courtroom culture. So, when the Guidelines were determined to be advisory in 2005, in many ways it was too late to reverse the effects of the previously mandatory guidelines. That shift of power had already occurred. It is possible that over time, we will begin to see the pendulum swing in the opposite direction, returning some power to the judges, but we see no evidence of the impact being reversed yet.

V. PROSECUTORS AND THE TRIAL PENALTY: ARE PLEAS A BARGAIN OR DO TRIALS CARRY A PENALTY?

The basic premise of the viability of plea bargains is that they provide benefits to both defendants, in terms of reduced punishment, and prosecutors, in terms of efficient use of limited resources. They mirror trial outcomes.⁶³ Theoretically, if defendants are unhappy with their offer, they can always opt to go to trial. In practice, however, some research has begun to compare the outcomes of trials and those of plea bargains, and scholars are

59. *Id.* at 1358, 1365; *see also* Simons, *supra* note 4, at 378 (discussing the shift of discretion following the sentencing guidelines).

60. Bjerck, *supra* note 51, at 591.

61. Jeffery T. Ulmer, Megan C. Kurlychek & John H. Kramer, *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RSCH. CRIME & DELINQ. 427, 427-28 (2007).

62. *See* United States v. Booker, 543 U.S. 220, 226-27 (2005).

63. *See* Bibas, *supra* note 34, at 2466.

beginning to consider the pressures that encourage a plea decision.⁶⁴ Is pleading guilty really a bargain? Do defendants who assert their right to a trial by a jury of their peers face a trial penalty? How, methodologically, do we compare trial and plea outcomes? Unfortunately, the answers to these questions are unclear and sometimes even contradictory.

There seems to be mounting evidence of the existence of a trial penalty,⁶⁵ but some legal scholars argue that the penalty is improperly calculated⁶⁶ and misrepresentative⁶⁷ because, in part, it does not include potential acquittals at trials and does not

64. See generally Allison D. Redlich et al., *The Psychology of Defendant Plea Decision Making*, 72 AM. PSYCH. 339 (2017) (discussing characteristics of defendants more or less likely to accept a plea, and the reasons some people plead guilty instead of asserting their right to trial).

65. Candace McCoy, *Prosecution*, in THE OXFORD HANDBOOK OF CRIME AND CRIMINAL JUSTICE 663, 665, 672 (Michael Tonry ed., 2011) (describing plea bargaining as inherently coercive process and suggesting that prosecutors have too much charging power in the context of pleas); see John Gramlich, *Only 2% of Federal Criminal Defendants go to Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/> (stating that the trial conviction rate in federal criminal cases is 83%, so there is a significant percentage of trial cases ending in acquittal); NAT'L ASS'N OF CRIM. DEF. LAWS., *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* (Norman L. Reimer et al., eds., 2018). According to the report, in 2015 the average trial sentence was 10.8 years, and the average plea sentence was 3.3 years. NAT'L ASS'N OF CRIM. DEF. LAWS., *supra*, at 20 fig.1. But again, the numbers may be misleading. See also Avishalom Tor, Oren Gazal-Ayal & Stephen M. Garcia, *Fairness and the Willingness to Accept Plea Bargain Offers*, 7 J. EMPIRICAL LEGAL STUD. 97, 97 (2010), for a discussion of how perception of fairness impacts defendant plea behavior and Stephanos Bibas, *Designing Plea Bargaining from the Ground up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055, 1063–65 (2016), for an analysis of inaccuracies in the plea-bargaining process and its unfair repercussions.

66. See Gary D. LaFree, *Adversarial and Nonadversarial Justice: A Comparison of Guilty Pleas and Trials*, 23 CRIMINOLOGY 289, 292–94 (1985). In comparing trials and pleas, LaFree found no significant difference between trial and plea outcomes, arguing that the statistical influence of harsh trial penalties is counterbalanced by acquittals. *Id.* at 307. LaFree emphasized that tight control on plea bargaining and managerial control of chief prosecutors could protect defendants from line prosecutors' overcharging practices. *Id.* The author uses the term "managerial control" to describe the control exerted by the chief prosecutor over the decisions of the prosecutors in his or her office; this control relates to all case decisions, from case selection and investigation to charging decisions and sentencing recommendations. *Id.* at 293.

67. WILLIAM M. RHODES, *PLEA BARGAINING: WHO GAINS? WHO LOSES?* 8, 45 (1978). Rhodes analyzed trial verdicts for Washington, D.C., developed an algorithm for determinants of verdict, and found that if defendants who had pled guilty had instead gone to trial, 34% of assault cases, 32% of burglary cases, 31% of larceny cases and 16% of robbery cases would have ended in acquittal. *Id.* at 18, 45. His findings suggest that plea bargaining, while perhaps resulting in a "discount" from a sentence to which the defendant may otherwise be exposed at trial, may hide a large number of defendants whose cases were not strong enough for a conviction at trial. *Id.* at 8.

consider the selection (and dismissal)⁶⁸ of cases prior to trial or pleas.⁶⁹ In some cases, the evidence for a trial penalty is even conflicting.⁷⁰ The difference in proportion of factually innocent defendants represented at trial and pleas also complicates this analysis, since we know that guilty defendants are more likely to accept pleas than innocent defendants.⁷¹

68. U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS app. B-3 (2016), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf (suggesting that dismissed cases, and defendants that are not charged, are not represented at trial, nor in plea bargains, yet make up a significant portion of cases; this number is excluded for trial penalty analysis).

69. Kevin C. McMunigal, *Prosecutorial Disclosure and Negotiated Guilty Pleas*, 16 OHIO ST. J. CRIM. L. 363, 366 (2019). Similar to LaFree, McMunigal points out that when we compare trial and plea outcomes, the comparison itself may be faulty: “[i]f one uses . . . proportionate punishment as the point of comparison rather than possible or likely post-trial punishment, one cannot conclude that a negotiated guilty plea necessarily or routinely results in steep discounting in punishment.” *Id.* He suggests assessing leniency not by comparing post-guilty plea punishment to likely post-trial punishment, but by asking if the punishment post-guilty plea is “disproportionately low in reference to retribution, deterrence, rehabilitation, and incapacitation.” *Id.* What we should be asking is whether the purpose of the punishment is achieved by guilty pleas. Given that there is a selection process that necessarily leads to a fundamental difference between trial and plea-bargained cases, it is arguably more accurate to compare guilty plea outcomes to the proportionate punishment, not to a theoretical trial outcome.

70. Shawn D. Bushway, Allison D. Redlich & Robert J. Norris, *An Explicit Test of Plea Bargaining in the “Shadow of the Trial,”* 52 CRIMINOLOGY 723, 739–49 (2014). *See also* Patricia D. Breen, *The Trial Penalty and Jury Sentencing: A Study of Air Force Courts-Martial*, 8 J. EMPIRICAL LEGAL STUD. 206, 231 (2011); David S. Abrams, *Is Pleading Guilty Really a Bargain?*, 8 J. EMPIRICAL LEGAL STUD. 200, 203 (2011). While some research suggests that those who plead guilty receive substantially shorter sentences than those convicted at trial, Abrams’ empirical work suggests that plea bargains actually result in either no trial discount or longer expected sentences than trials (14–18 months longer), seemingly negating the trial penalty advantage. Abrams, *supra*, at 220–21.

71. Kelsey S. Henderson & Lora M. Levett, *Investigating Predictors of True and False Guilty Pleas*, 42 L. & HUM. BEHAV. 427, 431 (2018). Arguably, then, it is possible that the trial penalty is actually worse than it seems, since a greater percentage of plea cases involve guilty defendants than trial cases. Research consistently finds that the decision to accept a plea or go to trial is primarily motivated by factual guilt status. These converging results suggest that guilty individuals are more highly represented in the population accepting guilty pleas than in the population going to trial. *See id.* at 434 (reporting findings that guilty participants were significantly more likely to accept guilty pleas (71%) than innocent participants (37%)); Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 34 (2013) (reporting findings that guilty participants were significantly more likely to accept guilty pleas (89.2%) than innocent participants (56.4%)); W. Larry Gregory, John C. Mowen & Darwyn E. Linder, *Social Psychology and Plea Bargaining: Applications, Methodology, and Theory*, 36 J. PERSONALITY & SOC. PSYCH. 1521, 1521 (1978) (reporting findings that guilty participants were significantly more likely to accept guilty pleas (83%) than innocent participants (18%)); Tor, Gazal-Ayal & Garcia, *supra* note 65, at 99–100 (explaining that exonerations indicate that innocent defendants are more likely to opt for trial than to accept a guilty plea, illustrated by the 6% of

Analyses to investigate a consistent trend of large discrepancies between plea offers and potential trial outcomes need to include multiple relevant factors, and comparative analyses of jurisdictions with different plea-offer practices will go a long way in elucidating the existence and extent of the trial penalty. Perhaps future empirical work will also examine the proportion of wrongful convictions in order to get an idea of whether there are systematically more severe punishments for those who opt into trial—although those numbers are vehemently disputed as well.⁷²

But while we wait for evidence to tip the scale on the trial penalty on a large scale,⁷³ it is undeniable that the ability to impose a potentially astronomical penalty on an individual defendant exists.⁷⁴ It is that ability, that lever, which acts as another bargaining chip in prosecutors' hands in our adversarial system. Combine these pressure points with the levers that prosecutors have at their discretionary avail—overcharging, exploding offers, dismissing charges, charge stacking, etc.—and there is an

exonerations that involved guilty pleas in contrast with the very high rate of guilty pleas (above 90%) generally).

72. See Paul G. Cassell, *Overstating America's Wrongful Conviction Rate? Reassessing the Conventional Wisdom About the Prevalence of Wrongful Convictions*, 60 ARIZ. L. REV. 815, 815 (2018) (arguing that the number of wrongful convictions makes up a small fraction of criminal convictions, only 0.016%–0.062%); Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 CRIM. L. BULL. 221, 278 (2017) (estimating that wrongful conviction incidences are as high as 2%–3%); see also NAT'L REGISTRY OF EXONERATIONS, *supra* note 29, at (indicating that upwards of 95% of criminal convictions are obtained via guilty plea but 80% of exonerations relate to trial convictions (not pleas)). This seems to suggest that pleas do not result in worse outcomes for defendants—or else they would be more appreciably represented in exonerations. In response, see Miko M. Wilford, Gary L. Wells & Annabelle Frazier, *Plea-Bargaining Law: The Impact of Innocence, Trial Penalty, and Conviction Probability on Plea Outcomes*, 46 AM. J. CRIM. JUST. 554, 555 (2021) (suggesting that with exonerations cases involving false guilty pleas on the rise over the past few years, the fact that false guilty pleas make up a disproportionately small number of exonerations may be more a reflection of a system that makes it difficult to revisit guilty pleas than a reflection of few false guilty pleas).

73. NAT'L ASS'N OF CRIM. DEF. LAWS., *supra* note 65, at 24–42 (discussing prosecutorial incentives to coerce in plea negotiations, and the leverage afforded to prosecutors in the negotiations).

74. See Redlich et al., *supra* note 64, at 345, for discussion of the influences that can shape a plea decision. The authors argue that those factors make plea bargaining necessarily coercive: people's tendency to comply with requests of those in positions of authority, their fear of an opportunity disappearing when offered a time-limited deal, the desire to behave similarly to others in similar situations, the difficulty in understanding the plea agreement language, and other social and cognitive influences. *Id.*

accumulation of factors that potentially contribute to worse outcomes for pleas than trials.⁷⁵

VI. THE IMPORTANCE OF BALANCE IN OUR LEGAL SYSTEM

The logic behind the legitimacy of our court system is that two independent parties submit their case to the judgment of an objective, independent third party to resolve their conflicting interests.⁷⁶ At its core, the purpose of a trial is to resolve conflict in a way that strikes a balance between truth-seeking, fairness, and the promotion of social stability.⁷⁷ It is the trust we have in the court to be impartial in its capacity as intermediary that makes the court powerful, a trust borne from independence from either party in conflict and independence from anybody who appoints or elects them. This “triadic structure of conflict resolution” is put at risk either when that independence is threatened or when the power of one member of the triad (i.e., the prosecution, the defense, or the judiciary) overwhelms the power of the others.⁷⁸ Legitimacy is jeopardized even more so when this objective third party is removed from the conflict resolution process entirely—as is the case in plea negotiations.

Beyond this balance within the court itself there is, of course, a separation of powers on a larger scale: our constitutional democracy is designed with three branches of government, each with the ability to restrain the powers of the others.⁷⁹ The constant tension between the diffused powers of the legislative, executive, and judicial branches is what creates balance, and thus legitimacy.⁸⁰ It is in this very design of our Constitution that America emphasizes the importance of distributing power.⁸¹

75. Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L. Q. 67, 83 (2005).

76. SHAPIRO, *supra* note 5, at 1.

77. See generally Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003).

78. SHAPIRO, *supra* note 5, at 63.

79. M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 603 (2001).

80. Tara Ginnane, *Separation of Powers: Legitimacy, Not Liberty*, 53 POLITY 132, 132–33 (2020).

81. See *Separation of Powers*, CORNELL L. SCH., https://www.law.cornell.edu/wex/separation_of_powers_0 (last visited Aug. 15, 2022), for a discussion of the separation of powers in the government and the role of checks and balances in the system.

VII. RECOMMENDATIONS FOR REGAINING BALANCE

The difficulty in proposing reforms in prosecutorial discretion is that the culture of prosecutors' offices is deeply ingrained. Prosecutors view themselves as zealous advocates and know very well that the laws typically work in their favor.⁸² But they, like all stakeholders in the legal system, are not infallible.⁸³ And providing them with unfettered discretion—especially now that most cases are resolved away from the watchful eyes of a jury or judge—invites trouble. It has been suggested that “perhaps the law and ethical provisions require too much of mortals in the fierce battle of high stakes criminal litigation.”⁸⁴

In an effort to regain balance and rebuild trust in our legal system, there are a number of reforms that may be considered to reestablish the reputation of prosecutors as the justice-seekers they are sworn to be—and that most of them are. Implementing all of them may be unrealistic, but a combination of a few may be within reach. Establishing meaningful, fair, and consistent repercussions for misconduct is perhaps the most obvious and straightforward solution. But if the goal is to effect long-term change, it may be far more productive to focus on reforms that can prevent prosecutorial misconduct to begin with. Punishing specific instances of misconduct does provide a partial and limited remedy, but a punitive response will not comprehensively uproot systemic issues with prosecutorial discretion and is unlikely to elevate the reputation of prosecutors as highly trustworthy and ethical officers of the court.

The time is ripe to begin to take plea bargaining out of the shadows. As Supreme Court Justice Anthony Kennedy famously wrote in the *Lafler* decision, “criminal justice today is for the most part a system of pleas, not a system of trials.”⁸⁵ Accordingly, the legal system should be adjusted to meet these evolving systemic needs and demands. While a jury trial served as a safeguard against possible government overreach, this protection is virtually

82. Hoeffel, *supra* note 35, at 1151.

83. See generally NAT'L REGISTRY OF EXONERATIONS, *supra* note 29, for further details about errors made by prosecutors that led to wrongful convictions.

84. Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 317 (2008).

85. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

ineffective if it is used in only 3%–5% of criminal cases.⁸⁶ The first step in tackling the prosecutorial discretion problem ingrained in the plea-bargaining process is systematic, consistent documentation. Prosecutors should be required to file every offer with the court, including information about what charges are being brought against a defendant, every offer made, the plea accepted, incentives offered in exchange for a guilty plea, etc. Better documentation will serve two purposes: it will reestablish the court's oversight of criminal cases—reintroducing the balance of power that leads to justice—and it will allow for systematic review of plea bargains to help identify patterns of biased practices in plea negotiations. Both purposes will help cabin prosecutorial discretion and facilitate the detection and remediation of abuse or misuse of discretion in the plea-bargaining process. Another step in addressing prosecutorial discretion in plea bargaining may be to eliminate “exploding offers,” or time-limited plea offers that do not give defendants or their attorneys sufficient time to review and analyze the prosecutor's evidence in a case.⁸⁷ Such offers are likely to both coerce and be perceived as coercive in ways that can lead to unjust outcomes and detract from the overall legitimacy of the criminal justice system.

This leads us to a second suggestion for reform: stricter requirements for turning over discovery. If the purpose of plea negotiations and trials is to achieve a just outcome, then it is difficult to justify withholding *any* evidence from the defense. Unfortunately, our system may be a long way from achieving this level of transparency. Nonetheless, in *Lafler v. Cooper* and *Missouri v. Frye*, the Court did affirm the right to effective assistance of counsel during the plea-bargaining process, but discovery was left largely unregulated.⁸⁸ In fact, in 2002 in *United States v. Ruiz*, the Court unanimously decided that the prosecutor did *not* have the obligation to disclose material impeachment information prior to entering into a plea deal with a defendant.⁸⁹

86. See Carlie Malone, *Plea Bargaining and Collateral Consequences: An Experimental Analysis*, 73 VAND. L. REV. 1161, 1162, 1165–66 (2020) (noting that 94%–97% of convictions are obtained via guilty plea and discussing collateral consequences of plea bargaining).

87. VANESSA A. EDKINS & ALLISON D. REDLICH, A SYSTEM OF PLEAS: SOCIAL SCIENCES CONTRIBUTIONS TO THE REAL LEGAL SYSTEM 73 (2019).

88. *Missouri v. Frye*, 566 U.S. 134, 143 (2012); *Lafler*, 566 U.S. at 162; Cynthia Alkon, *The Right to Defense Discovery in Plea Bargaining Fifty Years After Brady v. Maryland*, 38 N.Y.U. REV. L. & SOC. CHANGE 407, 415 (2014).

89. *United States v. Ruiz*, 536 U.S. 622, 633 (2002).

Access to uneven information means that defendants and defense attorneys are flying blind, relying on the subjective judgment of their opponents to share information at their discretion. Without access to the totality of the evidence in a case, it is impossible for attorneys to make informed recommendations to their clients about possible trial outcomes or for defendants to weigh their options adequately. Requiring discovery to be turned over prior to accepting plea deals—perhaps eventually open-file discovery, whereby the government turns over all known inculpatory and exculpatory evidence—would thus even the playing field and redistribute the negotiation power between defense attorneys, prosecutors, and defendants.⁹⁰

Third, mandating internal oversight within prosecutors' offices may go a long way toward systematizing plea bargains and curbing excessive discretion. The establishment of post-conviction review mechanisms independent from the prosecuting attorneys will encourage self-restraint if prosecutors know that a review process follows any conviction achieved.⁹¹ While such a process may be less efficient than giving individual prosecutors free reign, "the cost of the marginal gains in efficiency [are] too high to justify the loss of legitimacy."⁹²

In recent years, a growing number of prosecutors' offices have begun establishing Conviction Integrity Units ("CIUs") dedicated to preventing, identifying, and remedying wrongful convictions.⁹³ As of 2018, there were forty-four CIU's that helped secure fifty-eight exonerations, and the trend seems to be continuing toward expansion. As of the writing of this Article, there are a total of ninety-five CIUs in America.⁹⁴ With over 2,300 prosecutors' offices in the United States, there is still a long way to go.⁹⁵

90. Mosteller, *supra* note 84, at 318; Daniel S. Medwed, Brady's *Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1561 (2010).

91. Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 517 (2009).

92. Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1517 (2004).

93. COURTNEY OLIVA, ESTABLISHING CONVICTION INTEGRITY PROGRAMS IN PROSECUTOR'S OFFICES 5 (2020); JOHN HOLLWAY, CONVICTION REVIEW UNITS: A NATIONAL PERSPECTIVE 10 (2016).

94. *Conviction Integrity Units*, *supra* note 31.

95. *Prosecutors Offices*, BUREAU OF JUST. STATS., <https://www.bjs.gov/index.cfm/content/dcrp/content/data/index.cfm?ty=tp&tid=27> (last visited Aug. 15, 2022); see Rachel A. Bowman & Jon B. Gould, *Prosecutorial Involvement in Exoneration: An Exploratory*

Fourth, mandatory minimum sentences should be eliminated. *Bordenkircher v. Hayes* makes abundantly clear how mandatory sentences can be exploited by prosecutors: in 1977, Paul Hayes was charged with forgery for an \$88.30 check, an offense carrying a sentence of 2–10 years.⁹⁶ In plea negotiations, the prosecutor threatened to pursue a new indictment under the Kentucky Habitual Crime Act if the defendant did not accept the plea because the defendant already had two felonies on his record.⁹⁷ When Hayes refused to accept a plea, the prosecutor followed through on his threat, and Hayes received the mandatory sentence of life imprisonment under the Habitual Crime Act.⁹⁸ Notwithstanding the Supreme Court's determination that this behavior was within the bounds of the prosecutor's legal authority, at the very least there was an appearance of vindictive abuse of prosecutorial discretion.

There is also some space in our justice system to create a positive role for Congress as it relates to prosecutors' discretion. Certainly, removing mandatory minimum sentencing requirements is critical in returning power to judges.⁹⁹ Perhaps even mandatory maximums could be instituted to curb the potential for improperly imposed extreme penalties. Most importantly, reforming sentencing guidelines would begin to restore balance in the courts.

Finally, and perhaps most unorthodox, legislators might explore regulating plea offers such that offers cannot exceed a certain percentage of sentencing exposure at trial. This would work best within the context of a system with mandatory maximum sentences clearly delineated in sentencing guidelines. Although the disparity between sentencing exposure and plea offer

Analysis of Individual, Organizational, and Environmental Factors, 1 WRONGFUL CONVICTION L. REV. 74, 79, 82 (2020) (describing results of an empirical study looking at prosecutorial involvement in exonerations, suggesting that prosecutors face significant barriers to assisting in exonerations given the lack of legal regulation). See also Tyler Yeagain, *Prosecutorial Disassociation*, 47 AM. J. CRIM. L. 85, 87–92, 114–19 (2020), for a fascinating historical perspective of the development of Prosecutors' Associations, and the recent shift by progressive prosecutors to rethink the role of these associations within the justice system and to reconsider their role in influencing policy and practice.

96. *Bordenkircher v. Hayes*, 434 U.S. 357, 358 (1978).

97. *Id.*

98. *Id.* at 359.

99. See Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 200 (1993) ("Congress cannot micromanage. The attempt to do so is undesirable in principle and is unattainable and destructive in practice.").

is not clearly a systematic issue, as discussed above, it is certainly problematic in individual cases. Appearance of impropriety is also a concern, even if this systematic trial penalty itself is in dispute. Where to draw the line in terms of limits on how far plea offers should be allowed to deviate from trial exposure based on mandatory maximums is a policy question whose answer could vary across offense categories. As an illustrative example, if regulations mandated that prosecutors were required to keep plea offers within 20% of trial exposure, for instance, defendants would arguably feel less pressure to accept a plea, especially if they were innocent. This would in turn increase the likelihood of weaker cases going to trial. Prosecutors would then be forced to select cases for which they believed they could secure a conviction at *trial*, not just through guilty plea. Securing a conviction through plea is far easier than securing a conviction through trial and without this crutch, prosecutors would be forced to self-police and drop or dismiss the lowest tier of cases, those without robust evidence. While such a regulation would not strip prosecutors of discretion, it could help recalibrate the system by requiring prosecutors to operate within an established framework, while strengthening the role of the jury as a potential check on the exercise of government authority.

VIII. CONCLUSION

Prosecutorial discretion is not inherently negative or one-sided; it could err on the side of leniency *or* on the side of punishment. And the discussion surrounding prosecutorial discretion would benefit from nuance and precision. Like all tools available to law enforcement, it can be used appropriately, even benevolently, or it can be misused and exploited. Because our caselaw system is not designed to prospectively address all possible variations of every legal issue, subjective human judgment is a necessary component of legal decision-making and pursuit of justice. Prosecutorial discretion is just that: an opportunity to use human judgment to help inform decisions in criminal cases. And it does not exist in a vacuum. It is supposed to be checked by the power of the judge and the scrutiny of the jury. Overall, public trust and legitimacy of the criminal justice system depend in part on an appropriate balance of power among the prosecution, defense, and the court.

Unfortunately, by the end of the twentieth century, sentencing reforms rocked the delicate balance of powers in the legal system. The development of strict mandatory minimum sentences took away judicial discretion and inserted sentencing power into charging decisions made by prosecutors.¹⁰⁰ The simultaneous explosion of plea bargaining, whereby juries became nearly irrelevant in case negotiations and outcomes, created a perfect storm for the abuse of prosecutorial discretion. With little to no internal oversight and none whatsoever from a jury, guided by hazy laws regarding discovery rules in plea cases, prosecutors amassed a disproportionate number of bargaining chips in plea negotiations.

However, placing all blame for abuse of prosecutorial discretion on prosecutors themselves is myopic and unfair. The system has provided them with a tool that is specifically designed in a way that allows for egregious abuse. The American legal system is extremely adversarial; prosecutors and defense attorneys behave as opponents. And yet prosecutors seemingly are expected to angelically overcome what they view as a fervent pursuit of justice, without guidance and without oversight. They are expected to use perfect judgment, to recognize and correct their own biases—a herculean task for any person. And when they do not, blame is attributed to personal shortcomings. They are blamed for wanting to win in a system that is competitive and adversarial by design. These expectations, although understandable, are highly unrealistic and inevitably lead to disappointment.

The focus on blaming prosecutors distracts from the far more important and troubling issue raised by growing prosecutorial discretion: imbalance. Instead of focusing on how best to punish misconduct, suggestions for reform should focus on the bigger picture of re-establishing a balanced system of powers with a healthy tension between them to maintain proper behavior. Because without balance, a system cannot maintain the public's trust. And without trust, a system lacks legitimacy.

The suggestions above are by no means exhaustive, but they do attempt to consider both the strengths and weaknesses of prosecutorial discretion. These suggestions are intended to provide a framework within which prosecutorial discretion can continue to

100. See generally Hegarty, *supra* note 21 (explaining judges' inability to exercise discretion in light of sentencing legislation).

exist, while acknowledging human fallibility. Future calls for reform need to continue to prioritize the root of the problem rather than unproductively attempting primarily to quench a thirst for vengeance against those who abuse their positions of authority.

A system does not garner trust because it is powerful; a system is trusted because it subjects itself to the judgment and scrutiny of others. It behooves the legal system to give prosecutors the opportunity to subject themselves to this discerning judgment in a structured, systematic, and informed way.