

# Collusive Prosecution

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*ABSTRACT: In this Article, we argue that increasingly harsh collateral consequences have surfaced an underappreciated and undertheorized dynamic of criminal plea bargaining. Collateral consequences that mostly or entirely benefit third parties (such as other communities or other states) create an interest asymmetry that prosecutors and defendants can exploit in plea negotiations. In particular, if a prosecutor and a defendant can control the offense of conviction (often through what some term a “fictional plea”), they can work together to evade otherwise applicable collateral consequences, such as deportation or sex-offender registration and notification. Both parties arguably benefit: Prosecutors can leverage collateral consequences to extract greater punishments and defendants can avoid consequences they view as particularly burdensome. But these benefits can come at a cost to others who are not at the bargaining table. We contend that “collusive prosecution” of this sort can be pernicious, as may be the case when sex-offender registration and notification laws are in play, but it also has potential to be socially attractive. Accordingly, we sketch a normative framework for evaluating collusive prosecution as a matter of prosecutorial ethics. We draw on the emerging field of public fiduciary theory to characterize prosecutors’ ethical duties to varied—and often conflicting—beneficiaries. We suggest that programmatic uses of collusive prosecution may be fair and reasonable in a common immigration context, but collusive prosecution designed to relocate sex-offense registrants likely fail these conditions. Ultimately, we offer a suite of reforms that may be useful for policing collusive prosecution without banning the practice outright.*

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## INTRODUCTION

Courtney Wild was the first of Jeffrey Epstein’s victims to come forward.<sup>1</sup> Wild had been fourteen—a middle-school student and a cheerleading captain—when she was recruited by another girl to visit Epstein’s south Florida mansion under the pretense that she would be paid to give a massage to the wealthy, older man.<sup>2</sup> Following a script that Epstein repeated many times with many different young girls, the “massage” quickly turned into a sexual assault, then into a series of assaults.<sup>3</sup> Eventually, Epstein caused Wild

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1. See Julie K. Brown, *For Years, Jeffrey Epstein Abused Teen Girls, Police Say. A Timeline of His Case*, MIAMI HERALD (Nov. 28, 2018), <https://www.miamiherald.com/news/local/article221404845.html> [<https://perma.cc/2L5X-N5MB>].

2. See Jane Coaston, Anna North & Andrew Prokop, *The Life and Death of Sex Offender Jeffrey Epstein, Explained*, VOX (Jan. 16, 2020, 10:56 AM), <https://www.vox.com/2018/12/3/18116351/jeffrey-epstein-case-indictment-arrested-trump-clinton> [<https://perma.cc/6F6Y-RVRE>].

3. Kate Sheehy, *Jeffrey Epstein Accuser: I Was 14 Years Old and Still in Braces When Abuse Began*, N.Y. POST (July 8, 2019, 2:45 PM), <https://nypost.com/2019/07/08/jeffrey-epstein-accuser-i-was-14-years-old-and-still-in-braces-when-abuse-began> [<https://perma.cc/JSP5-GTYB>].

to recruit new girls whom he could assault in the same manner.<sup>4</sup> Wild ultimately became the centerpiece of Florida's subsequent prosecution of Epstein. She was the only victim state prosecutors brought to testify before the grand jury, despite the almost three dozen girls who had reported being similarly victimized.<sup>5</sup> When Epstein finally pled guilty to solicitation of prostitution with a minor under eighteen,<sup>6</sup> several media outlets reported that Epstein had admitted to soliciting a fourteen-year-old, assuming that the charge related to the crimes against Wild.<sup>7</sup>

There is a significant problem with the media's characterization, however: Epstein never admitted to soliciting Wild, at least not in any formal sense. Indeed, it is not clear that Epstein ever admitted to soliciting any particular person.<sup>8</sup> The indictment neither named nor specified the age of any victim.<sup>9</sup> The prosecution never submitted its probable cause affidavit to

4. James Hill, *Jeffrey Epstein Survivors on Coming to Terms with What Happened to Them in Palm Beach: 'I Had Blamed Myself for All These Years'*, ABC NEWS (Jan. 8, 2020, 4:53 AM), <https://abcnews.go.com/US/jeffrey-epstein-survivors-coming-terms-happened-palm-beach/story?id=68099808> [https://perma.cc/PY69-DX43].

5. Jane Musgrave, John Pacenti & Lulu Ramadan, *Palm Beach Post Investigation: Jeffrey Epstein Case—The First Failure*, PALM BEACH POST (Oct. 21, 2020, 6:12 PM), <https://www.palmbeachpost.com/story/news/local/2020/10/21/jeffrey-epstein-case-palm-beach-post-investigation/3720623001> [https://perma.cc/ETB4-2PV2]; Julie K. Brown, *She Was the Victim in Jeffrey Epstein's Secret Plea Deal. She Didn't Even Know It*, MIAMI HERALD (Mar. 19, 2019, 8:37 PM) [hereinafter Brown, *She Was the Victim*], <https://www.miamiherald.com/news/politics-government/article2228148659.html> [https://perma.cc/HV8V-Y2F5].

6. Epstein pled guilty to two charges—solicitation of prostitution and procuring a minor under eighteen for prostitution. Tom Winter, *Who is Jeffrey Epstein, and Why Has He Been Arrested Again?*, NBC NEWS (July 11, 2019, 12:52 PM), <https://www.nbcnews.com/news/crime-courts/who-jeffrey-epstein-why-has-he-been-arrested-again-n1027241> [https://perma.cc/PBH5-2WPP].

7. See, e.g., Samuel Goldsmith, *Jeffrey Epstein Pleads Guilty to Prostitution Charges*, N.Y. POST (June 30, 2008, 5:04 PM), <https://nypost.com/2008/06/30/jeffrey-epstein-pleads-guilty-to-prostitution-charges> [https://perma.cc/WY82-K8TU] (“[Jane] Doe was a [fourteen]-year-old high school student when Epstein paid her \$200 for a massage at his Palm Beach mansion in early 2005.”); Josh Russell, *Billionaire's Alleged Sex Slave Settles Libel Case*, COURTHOUSE NEWS SERV. (May 25, 2017), <https://www.courthousenews.com/billionaires-alleged-sex-slave-settles-libel-case> [https://perma.cc/D364-3U22] (noting that Epstein “spent a year and a half in prison after pleading guilty to a state charge of soliciting a [fourteen]-year-old prostitute in June 2008”); Julie K. Brown, *How a Future Trump Cabinet Member Gave a Serial Sex Abuser the Deal of a Lifetime*, MIAMI HERALD (Nov. 28, 2018, 8:00 AM), <https://www.miamiherald.com/news/local/article220097825.html> [https://perma.cc/998A-3EAD] (“Epstein admitted to committing only one offense against one underage girl, who was labeled a prostitute, even though she was [fourteen], which is well under the age of consent—[eighteen] in Florida.”).

8. See Beth Reinhard, Kimberly Kindy & Julie Tate, *Age of Victim in Prosecution of Jeffrey Epstein, Long a Source of Confusion, Eased His Obligations to Register as a Sex Offender*, WASH. POST (Mar. 17, 2019, 8:40 PM), [https://www.washingtonpost.com/investigations/age-of-victim-in-prosecution-of-jeffrey-epstein-long-a-source-of-confusion-eased-his-obligations-to-register-as-a-sex-offender/2019/03/17/57063cd8-4035-11e9-a44b-42f4df262a4c\\_story.html](https://www.washingtonpost.com/investigations/age-of-victim-in-prosecution-of-jeffrey-epstein-long-a-source-of-confusion-eased-his-obligations-to-register-as-a-sex-offender/2019/03/17/57063cd8-4035-11e9-a44b-42f4df262a4c_story.html) [https://perma.cc/LXD8-M2KU].

9. Simon Romero & Nicholas Kulish, *Jeffrey Epstein Registered as a Sex Offender in 2 States. In New Mexico, He Didn't Have to*, N.Y. TIMES (July 11, 2019), <https://www.nytimes.com/2019/07/11/us/jeffrey-epstein-house-new-mexico.html> [https://perma.cc/F6Q8-YVG8].

the court,<sup>10</sup> and the plea colloquy did not establish any factual basis for Epstein's guilty plea, at least with respect to the total number of offenses or the identities of the victims.<sup>11</sup> In fact, the prosecutor's office deliberately withheld details about the scope of Epstein's crimes and the ages of the children involved from the presiding judge in order to secure the plea from Epstein.<sup>12</sup>

As a direct result of the Florida prosecutors' secrecy about these details, and particularly the age of his victims, Epstein was able to avoid registering as a "sex offender" when he later relocated to New Mexico.<sup>13</sup> In 2010, shortly after his release from jail in Dade County, Florida, Epstein changed his residence to a luxury mansion on a "very large, very secluded and very high-security" ranch in Santa Fe County, New Mexico.<sup>14</sup> His move triggered Florida officials to notify the New Mexico Department of Public Safety of Epstein's history.<sup>15</sup> Soon, New Mexico's sex-offender registry unit found itself translating Epstein's Florida offenses into their New Mexico legal equivalents.<sup>16</sup> Under New Mexico law, procuring a minor for prostitution is a registrable offense but only if the victim is under sixteen years of age.<sup>17</sup> Because the factual basis for Epstein's convictions was so unclear, the Department of Public Safety ultimately made its determination that Epstein did not have to register by relying on an untested Florida police report that erroneously listed the victim's age as seventeen.<sup>18</sup> In New Mexico, unburdened by registration and notification requirements, and perhaps by some of the publicity likely to follow a well-known billionaire's presence on a sex-offender registry, Epstein returned to his pattern of sexually abusing minors for nine more years.<sup>19</sup>

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10. Brown, *She Was the Victim*, *supra* note 5.

11. Romero & Kulish, *supra* note 9.

12. Brown, *She Was the Victim*, *supra* note 5; WPTV News, *June 30, 2008: Jeffrey Epstein Pleads Guilty, Goes to Jail*, YOUTUBE (July 18, 2019), <https://youtu.be/OUylMcXT2pI> [<https://perma.cc/4UE3-ULG8>] ("The prosecuting attorney would not say how many female victims there are. She would only say there was more than one adult victim and more than one underaged victim.").

13. Because of his two felony convictions, Epstein was required to register as a sex offender in Florida prior to relocating. Romero & Kulish, *supra* note 9.

14. *Id.* (internal quotation marks omitted); see Christine Pae, *Jeffrey Epstein Did Not Have to Register as Sex Offender After Setting Up Stanley Residence*, KOAT ACTION NEWS (July 11, 2019, 5:58 PM), <https://www.koat.com/article/jeffrey-epstein-did-not-have-to-register-as-sex-offender-after-setting-up-stanley-residence/28369958> [<https://perma.cc/JN3E-BHZ9>].

15. Pae, *supra* note 14.

16. Romero & Kulish, *supra* note 9.

17. N.M. STAT. ANN. §§ 29-11A-3, 30-6A-4 (2022).

18. Romero & Kulish, *supra* note 9.

19. See *id.* We acknowledge that registration and notification in New Mexico may not have disrupted Epstein's criminal behavior in that state. Indeed, notification may have rendered Epstein more likely to recidivate. J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161, 186 (2011), although Epstein was a visible public figure at the time, and existing research may not be helpful in understanding the effects of these laws on his behavior. From our perspective, what matters is that New Mexico officials would have preferred to subject Epstein to its registration and notification requirements

The design and handling of Epstein's plea agreement in Florida raises many questions of prosecutorial ethics. Over the last few years, concerning details have come to light regarding the state prosecutors' negotiations to stave off federal charges.<sup>20</sup> In addition, the Palm Beach County District Attorney has been repeatedly sued for deliberately misleading Epstein's victims—including Wild—about the existence and nature of the plea deal.<sup>21</sup> Even Senate Majority Leader Chuck Schumer has decried Epstein's "absurd, obscene plea bargain" for its charge selection.<sup>22</sup> "This was not prostitution, which is what Epstein pleaded guilty to," Schumer explained, "this was sex trafficking."<sup>23</sup>

This Article examines a different, novel question of prosecutorial ethics that emerges from the twisted contours of Epstein's story. Do prosecutors have a responsibility to ensure the faithful operation of collateral consequences when negotiating plea agreements? We tie this question to recent research on the phenomenon of fictional pleas, which permit defendants to plead guilty to charges not actually supported by the facts of their case.<sup>24</sup> So-called progressive prosecutors have embraced fictional pleas as a means of sidestepping draconian immigration consequences for particular categories of convictions.<sup>25</sup> But Epstein's plea arrangement provides insight into the pernicious potential of some fictional pleas. Because future sex-offender registration obligations often depend on a defendant's *negotiated* offense of conviction, rather than the offense the defendant appears to have actually committed, a prosecutor and a defendant can sometimes work together to identify a fictional plea that circumvents registration requirements *outside* of the state of conviction but keeps them in place locally where the prosecutor's constituency resides. Thus, such plea

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had they been able to confirm the actual details of his crimes. Similarly, it also matters that the Florida prosecutors involved likely assumed that registration and notification laws improve public safety wherever a registrant lives.

20. Jane Musgrave, *Jeffrey Epstein Case: PBC State Attorney Worked with Defense to Undercut Feds, Report Says*, PALM BEACH POST (Dec. 15, 2020, 3:13 PM), <https://www.palmbeachpost.com/story/news/2020/12/12/jeffrey-epstein-case-pbc-state-attorney-worked-undercut-federal-probe/3881397001> [<https://perma.cc/QYA9-UJUW>].

21. See, e.g., Erik Altmann, *Jeffrey Epstein Accuser Courtney Wild Continues Fight over His 2008 Plea Deal*, WPTV (Oct. 2, 2019, 3:12 AM), <https://www.wptv.com/news/region-c-palm-beach-county/palm-beach/jeffrey-epstein-accuser-courtney-wild-continues-fight-over-his-2008-plea-deal> [<https://perma.cc/73SA-Z8L6>]; Ari Hait, *Judge Rules in Favor of Victims in Jeffrey Epstein Case*, WPBF (Feb. 21, 2019, 5:37 PM), <https://www.wpbfl.com/article/judge-rules-in-favor-of-victims-in-jeffrey-epstein-case/26454165> [<https://perma.cc/ET99-JC45>].

22. Washington Post, *Schumer on Epstein: 'Why Did this Absurd, Obscene Plea Bargain Occur?'*, YOUTUBE (July 9, 2019), <https://www.youtube.com/watch?v=8YNCLJhZiSo> [<https://perma.cc/MR8E-NXJS>].

23. *Id.*

24. See Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 857 (2019) [hereinafter Johnson, *Fictional Pleas*] (describing a fictional plea as "a plea bargain agreement in which the defendant pleads guilty to a crime he did not commit, with the consent and knowledge of multiple actors in the criminal justice system").

25. See *id.* at 859.

agreements have the potential to impose negative externalities on other states or parties that have no say in the terms of the agreement.

The Article proceeds in three parts. Part I introduces the concept of “collusive prosecution”—the cleanest example of which (and our focus) is the use of fictional pleas by prosecutors and defendants to avoid collateral consequences that ought to apply given the apparent facts of the case. As we demonstrate, collusive prosecution creates a “win-win” solution for prosecutors and defendants, as do all plea bargains, but they may also impose potentially inappropriate costs on others who are not in on the deal. We document the increasing use of fictional pleas by progressive prosecutors to illustrate this idea. Part I then investigates the ethical implications of collusive prosecution in a common context: prosecutors’ programmatic efforts to avoid seemingly harsh immigration consequences disfavored by their constituents. We use public fiduciary theory to illuminate prosecutors’ many ethical duties to different—and sometimes adverse—beneficiaries, concluding that collusive prosecution is at least provisionally defensible in this context.

Part II then examines two potentially troubling uses of collusive prosecution in the context of sex-offender registration and notification laws. Drawing from Epstein’s example, we show how prosecutors may allow defendants to negotiate fictional pleas in one state for the purpose of evading sex-offender registration obligations in another state. This creates a benefit primarily available to already privileged defendants—those with the resources to relocate and the legal representation to investigate and exploit variation in state registration schemes. Alternatively, hardline prosecutors may wish to use well-crafted fictional pleas as a form of modern-day banishment, creating strong incentives for individuals charged with sex offenses to leave the state of conviction in order to escape burdensome registration requirements.<sup>26</sup> Using the model of prosecutors as public fiduciaries that we outline in Part I, we suggest that these two possibilities may violate prosecutors’ ethical obligations to treat their different classes of beneficiaries both fairly (a nondiscrimination obligation) and reasonably (a due-consideration obligation).

Part III sketches a few state-level reforms that legislatures and courts might adopt to police collusive prosecution without banning it outright. First, we consider the potential of an enhanced judicial role in plea colloquies, with judges investigating not only the factual basis for pleas but also prosecutors’ incentives and motivations to resort to fictions. Second, we explore the possibility of two legislative reforms that may limit the value of unethical collusion: One, based on the model of real-offense sentencing, would generate a more robust factual record on which other states can rely in making registration-related or other collateral determinations; the other, a direct

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26. We develop these arguments using onerous sex-offender registration and notification laws, but we offer other examples along the way to show that this dynamic is a general one that is also plausible in the context of other offenses, including misdemeanors.

change to states' sex-offender registration requirements that untethers registration from the offense of conviction. These ideas are generalizable to other collateral consequences. Any of these changes would operate to discourage collusive prosecution that violates prosecutors' fiduciary obligations while preserving a role for welfare-enhancing fictional pleas.

## I. RESORTING TO FICTIONS

Plea bargaining and collateral consequences are two defining features of our contemporary criminal justice system. Criminal prosecutions are overwhelmingly, and increasingly, resolved without trials. At the federal level, the number of defendants willing to risk trial has fallen by approximately sixty percent over just the last two decades to about two percent of total prosecutions.<sup>27</sup> State-level data are trickier to access and use due to a lack of standardized record keeping.<sup>28</sup> But most court watchers believe that trials are even more rare in state court.<sup>29</sup> The National Center for State Courts reports criminal trial rates as low as 0.07 percent in some states.<sup>30</sup> The decline in criminal trials corresponds with an increase in negotiated resolutions to criminal charges. Plea bargaining now produces nearly ninety-eight percent of federal criminal convictions and over ninety-five percent of state criminal convictions.<sup>31</sup> In fact, plea bargaining has become so central that, in 2012, the

27. 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> [<https://perma.cc/8MF5-DULY>]. The most recent data from U.S. District Courts show that 89.8 percent of total defendants pled guilty in the past year and a mere 2.1 percent of defendants were tried. *Federal Judicial Caseload Statistics: U.S. District Courts—Criminal Defendants Terminated, by Type of Disposition and Offense—During the 12-Month Period Ending March 31, 2022*, U.S. CTS. (Mar. 31, 2022), <https://www.uscourts.gov/statistics/table/d-4/federal-judicial-caseload-statistics/2022/03/31> [<https://perma.cc/7QLW-P9N7>].

28. Gramlich, *supra* note 27.

29. See, e.g., Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, but Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does It Matter?*, 101 JUDICATURE 26, 28 (2017) (“[I]f anything, there is even less likelihood of a case proceeding to trial in state court than in federal court.”).

30. See *Court Statistics Project, Caseload Detail—Total Criminal*, NAT'L CENT. FOR STATE CTS. (last visited Feb. 14, 2023), <https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-criminal> (choose “Data Table \*\*2021 Update” from list; then choose “Criminal” then “Total Criminal” in the Case Filter List; then choose “Dispositions” from the Caseload Measure category, “2021” from Year, and “Connecticut” from State) (reporting fifty criminal jury trials and nine criminal bench trials among Connecticut's 84,465 criminal dispositions in 2021). Recent numbers might be especially low due to COVID-related limitations on in-person court proceedings, but 2018 numbers tell the same story. *Id.* (choose “Data Table \*\*2021 Update” from list; then choose “Criminal” then “Total Criminal” in the Case Filter List; then choose “Dispositions” from the Caseload Measure category, “2018” from Year, and “Connecticut” from State) (reporting 223 criminal jury trials and sixteen criminal bench trials among Connecticut's 104,494 criminal dispositions in 2018).

31. Somil Trivedi, *Coercive Plea Bargaining Has Poisoned the Criminal Justice System. It's Time to Suck the Venom Out*, ACLU (Jan. 13, 2020), <https://www.aclu.org/news/criminal-law-reform>

Supreme Court announced: “It is not some adjunct to the criminal justice system; it *is* the criminal justice system.”<sup>32</sup>

Collateral consequences, too, are increasingly common.<sup>33</sup> Nearly every criminal conviction now subjects the convicted individual to a network of legal obligations and restrictions that can substantially affect many aspects of life. Yet the law does not formally consider such consequences to be part of the individual’s “punishment.” Some collateral consequences are motivated by valid public safety concerns, but many arguably frustrate public safety by hindering people’s ability to successfully reintegrate into society.<sup>34</sup> As one scholar notes, “the United States has a uniquely extensive and debilitating web of collateral consequences that continue to punish and stigmatize individuals with criminal records long after the completion of their sentences.”<sup>35</sup> Individuals with criminal convictions may lose their driver’s license, their business license, their employment, their housing, their pension, their right to vote, their right to bear arms, and even their right to remain in the country.<sup>36</sup>

/coercive-plea-bargaining-has-poisoned-the-criminal-justice-system-its-time-to-suck-the-venom-out [https://perma.cc/5CHV-C8WT]. Available reliable data are limited to state court felonies. *See, e.g.*, U.S. DEP’T OF JUST., FELONY SENTENCES IN STATE CTS., 2006—STATISTICAL TABLES 1 (2009), <https://bjs.ojp.gov/content/pub/pdf/fssc06st.pdf> [https://perma.cc/H6CS-2BQ2]. Rates of misdemeanor convictions obtained through plea bargaining are thought to be even higher. *See* Emily Yoffe, *Innocence is Irrelevant*, ATLANTIC (Sept. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171> [https://perma.cc/RU7F-9VX7].

32. *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (internal quotation marks omitted) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

33. Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators,”* 93 MINN. L. REV. 670, 701 (2008). The National Institute of Justice recently catalogued more than 44,000 distinct collateral consequences nationwide. *National Inventory of the Collateral Consequences of Conviction*, NAT’L INST. OF JUST., <https://nij.ojp.gov/topics/articles/national-inventory-collateral-consequences-conviction> [https://perma.cc/C7UQ-VSSZ]. In this Article, we use the term “collateral consequences” broadly to refer to any consequences of a conviction that are not part of the formal punishment that a court imposes. *See* Roberts, *supra* at 672 (“Direct consequences include the potential jail or prison term, fines, and any other criminal punishment that a trial judge may impose after conviction. Almost everything else is deemed ‘collateral.’”).

34. Sabra Micah Barnett, Commentary, *Collateral Sanctions and Civil Disabilities: The Secret Barrier to True Sentencing Reform for Legislatures and Sentencing Commissions*, 55 ALA. L. REV. 375, 375 (2004) (“Additionally, these sanctions can act as barriers to reintegration and rehabilitation and can serve as enablers for high recidivism rates.”); Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER, RACE & JUST. 253, 254 (2002) (“What is clear is that these collateral sanctions may make it impossible for convicted persons to be employed, to lead law-abiding lives, to complete probation, or to avoid recidivism.”). *See generally* Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623 (2006) (exploring the impact of collateral consequences on reentry).

35. Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 524 (2010).

36. Gabriel J. Chin, *Collateral Consequences*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 371, 372, 376 (Erik Luna ed., 2017). This is to say nothing of the



The combination of plea bargaining and collateral consequences can, and increasingly does, give rise to fictional pleas.<sup>37</sup> A fictional plea, also sometimes known as a “baseless plea,”<sup>38</sup> occurs when a defendant agrees to admit to a crime (under a given set of circumstances) that *both parties* agree does not accurately represent what actually occurred or that purposely leaves the exact nature of the crime unclear to observers, including potentially the court and officials in other states.<sup>39</sup> Fictional pleas expand the range of potential bargains available to prosecutors and defendants—and are often particularly motivated by the desire to avoid the application of certain collateral consequences. This is how a violent robbery prosecution, for example, may end in a conviction for illegally downloading music.<sup>40</sup> Or how a speeding ticket may be resolved with a plea to defective vehicle equipment.<sup>41</sup> Or how a predatory sex crime against a fourteen-year-old becomes a different sex offense against only a minor “under eighteen.” In a growing number of cases, progressive prosecutors are offering fictional pleas for the specific purpose of avoiding some of the most serious collateral consequences, such as removal from the country.<sup>42</sup>

In this Part, we unpack the logic behind fictional pleas in the collateral consequences context. Because collateral consequences are frequently tied to the offense of conviction or to “facts” that the parties agree occurred during the offense, fictional pleas allow prosecutors and defendants to control or

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substantial social stigma and shame associated with a criminal record. See Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1105–09 (2013) (analyzing informal collateral consequences associated with criminal convictions). As a preview, collateral consequences turn out to be important to our analysis, because legislators build their terms of eligibility and scope of application on specific crimes of conviction and because their operation is of concern to the communities in which bargaining defendants are likely to live after they complete any sentence.

37. Although we are unaware of any attempt to measure the frequency of fictional pleas, judges and lawyers indicate that they are prevalent. See Rob Mangone, Note, *Littering for \$500: How Does Judicial Estoppel Solve the Problems that Factually Baseless Pleas Pose to the Double Jeopardy Clause?*, 97 WASH. U. L. REV. 953, 954 (2020).

38. See Mari Byrne, Note, *Baseless Pleas: A Mockery of Justice*, 78 FORDHAM L. REV. 2961, 2966 (2010). Although Byrne specifically defines “fictional pleas” as pleas to crimes that are not even part of the criminal code, thus distinguishing them from “baseless pleas,” recent scholarship uses the term “fictional plea” broadly to include both circumstances. See Johnson, *Fictional Pleas*, *supra* note 24, at 860–61. In this Article, we follow the more recent convention.

39. Throughout this Article, we use the term “fictional” to refer to substantively vague (but perhaps technically accurate) descriptions of crimes as well as to precisely specified, yet erroneous, descriptions of crimes, as they both mislead and result in the inaccurate application of collateral consequences.

40. See Thomas Clouse, *Man Pleads Guilty to Bogus Crime*, SPOKESMAN-REV. (May 1, 2006), <https://www.spokesman.com/stories/2006/may/01/man-pleads-guilty-to-bogus-crime> [<https://perma.cc/LD5M-QZ5L>].

41. Michael Mansur, *A Defective System Gives Speeders a Pass*, KAN. CITY STAR, Jan. 29, 2006, at A1.

42. See Johnson, *Fictional Pleas*, *supra* note 24, at 871–74.

avoid certain extrajudicial effects associated with conviction.<sup>43</sup> To explore the implications of these bargains, we examine the specific use of fictional pleas to avoid noncitizen removal, both descriptively and normatively. Descriptively, progressive prosecutors in some states have made policy commitments to avoid pursuing convictions that needlessly trigger removal proceedings.<sup>44</sup> Fictional pleas provide an avenue to achieve this goal without either party sacrificing too much, given the constraining nature of the facts. Normatively, we argue that this use of fictional pleas may be theoretically justifiable— notwithstanding that it effects a nullification of federal law—on a model of prosecutors as public fiduciaries, at least in cases where elected local prosecutors are best situated to internalize the community costs and benefits of removal.

#### A. MODELING COLLUSIVE PROSECUTION

A fictional plea occurs when a defendant pleads guilty to a crime that all involved parties agree did not in fact occur or, alternatively, to a crime that the parties purposely present to the court in a vague or misleading manner with the goal of disrupting or interfering with accurate inferences about some of the offense's most important details.<sup>45</sup> Fictional pleas should be distinguished from *nolo contendere* or so-called *Alford* pleas.<sup>46</sup> In those cases, a defendant is permitted to enter a guilty plea while maintaining his factual innocence.<sup>47</sup> But the prosecutor and judge will typically have at least a reasonable basis to believe that the defendant is guilty of the charged offense.<sup>48</sup> In the case

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43. Importantly, the parties are typically unable to bargain around collateral consequences directly because their application is often mandatory and automatic, triggered by a specific crime of conviction, the crime's statutory features or characteristics, or its factual circumstances as generally presented to the court.

44. See, e.g., Kendra Sena, *State Criminal Law and Immigration: How State Criminal-Justice Systems Can Cause Deportations, or Limit Them*, ALB. L. SCH. GOV'T L. CTR. (May 6, 2019), <https://www.albanylaw.edu/government-law-center/state-criminal-law-and-immigration-how-state-criminal-justice-systems-can> [<https://perma.cc/AH6U-8ND3>] (citing statewide law in California and local practices in Baltimore and Brooklyn).

45. Johnson, *Fictional Pleas*, *supra* note 24, at 860–61 (quoting from Byrne, *supra* note 38, at 2966). Johnson uses the phrase “sterilizing the record” to capture the idea that fictional pleas can sometimes achieve their aims by making the factual record vague or misleading. See Thea Johnson, *Measuring the Creative Plea Bargain*, 92 IND. L.J. 901, 924 (2017) [hereinafter Johnson, *Measuring the Creative Plea Bargain*] (“Where a plea cannot be negotiated down or around, sometimes defenders are left to ‘sterilize’ the record as much as possible to avoid later consequences for the client, particularly at immigration hearings.”) (citation omitted).

46. See generally *North Carolina v. Alford*, 400 U.S. 25 (1970) (establishing the common-law concept of an *Alford* plea).

47. *Id.* at 37 (“An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.”).

48. See *id.* (“Here the State had a strong case of first-degree murder against Alford.”); AM. BAR ASS'N, CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.3(a) (4th ed. 2017) [hereinafter CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION] (“A prosecutor should seek or file criminal

of a true fictional plea, by contrast, even the prosecutor and in many instances the judge are aware that the charged offense does not accurately characterize material facts of the case.<sup>49</sup> Defendants are nevertheless generally free under the law to enter a guilty plea to an offense that they believe to be preferable to those offenses supported by the facts.<sup>50</sup>

At first blush, fictional pleas may seem unnecessary. State criminal codes are notoriously broad and deep—broad, in that they establish a large number of distinct crimes with slightly varying elements; deep, in that any particular crime is likely to contain multiple sentencing levels and punishment options that reflect the existence of aggravating factors.<sup>51</sup> Consequently, prosecutors in every state seemingly already have a vast arsenal of statutory options at their disposal to construct a precisely targeted, mutually satisfactory non-fictional plea offer for any particular fact pattern, sometimes simply by offering to decline some charges.

But criminal codes often do not provide prosecutors with the power to bargain away something that can be very valuable (if not most valuable) to defendants: collateral consequences that are mandatory for an entire class of crimes.<sup>52</sup> The standard account portrays plea bargaining as a basic contracting problem. Many of the interests of a prosecutor (including the preferences of the public they represent) are diametrically opposed to the interests of a criminal defendant.<sup>53</sup> The prosecutor's interests lie in securing a conviction and a punishment sufficient to achieve some relevant purpose of punishment (and to do so quickly, efficiently, and with certainty). By contrast, the defendant's interests usually lie in avoiding punishment to the maximum extent possible, up to and including dismissal or acquittal,<sup>54</sup> while also limiting risk-bearing

charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.”).

49. See Johnson, *Fictional Pleas*, *supra* note 24, at 857 (“In courtrooms across the country, defense attorneys, prosecutors, and judges are allowing plea bargains to charges of conviction, which are completely disconnected from any factual allegations against the defendant.”).

50. See, e.g., *People v. Freeman*, 52 N.Y.S.3d 340, 340 (App. Div. 2017) (“Defendant concedes he wanted to avoid the significant stigma of a conviction on the initial class A misdemeanor charge, an animal cruelty charge, and therefore pleaded guilty to second-degree trespass, also a class A misdemeanor, even though there was no common factual or legal predicate for that charge.”).

51. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512–19 (2001).

52. See Richard Lorren Jolly & J.J. Prescott, *Beyond Plea Bargaining: A Theory of Criminal Settlement*, 62 B.C. L. REV. 1047, 1065 (2021); *infra* text accompanying notes 62–71.

53. Of course, prosecutors and defendants do share an interest in conserving resources, which encourages resolution through a negotiated outcome. See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1915 (1992).

54. The paradigmatic view of plea bargaining thus presents plea deals as necessarily benefiting defendants; assuming a rational defendant, the voluntarily contracted-for outcome must be preferable to the range of outcomes associated with trial. For an account of why the comparison to trial outcomes may be misguided, see Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners' (Plea Bargain) Dilemma*, 1

losses and keeping defense costs (of all sorts) low. When depicted this way, plea bargaining is essentially a tug-of-war over the crime of conviction and the eventual criminal sentence; neither side can advance their interests without harming the interests of their opponent.<sup>55</sup> On this view, bargains usually happen because both sides wish to reduce their exposure to risk and lower their costs by avoiding trial, not because they share an opinion on what the right outcome of the trial should be.

Collateral consequences, however, introduce additional, potentially asymmetric, incentives into this model. Prosecutors may care little or not at all about subsequent collateral consequences or may even agree that they are unnecessary or counterproductive.<sup>56</sup> Thus, the parties may now have more regular, systematic reasons to agree on certain aspects of the formal outcome, and this may shift how they approach bargaining over all other potential terms. Individual defendants may be less concerned about the formal punishment that attends their conviction—the length of probation, for instance—than about ensuring that they do not lose their job, their housing, or their pension.<sup>57</sup> Under such circumstances, a rational defendant may prefer a harsh sentence, such as a term of incarceration, to a more lenient sentence that triggers harsh collateral consequences that might hurt loved ones.<sup>58</sup> For their part, prosecutors may continue to be interested in significant formal punishment but have little interest in making sure that defendants experience the burdens of collateral consequences.<sup>59</sup> Given their policy goals, prosecutors may even affirmatively favor avoiding these outcomes.<sup>60</sup> After all, if prosecutors believe that certain collateral consequences are criminogenic or harmful to their community in most cases, while also believing that a marginally longer prison sentence

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J. LEGAL ANALYSIS 737, 744–46 (2009) (explaining how the pervasiveness of plea bargaining arguably permits prosecutors to bring charges that would otherwise be cost prohibitive to pursue vigorously). A contrary view holds that plea deals are not voluntary contracts but rather bargains reached under duress. *Id.* at 738. The vast array of possible charges that can stem from a single set of facts means that prosecutors can employ threats and coercion to extract convictions while conserving prosecutorial resources. *See id.* at 741–42.

55. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 765 (1984) (“Simply put, in the pure adversarial case, each party wants as much as he can get out of the thing bargained for, and the more one party receives, the less the other party receives.”).

56. Johnson, *Measuring the Creative Plea Bargain*, *supra* note 45, at 931–33.

57. McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney’s Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 495 (2005).

58. Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1212–13 (2016). To see this modeled in purely economic terms, see Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on Megan’s Laws*, 42 HARV. J. ON LEGIS. 355, 376–77 (2005).

59. To be sure, a collateral consequence may be a key prosecutorial objective in some instances, particularly if the prosecutor views the consequence as enhancing public safety. *See* Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775, 793–95 (2016); Jain, *supra* note 58, at 1221–23.

60. Johnson, *Fictional Pleas*, *supra* note 24, at 874–75.

would be welfare improving, it stands to reason that both parties might look for and find a way to structure their bargain to eliminate those consequences.

With collateral consequences on the table, plea bargaining becomes more than the usual idea of parties granting concessions to save time and resources and to reduce risk by avoiding trial, although prosecutor and defendant preferences over punishment outcomes are often less zero-sum than a typical one-shot sales contract, given the plausible prosecutorial goal of doing justice and reducing crime, not just maximally punishing every defendant. Prosecutors may benefit very little from certain collateral consequences—like those designed to benefit other communities—even when defendants find them particularly burdensome. The existence of collateral consequences without this zero-sum feature opens up the possibility of a win-win solution by staking prosecutors with a powerful bargaining chip that may be costless for them to concede. For example, a prosecutor may be able to propose a “lateral move” that does not sacrifice the overall criminal penalty but avoids other consequences of import to a defendant, such as the opportunity for an undocumented defendant to plea to a simple assault instead of a removal-eligible intentional assault.<sup>61</sup> Such a move effectively increases the total value of the bargain, creating a surplus that the prosecutor and the defendant may then share through agreement.

But the availability of such a win-win solution turns on the range of charges available to a prosecutor. At least as they presently operate in the law, collateral consequences are, by definition, not a form of punishment.<sup>62</sup> Therefore, parties cannot negotiate over them directly<sup>63</sup>—not in the way that a prosecutor and a defendant may negotiate a sentence to recommend or the terms of supervised release. In this sense, collateral consequences entail bargaining friction. They are lumpy and often mandatory, and their existence leads to second-best solutions as parties negotiate toward an indirect way of achieving something they cannot achieve directly.<sup>64</sup> The crime of conviction (along with its formally documented “facts”) triggers specific collateral

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61. Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1188 (2013) (discussing lateral moves in the immigration context); see also Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 23 (2012) (arguing that prosecutors should consider immigration consequences during plea bargaining in order to ensure proportionate punishments).

62. Chin, *supra* note 36, at 372 (“[C]ollateral consequences, the most significant part of the criminal justice system for many people, have generally not been considered punishment, and therefore are not subject to provisions of the Constitution regulating criminal proceedings.”).

63. This, of course, could, and perhaps should, change, at least if the parties taking other routes eventually wind up in the same place at greater cost and with more uncertainty.

64. Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1220 (2010) (“[I]t is difficult—essentially impossible—to fully grasp the scope of these consequences in a given jurisdiction, because they are dispersed throughout various federal and state statutes, federal and state regulations, and local policies.”); see also Chin, *supra* note 34, at 254 (explaining that collateral consequences are “unstructured” and “[n]o one knows, really, what they are”).

consequences under the law, and the prosecutor only has the power to manipulate the former, not the latter.<sup>65</sup> Some consequences can turn on the specific offense or even the underlying factual details of the offense—often the case with sex-offender registration and notification requirements.<sup>66</sup> Others attach to broad categories of offenses, leaving consequences to depend on whether the prosecutor charges the criminal conduct as a felony or misdemeanor, as violent or non-violent, or as a crime of moral turpitude.<sup>67</sup>

In some instances, fealty to the underlying facts of the case and the uneven landscape of the existing criminal code simply do not present a prosecutor with sufficiently diverse charging options to prevent collateral consequences that are particularly important to a defendant. The factual allegations against a defendant may only support one charge<sup>68</sup> or the nature of the offense may carry collateral consequences regardless of the precise charge the prosecutor brings.<sup>69</sup> “If the non-legal sanctions associated with a plea are mandatory, the only benefit of a plea agreement for defendants is the savings in trial costs, which in many cases may not justify forgoing the opportunity of acquittal.”<sup>70</sup> The result is that the bargaining parties will be stuck choosing between “overkill” and something too lenient as far as the prosecutor is concerned or alternatively gambling on one of those outcomes at trial.<sup>71</sup>

Enter the fictional plea. With the ability to admit to “facts” that are inconsistent with the actual offense or to a vague description of the crime that can interfere with the application of collateral consequences, defendants can bridge gaps with prosecutors who are unwilling to abandon prosecution altogether (or to charge a much less serious crime) to avoid a relatively poor substantive fit between the law’s prescription and the facts. In doing so, these “defendants may benefit profoundly” not only by eluding the risks they face at trial but also by avoiding what they may consider to be acutely burdensome

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65. The two prevalent paradigms for plea bargaining are “charge bargaining,” which occurs when prosecutors offer defendants a less serious charge, and “fact bargaining,” which occurs when prosecutors permit defendants to stipulate to fewer, or less serious, facts to reduce sentencing exposure. See Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1311, 1338–40 (2018).

66. See *infra* Section II.A.

67. Chin, *supra* note 36, at 376.

68. This is often the case with possession offenses, particularly possession of the lowest chargeable quantity of a particular illegal substance.

69. See Johnson, *Fictional Pleas*, *supra* note 24, at 883 (“Virtually all drug crimes—both misdemeanor and felony—are removable offenses under immigration law.” (citing Immigration and Nationality Act § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2012))).

70. Teichman, *supra* note 58, at 376. The former president of the National District Attorneys’ Association once noted that often the only palatable plea for a defendant may be one that avoids a collateral consequence; defendants otherwise may prefer to turn down a plea and take their chances at trial. See Robert M.A. Johnson, *Collateral Consequences*, 16 CRIM. JUST. 32, 32 (2001).

71. Jain, *supra* note 58, at 1217 (citing Francis A. Allen, *The Morality of Means: Three Problems in Criminal Sanctions*, 42 U. PITT. L. REV. 737, 739 (1981)).

collateral consequences they would face with a nonfictional plea bargain.<sup>72</sup> The availability of fictional pleas thus expands the prosecutor's discretion to select a charge, or collection of charges, with overall consequences that best fit their conception of just punishment for the crime, even if the charge does not fit the crime itself.

When a prosecutor and a defendant agree to a fictional description of a crime that makes them both better off, but which *also* negatively affects third parties not at the bargaining table, we describe this particular use of fictional pleas as "collusive prosecution."<sup>73</sup> In economic terms, by colluding on terms of a fictional plea that circumvent collateral consequences that protect or are at least preferred by third parties,<sup>74</sup> the prosecutor and the defendant obtain surplus value that was not previously available to them by appropriating value from others not party to the arrangement.<sup>75</sup> When the benefits of fictional

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72. Johnson, *Fictional Pleas*, *supra* note 24, at 857.

73. Admittedly, all plea bargains may be thought of as collusive in some sense. A prosecutor's charging and sentencing concessions during plea bargaining undoubtedly impact community interests in local government expenses and criminal punishment, including public safety, retribution, rehabilitation, and reentry. However, because prosecutors are typically elected locally and are expected to represent the interests of their constituency, see *infra* text accompanying notes 128–32, we assume for purposes of this Article that prosecutors internalize some large share of the costs and benefits that ordinary plea bargaining creates for their local community. See, e.g., *infra* text accompanying notes 224–30. We thus do not include in our definition of collusive prosecution situations in which prosecutors are bad actors or act in ways that effectively render their community an injured third party. In practice, prosecutors are never perfect agents and will always have self-interested incentives to help defendants at a potential cost to their community. They may prefer a mediocre bargain that resolves a case quickly to working long hours on a trial, or they may choose to incorporate their own punitive or idiosyncratic social preferences into their decisions. In this Article, however, we take prosecutors to be faithful agents who are generally responsive and accountable to their local electorate. Under these assumptions, collusive prosecution occurs when prosecutors and defendants knowingly sacrifice the interests of identifiable third parties, usually other communities, in order to extract surplus value from the plea bargain, generally to the active benefit of the prosecutor's locality.

74. If we are being rigorous, we must also acknowledge that positive and negative externalities abound in this setting, and so third-party harms flowing from prosecutorial decisions are ubiquitous. In the abstract, every decision a prosecutor makes, including decisions related to plea bargaining, has *some* effect on third parties. Thus, when a prosecutor secures a conviction that leads to incarceration, other communities may benefit from the incapacitation of a potential recidivist or may lose the value of a productive citizen whenever there is at least some chance the individual might otherwise have relocated to those communities. But local and third-party gains (and losses) like these seem likely to be positively correlated, meaning a local gain is also broadly beneficial to third parties and vice versa. For this reason, collusive prosecution is most conspicuous in the context of collateral consequences where there is significant state-to-state variation and legal heterogeneity generates opportunities for misappropriation. Collusive prosecution may also occur, however, whenever there is significant community-to-community variation in criminal justice policy preferences.

75. Fictional pleas can be noncollusive when they do not have third-party effects, for example, by allowing a prosecutor to secure a quantum of punishment they deem more appropriate for the underlying misconduct while allowing a defendant to evade a direct consequence of conviction that would ordinarily follow from their behavior, such as a sentence that is too severe. In such a

pleas come at a cost to others outside of the negotiation,<sup>76</sup> amounting to a negative externality on others beyond any cost to the integrity of the criminal justice system itself,<sup>77</sup> the bargain becomes collusive. We acknowledge that, even when they are not “collusive” in our sense of the term, fictional pleas can be disquieting. For instance, Thea Johnson, who has studied fictional pleas extensively, reports that parties to a criminal prosecution even reach agreements on charges that are logically impossible.<sup>78</sup> As an example, she points to the well-known casebook headscratcher of attempted manslaughter, which would seemingly require one’s conduct to be simultaneously intentional (an attempt) and unintentional (hence manslaughter).<sup>79</sup> More generally, Johnson’s work criticizes the practice, because it seems to undermine truth in our criminal justice system,<sup>80</sup> in addition to raising other concerns.<sup>81</sup>

Yet, fictional pleas mostly occur openly in our system. This tolerance for the practice is consistent with the notion that fictional pleas can be welfare enhancing.<sup>82</sup> At least a few courts have even accepted pleas to attempted manslaughter as a way of disposing of a case on terms that are agreeable to all parties.<sup>83</sup> It may seem surprising to some that courts would support outright fictions.<sup>84</sup> After all, Federal Rule of Criminal Procedure 11(b)(3)—and the various state rules that mirror it—require that a court find a factual basis supporting a guilty plea.<sup>85</sup> Similarly, the American Bar Association (“ABA”) advises courts to identify a factual basis in every case before accepting a plea.<sup>86</sup> Nevertheless, the U.S. Constitution does not require that a court find a factual

case, each party benefits relative to their next best option, but this surplus comes from a better exchange rather than from misappropriation.

76. See *infra* notes 300–01, 313–21 and accompanying text.

77. See Johnson, *Fictional Pleas*, *supra* note 24, at 898–900.

78. See *id.* at 863–64.

79. *Id.* at 864 n.31 (citing *People v. Martinez*, 611 N.E.2d 277, 278 (N.Y. 1993)).

80. *Id.* at 894 (causing “grave risks to the rule of law”).

81. *Id.* at 899–900.

82. *Id.* at 858 (“[Fictional pleas] are an offshoot of the ‘creative plea bargaining’ encouraged by Justice Stevens in *Padilla v. Kentucky*. Such creative bargaining, which involves negotiating around collateral consequences, is common among the players in the criminal system.” (citing *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010))).

83. *Id.* at 864 n.31 (citing *McPherson v. State*, 163 P.3d 1257, 1262–63 (Kan. Ct. App. 2007); *People v. Martinez*, 611 N.E.2d 277, 278 (N.Y. 1993)).

84. We observe that a few states have outlawed fictional pleas, including Iowa, New Jersey, and Connecticut. See Mangone, *supra* note 37, at 960 (Iowa); Michael P. Donnelly, *End Factually Baseless Plea Bargains*, 42 LITIG. 6, 7 (2016) (New Jersey and Connecticut). At the other end of the spectrum, the New York Court of Appeals, the Supreme Court of California, and the Court of Appeals of Wisconsin have all expressly endorsed the use of fictional pleas. Byrne, *supra* note 38, at 2987–88.

85. FED. R. CRIM. P. 11(b)(3); see, e.g., ARIZ. R. CRIM. P. 17.3(b) (mirroring the federal rule).

86. AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, STANDARD 14-1.6 (3d ed. 1999).



basis for a plea, and not all states mandate it, usually for practical reasons that most agree are sensible if not attractive.<sup>87</sup>

Some states, for example, explicitly eschew the factual basis requirement for misdemeanor prosecutions.<sup>88</sup> Other states conclude that a factual basis is not required when pleading to a less serious offense than the one initially charged.<sup>89</sup> Even when court rules do require a factual basis, moreover, courts do not scrupulously observe the requirement.<sup>90</sup> Provided that the defendant voluntarily and knowingly enters the guilty plea, courts seem content to defer to prosecutors on the appropriate fit between the charged conduct and underlying facts.<sup>91</sup> Although judges must officially approve plea agreements in a colloquy, they typically perform little independent review and overwhelmingly endorse the bargains struck by parties.<sup>92</sup>

Fictional pleas thus raise important ethical questions for prosecutors, which scholars have yet to explore. Both ABA Standards and Model Rules of Professional Conduct advise only that prosecutors should not maintain charges unsupported by probable cause, that is, a “reasonable ground to suspect that a person has committed . . . a crime.”<sup>93</sup> These rules and standards provide no clarity about whether a prosecutor’s ethical obligations may be satisfied by a fictional plea when the prosecutor has probable cause to believe that the defendant committed *some* chargeable offense. The result is that, by the American criminal justice system’s design,<sup>94</sup> the precise resolution of a case through plea bargaining—which charges to keep or drop, which facts to include or ignore, and what punishments to pursue—is almost entirely a matter of individual prosecutorial discretion.<sup>95</sup> Prosecutors are empowered to

87. Johnson, *Fictional Pleas*, *supra* note 24, at 864 n.31 (citations omitted).

88. See, e.g., *In re Gross*, 659 P.2d 1137, 1141 (Cal. 1983) (en banc) (citing *Ganyo v. Mun. Ct.*, 145 Cal. Rptr. 636, 640–41 (Ct. App. 1978) (“The conclusion is inescapable that there is no constitutional basis for such a requirement, and if it exists at all in misdemeanor cases it is merely a judicially declared rule of criminal procedure.”)).

89. See *State v. Harrell*, 513 N.W.2d 676, 680 (Wis. Ct. App. 1994) (“This latter rule reflects the reality that often in the context of a plea bargain, a plea is offered to a crime that does not closely match the conduct that the factual basis establishes.”).

90. See Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMPAR. L. 199, 212–13 (2006).

91. Myeonki Kim, *Conviction Beyond a Reasonable Suspicion? The Need for Strengthening the Factual Basis Requirement in Guilty Pleas*, 3 CONCORDIA L. REV. 102, 104 (2018) (“[M]ost judges tend to focus on confirming whether defendants are voluntarily pleading guilty and waiving their constitutional rights, rather than confirming the factual basis of the guilty plea.”).

92. See Turner, *supra* note 90, at 212–13.

93. H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 67 (2011) (alteration in original) (quoting *Probable Cause*, BLACK’S LAW DICTIONARY 1321 (9th ed. 2009)); see CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION, *supra* note 48, § 3-4.3; MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS’N 2016).

94. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 46 (2007).

95. At the same time, state-level legal reforms that aim to constrain prosecutorial discretion in charge sliding may also have potential to reduce coercive forms of charge bargaining in a fictional plea context. See Crespo, *supra* note 65, at 1361–68.

engage in collusive prosecution with little ethical guidance and essentially no supervision from other government officials.<sup>96</sup>

B. COLLUSIVE PROSECUTION IN PRACTICE

Nowhere have fictional pleas received more attention and practical purchase in recent years than in criminal prosecutions with possible immigration consequences. Commentators and policymakers alike widely consider deportation and exclusion (collectively “removal”)<sup>97</sup> among the most serious collateral consequences that the government can levy on an individual.<sup>98</sup> Indeed, “[f]or many noncitizen defendants, the fact of banishment from the United States is the most severe aspect of the punishment.”<sup>99</sup> Removal has the potential to break up families and communities in the United States, while sending defendants to unfamiliar lands where they lack friends, family, and support systems and may not even know the language.<sup>100</sup>

The Supreme Court has ruled that deportation arising from a criminal conviction is such a serious repercussion that defendants have a right to be notified whenever it is a possible consequence of a guilty plea; defense counsel’s failure to give such notice qualifies as “ineffective assistance” and would permit a defendant to set aside their plea.<sup>101</sup> Demonstrating its gravity, deportation is currently the only context in which constitutional trial rights of this sort have been extended into the pretrial plea-bargaining stage.<sup>102</sup> In *Padilla v. Kentucky*, Justice Stevens, writing for a majority, even encourages defense counsel to “plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation.”<sup>103</sup>

And yet the number of “removable offenses” in the United States continues to rise. Once largely limited to crimes of violence, serious drug offenses, and other types of aggravated felonies, today finds misdemeanor

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96. Michelle A. Gail, *Preliminary Proceedings*, 85 GEO. L.J. 983, 983 (1996).

97. Jennifer M. Chacón, *Criminalizing Immigration*, in 1 REFORMING CRIMINAL JUSTICE: INTRODUCTION AND CRIMINALIZATION 205, 207 n.1 (Erik Luna ed., 2017) (explaining that “[r]emoval is a legal term of art that includes both” the deportation of individuals who have been formally admitted to the country and the exclusion of individuals who have not been formally admitted, regardless of their length of residency).

98. See Peter L. Markowitz, *Deportation is Different*, 13 J. CONST. L. 1299, 1301–02 (2011); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012).

99. Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L. REV. 12, 21 (2017).

100. See Markowitz, *supra* note 98, at 1301–02.

101. *Padilla v. Kentucky*, 599 U.S. 356, 374 (2010) (holding that the failure of a defense attorney to inform a forty-year permanent resident that a felony plea could lead to the client’s deportation is constitutionally deficient performance).

102. See Chin, *supra* note 36, at 380, 385.

103. *Padilla*, 599 U.S. at 373.

drug convictions<sup>104</sup>—and even traffic infractions<sup>105</sup>—capable of triggering removal. Furthermore, the law has evolved in ways that substantially curtail judicial options for discretionary relief.<sup>106</sup> A few years ago, then-President Trump reinstated a controversial federal program prioritizing for removal any foreign national who is *arrested* for a crime (regardless of whether they are convicted of a crime).<sup>107</sup> The result has been that the government spends significant criminal justice resources enforcing noncitizen immigration laws, quite literally transforming the criminal justice process in border courts.<sup>108</sup>

While some states and localities have leaned into their immigration enforcement role,<sup>109</sup> a number of so-called progressive prosecutors have begun to seek case resolutions that specifically minimize the possibility of removal.<sup>110</sup> Former Baltimore City State’s Attorney Marilyn Mosby and current Brooklyn District Attorney Eric Gonzalez have both made high-profile announcements of their intent to utilize prosecutorial discretion to avoid drastic immigration consequences for defendants who plead guilty to low-level offenses.<sup>111</sup> Other offices have issued guidelines for engaging in collateral mitigation more broadly.<sup>112</sup> For example, “[a] 2011 memorandum distributed to prosecutors in Santa Clara County, California, cites *Padilla* as supporting a ‘dominant paradigm’ that ‘prosecutors should consider both collateral and direct consequences of a settlement in order to discharge our

104. See generally Jordan Cummings, Comment, *Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences*, 62 UCLAL. REV. 510 (2015) (documenting how even a minor marijuana conviction obtained without the advice of counsel can result in deportation).

105. Eagly, *supra* note 61, at 1218 (calling traffic convictions “the single largest source of the rise in criminal alien removals over the past decade”).

106. See Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1891 (2000) (“Deportation is now often a virtually automatic consequence of criminal conviction.”).

107. Chacón, *supra* note 97, at 212.

108. *Id.* at 209 (citing Mona Lynch, *Backpacking the Border: The Intersection of Drug and Immigration Prosecutions in a High Volume U.S. Court*, 57 BRIT. J. CRIMINOLOGY 112, 117 (2015)). This criminal justice crisis has developed as its own field of study within the legal academy: “cimmigration law.” See Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006).

109. See, e.g., Eagly, *supra* note 61, at 1180–89; see also ARIZ. REV. STAT. ANN. § 11-1051 (2020) (codifying S.B. 1070); *Arizona v. United States*, 567 U.S. 387 (2012) (striking down much of S.B. 1070 but leaving intact a provision that requires law enforcement to inquire about immigration status and communicate with federal officials).

110. See, e.g., Andrew Denney, *Brooklyn DA Aiming to Limit Immigration Impact for Low-Level Offenders*, N.Y. L.J. (Apr. 24, 2017, 6:00 PM), <https://www.law.com/newyorklawjournal/2017/04/24/brooklyn-da-aiming-to-limit-immigration-impact-for-low-level-offenders/> [<https://perma.cc/F4DT-NPWC>]; Altman, *supra* note 61, at 28–32.

111. Christie Thompson, *How Prosecutors Are Fighting Trump’s Deportation Plans*, MARSHALL PROJECT (May 16, 2017, 10:00 PM), <https://www.themarshallproject.org/2017/05/16/how-prosecutors-are-fighting-trump-s-deportation-plans> [<https://perma.cc/P8BR-XS8L>].

112. See Eagly, *supra* note 61, at 1154.

highest duty to pursue justice.”<sup>113</sup> Former New York County District Attorney Cyrus Vance, Jr., has said that prosecutors must be mindful that every criminal conviction “can have devastating consequences for” a defendant.<sup>114</sup> If election outcomes are any measure, policies like these have proven highly attractive to local voters in many cities across the country.<sup>115</sup>

To make good on their promises, progressive prosecutors frequently employ somewhat amorphous stand-in charges to replace the more factually accurate charges that might trigger disproportionate collateral consequences. For example, solicitation and misprision are “kind of a go-to fiction for people arrested on felony drug crimes that carry heavy collateral consequences.”<sup>116</sup> In fact, widely available handbooks specifically advise defense attorneys to bargain any removable felonies, such as drug crimes, into offenses like these.<sup>117</sup> At other times, prosecutors have to get creative, such as dropping a removal-eligible marijuana charge in exchange for a fictional plea to huffing (inhaling

113. Jain, *supra* note 58, at 1218 (internal quotation marks omitted) (quoting Memorandum from Jeff Rosen, Dist. Att’y, to Fellow Prosecutors (Sept. 14, 2011), [https://www.ilrc.org/sites/default/files/resources/unit\\_7b\\_4\\_santa\\_clara\\_da\\_policy.pdf](https://www.ilrc.org/sites/default/files/resources/unit_7b_4_santa_clara_da_policy.pdf) [<https://perma.cc/gVZ8-3G74>]). Likewise, the ABA Standards for Criminal Justice on Collateral Sanctions and Discretionary Disqualification of Convicted Persons advises sentencing courts to consider “applicable collateral sanctions in determining an offender’s overall sentence” in order to “ensure that the totality of the penalty is not unduly severe and that it does not give rise to undue disparity.” AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, Standard 19-2.4 (3d ed. 2004). The National Prosecution Standards, circulated by the American Bar Association’s Criminal Justice Standards, the National District Attorneys Association, and the U.S. Attorneys’ Manual, also recommend that prosecutors consider potential collateral consequences when making initial charging decisions. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION, *supra* note 48, § 3-4.4(a); AM. BAR ASS’N, CRIM. JUST. STANDARDS FOR THE DEFENSE FUNCTION § 4-5.4 (2017); see NAT’L DIST. ATT’YS ASS’N, NATIONAL PROSECUTION STANDARDS §§ 4-1.3, 4-2.4 (3d ed. 2009) [hereinafter NATIONAL PROSECUTION STANDARDS]; U.S. Dep’t of Just., Just. Manual §§ 9-27.230, 9-27.240, 9-27.250 (2018).

114. Cyrus R. Vance, Jr., *Keynote Address*, 54 HOW. L.J. 539, 543 (2011) (“[I]n any case we handle, the consequences of conviction and sentencing can have devastating consequences for an offender, and even for innocent parties such as the defendant’s family.”).

115. Daniel A. Medina, *The Progressive Prosecutors Blazing a New Path for the US Justice System*, GUARDIAN (July 23, 2019, 2:00 PM), <https://www.theguardian.com/us-news/2019/jul/23/us-justice-system-progressive-prosecutors-mass-incarceration-death-penalty> [<https://perma.cc/R6QZ-QZS7>] (showing that candidates who run on progressive platforms such as “promising to end mass incarceration, dramatically reform the cash bail system, end the death penalty and decriminalize marijuana possession” are winning local and state prosecutor elections throughout the country).

116. Barry Lam, *How Defendants End Up Pleading Guilty to Nonexistent Crimes*, SLATE (June 10, 2020, 7:30 AM), <https://slate.com/news-and-politics/2020/06/fictional-pleas-collateral-consequences-criminal-justice-reform.html> [<https://perma.cc/W4UK-HZUV>]. Solicitation is requesting or encouraging someone else to commit a crime, and misprision is failing to report a crime. See, e.g., 18 U.S.C. §§ 4, 373 (2018) (criminalizing misprision of felony and solicitation to commit a crime of violence).

117. See, e.g., IMMIGRANT LEGAL RES. CTR., QUICK REFERENCE CHART FOR DETERMINING KEY IMMIGRATION CONSEQUENCES OF SELECTED CALIFORNIA OFFENSES 3 (2016), [https://www.ilrc.org/sites/default/files/resources/california\\_chart\\_jan\\_2016-v2.pdf](https://www.ilrc.org/sites/default/files/resources/california_chart_jan_2016-v2.pdf) [<https://perma.cc/BG8X-ZQC4>] (“[T]he best practice for a noncitizen defendant is to plead to the specific ‘safe’ minimum conduct rather than, e.g., to the facts in the charge or the statutory language, where that is possible.”).

toxic fumes).<sup>118</sup> In this context, fictional pleas represent an exercise of prosecutorial discretion aimed at “do[ing] the ‘right thing’ for the defendant in view of the defendant’s social circumstances or in view of the peculiar circumstances of his crime.”<sup>119</sup>

### C. JUSTIFYING COLLUSIVE PROSECUTION

One might question whether subverting federal immigration policy by resorting to fictions is a justifiable exercise of prosecutorial discretion. After all, even if the local electorate supports nonenforcement policies, local preferences serving only the narrow interests of a specific community can be, and frequently are, welfare reducing from the perspective of the broader community.<sup>120</sup> On the other hand, strong proponents of broad prosecutorial discretion dispute the ethical preeminence of national legislation in a world of atomized local systems; they make the case “that elected prosecutors should serve as check on legislatures and should play an independent role in shaping the law.”<sup>121</sup>

Moreover, the American criminal justice system emphasizes local preferences by design. Local constituents elect their prosecutors to office in all but five states, and thus, a prosecutor typically represents the citizens of only a single county or municipality.<sup>122</sup> They set enforcement priorities at the local level and are accountable to the public through direct elections,<sup>123</sup> with no oversight by the state attorney general despite being a state employee.<sup>124</sup> Although a recent gubernatorial removal of an elected prosecutor has garnered national attention, suspension of an independently elected prosecutor by a governor remains extremely rare and perhaps unlawful under some circumstances.<sup>125</sup> Florida Governor Ron DeSantis’s decision to suspend the

118. See Johnson, *Fictional Pleas*, *supra* note 24, at 864.

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

120. See, e.g., Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347, 1400–02 (1997).

121. Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 876 (emphasis omitted).

122. Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1549–50 (2020).

123. See Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 75–76 (2011).

124. See Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 564 (2011). *But see* Justin Murray, *Prosecutorial Nonenforcement and Residual Criminalization*, 19 OHIO ST. J. CRIM. L. 391, 392–96 (2022) (documenting how the fragmentation of prosecutorial authority in the United States preserves mechanisms for the enforcement of criminal laws even when local prosecutors engage in programmatic nonenforcement).

125. See Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 114 (2016) (“Historically, there was limited examination of [prosecutorial misconduct] beyond some defense organizations and a few judges, and regulation of prosecutorial conduct, either by courts or disciplinary authorities, was scant.”); *see also* Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and*

top elected prosecutor in Tampa Bay bucked precedent followed by DeSantis's Republican predecessor, now-Senator Rick Scott, who usually resorted to removal "only after [elected officials] had been charged with a crime."<sup>126</sup> This system of locally elected prosecutors is intentional, designed to ensure that prosecutors are "more responsive to the criminal justice priorities of local communities than prosecutors selected by a governor or legislature located in the state capital."<sup>127</sup>

This Section touches on the history of local prosecutors in the United States to highlight the ways in which local prosecutorial incentives organically insulate prosecutors from forced fidelity to state or national policies. We also examine recent attempts to justify the practice of prosecutorial nonenforcement as a matter of populist politics. We then ask whether collusive prosecution, in particular, implicates prosecutorial ethics in some distinct way. To this end, we draw on the budding field of public fiduciary theory to evaluate prosecutors' diverse ethical obligations to a wide range of constituencies. Ultimately, we conclude that collusive prosecutions structured to circumvent national policies disfavored at the local level are at least arguably justifiable under this framework. Locals typically bear the effects of prosecutorial priorities, meaning that a prosecutor's discretion about employing fictional pleas redounds to the benefit or detriment of a relatively small (voting) population. When we combine this tendency with well-informed local elections, we can construct a normative case for broad prosecutorial discretion and advance a preliminary defense of collusive prosecution under these conditions.

### 1. Local Prosecutors and Nonenforcement Discretion

Local prosecutors are an American institution.<sup>128</sup> States began turning from private prosecution to elected local prosecutors in the early nineteenth century,<sup>129</sup> and they haven't looked back. "Locally elected prosecutors embodied the colonial American preference for local governmental control and suspicion

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*Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143, 143 (2016) ("[C]ourts have traditionally relied primarily on prosecutors' individual self-restraint and institutional self-regulation to curb prosecutors' excesses and redress their wrongdoing . . ."); CAL. CONST. art. V, § 6 (authorizing gubernatorial authority to reorganize executive functions "other than elective officers and agencies administered by elective officers").

126. Patricia Mazzei, *DeSantis Suspends Tampa Prosecutor Who Vowed Not to Criminalize Abortion*, N.Y. TIMES (Aug. 4, 2022), <https://www.nytimes.com/2022/08/04/us/desantis-tampa-prosecutor-abortion.html> [<https://perma.cc/ZK4F-N5BJ>].

127. Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1536 (2012).

128. See Gold, *supra* note 123, at 75-78; see also Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 593 (2014) ("In most places around the world, the idea of an elected prosecutor is downright bizarre. In the United States, it is the norm.").

129. See Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 432-33 (2009); Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1327-28 (2002).

of an overly powerful central government.”<sup>130</sup> In theory, the use of local elections tethered prosecutorial discretion directly to public sentiment (at least of those with the legal and practical ability to vote).<sup>131</sup> Moreover, observers have long assumed that direct elections have the capacity to insulate local prosecutors from malign state-level political influences.<sup>132</sup>

Today, America retains its system of local prosecutorial elections despite national expansion and increased urbanization. Fewer than five percent of chief prosecutors nationally are selected in a manner other than by direct election.<sup>133</sup> Local prosecutors occupy more than 2,300 distinct offices,<sup>134</sup> most representing only a single county.<sup>135</sup> Because prosecutors are responsible for a narrow category of decisions that can be highly salient to local voters, who suffer or enjoy the consequences, the theoretical building blocks for effective democratic accountability appear intact.<sup>136</sup> Nevertheless, scholars regularly question the effectiveness of elections as a means of holding prosecutors accountable to public sentiment. In particular, some fear that the electorate is insufficiently informed about prosecutorial functions, powers, constraints, and decision-making<sup>137</sup>; that racial and wealth segregation fragments some electorates<sup>138</sup>; and that the costs of prosecutorial decisions may be difficult to detect if they wind up on budgets of other government entities.<sup>139</sup> Others point out that re-election rates are unreasonably high,<sup>140</sup> that prosecutors regularly run unopposed,<sup>141</sup> and that election rhetoric rarely embraces substantive issues.<sup>142</sup>

130. Gold, *supra* note 123, at 75.

131. Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 582 (2009) (“There are reasons to believe that elections could lead prosecutors to apply the criminal law according to public priorities and values.”).

132. Ellis, *supra* note 127, at 1550–51.

133. Gold, *supra* note 123, at 77 (citing Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334, 335 (2002)).

134. Hessick & Morse, *supra* note 122, at 1548.

135. Wright, *supra* note 131, at 599.

136. *Id.*

137. Gold, *supra* note 123, at 78 (“Because prosecutors know that voters lack sufficient information to check their exercise of authority after the fact, prosecutors need not account for voter preferences.”).

138. Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 197–98 (2017) (citing WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 191–95 (2011)).

139. *Id.* at 196 (“State-funded prisons, for instance, give local police, prosecutors, and judges little incentive to ration imprisonment.”).

140. See Wright, *supra* note 128, at 600 (“Incumbents win [ninety-four percent] of the races they enter and [seventy percent] of all races, even higher than the incumbency success rates for state legislators.”); Hessick & Morse, *supra* note 122, at 1544 (“Our study confirmed that when incumbents seek reelection, they win an astonishing [ninety-five] percent of the time.”).

141. Wright, *supra* note 128, at 601 (“[O]ver [eighty percent] of prosecutor incumbents run unopposed in both general elections and in primaries.”).

142. See *id.* at 604–05.

In recent years, a number of high-profile elections rich in substantive, debate-worthy issues have belied these concerns, underscoring the public's potential sensitivity to prosecutorial programmatic policy positions, at least as part of a campaign platform.<sup>143</sup> In Philadelphia, voters elected (and re-elected) long-time defense lawyer Larry Krasner as the city's district attorney amidst his pledges to end the death penalty, mass incarceration, and cash bail.<sup>144</sup> In San Francisco, former public defender, turned top prosecutor, Chesa Boudin campaigned on confronting racial disparities and holding police more accountable for their use of force.<sup>145</sup> And in Boston, Rachel Rollins prevailed on a platform that included addressing minor crimes, such as shoplifting and drug possession, through compassionate alternatives to incarceration.<sup>146</sup> Election outcomes such as these have defied the "academic conventional wisdom" regarding the public's interest in prosecutorial policies.<sup>147</sup>

Accordingly, when prosecutors deploy their discretion to subvert applicable state or federal laws, they may very well be vindicating a public mandate to do so. In recent work, Kerrel Murray lays out the normative case in favor of prosecutorial nonenforcement of certain crimes, concluding that systematically forgoing certain prosecutions can be justifiable as an outgrowth of power already vested by the state in local communities.<sup>148</sup> According to Murray, we should view nonenforcement policies by local prosecutors as an extension of the historical power of petit juries to nullify charges in individual

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143. See Carissa Byrne Hessick, *Elected Prosecutors and Non-Prosecution Policies*, PRAWFSBLAWG (Sept. 8, 2018, 9:37 AM), <https://prawnsblawg.blogspot.com/2018/09/elected-prosecutors-and-non-prosecution-policies.html> [<https://perma.cc/TgUX-UAAG>]; Sam Reisman, *The Rise of the Progressive Prosecutor*, LAW360 (Apr. 7, 2019, 8:02 PM), <https://www.law360.com/article/s/1145615/the-rise-of-the-progressive-prosecutor> [<https://perma.cc/9YQ7-BLU2>].

144. Chris Brennan & Aubrey Whelan, *Larry Krasner Wins Race for Philly DA*, PHILA. INQUIRER (Nov. 7, 2017), <https://www.inquirer.com/philly/news/politics/city/larry-krasner-wins-race-for-philly-da-20171107.html> [<https://perma.cc/V77F-YA73>].

145. Evan Sernoffsky, *Chesa Boudin, Reformer Public Defender, Wins Election as San Francisco's New DA*, S.F. CHRON. (Nov. 9, 2019, 5:54 PM), <https://www.sfchronicle.com/bayarea/article/Chesa-Boudin-reformer-public-defender-wins-14823166.php> [<https://perma.cc/B7US-U52Z>]. Boudin was later recalled in a high-profile vote, again demonstrating the sensitivity of local electorates to prosecutors' announced and implemented policy positions. See Shaila Dewan, *The Lessons Liberal Prosecutors Are Drawing From San Francisco's Backlash*, N.Y. TIMES (June 15, 2022), <https://www.nytimes.com/2022/06/13/us/justice-reform-boudin-recall-san-francisco.html> [<https://perma.cc/MLP5-ZBFN>].

146. See Maria Cramer & Jackson Cote, *Rachael Rollins Wins Suffolk DA Race*, BOS. GLOBE (Nov. 7, 2018, 12:21 AM), <https://www.bostonglobe.com/metro/2018/11/06/contested-races-for-decided-mass-counties/ZqYhxN6gYx6hOwHPGp7Ztj/story.html> [<https://perma.cc/VgTP-LAAN>].

147. See Hessick and Morse, *supra* note 122, at 1543.

148. W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 181 (2021). Murray specifically examines the issue of "categorical prosecutorial nullification"—prosecutors "refusing to apply inarguably applicable law because of moral or ideological opposition to that law in all or a subset of cases." *Id.* This is to be distinguished from the generally accepted discretion of prosecutors not to pursue charges in individual cases because of resource constraints or the dictates of justice. See *id.* at 175–76. For a critical history of jury nullification, see Richard Lorren Jolly, *Jury Nullification as a Spectrum*, 49 PEPP. L. REV. 341, 361–66 (2022).



cases.<sup>149</sup> Jury nullification occurs when a jury refuses to convict a defendant on particular criminal charges even when the facts indisputably support those charges.<sup>150</sup> Murray views historical support for jury nullification as indicative of two foundational commitments in American criminal law: First, that a community's sense of justice is worth respecting, even to the exclusion of written law; second, that we must define the relevant community as the locality where the decision occurs because only its members have "a materially different stake in the question of guilt than those outside it."<sup>151</sup>

As jury trials have all but disappeared in our criminal justice system, the exercise of nonenforcement discretion by locally elected prosecutors arguably functions as a jury nullification substitute.<sup>152</sup> In many respects, prosecutorial nonenforcement is preferable to jury nullification. Jury nullification is necessarily ad hoc,<sup>153</sup> and the preferences of individual juries may not reflect the preferences of the broader community—either in the order or emphasis of its priorities or in its views on the legal or factual questions at issue.<sup>154</sup> Prosecutorial nonenforcement, by contrast, has the potential to be programmatic and thus consistently applied, so that like defendants are treated alike.<sup>155</sup> In addition, as we have seen in recent years, nonenforcement policies can be part of a prosecutor's campaign platform, ensuring that nonenforcement decisions are to some degree subject to the electorate's will.<sup>156</sup> When nonenforcement of certain laws originates from the policy preferences of

149. Murray, *supra* note 148, at 180 ("When fettered to localized popular will, programmatic prosecutorial nullification acts as a hydraulic descendant of jury nullification: It facilitates wholesale the species of democratic local control that jury nullification permits retail.").

150. See Paul Butler, *In Defense of Jury Nullification*, 31 LITIG. 46, 46 (2004) ("Juries nullify when they acquit a defendant who they believe is actually guilty.").

151. Murray, *supra* note 148, at 186.

152. See *id.* at 197 ("The Founding-era powerful jury reflected a desire for the demos to exercise localized control over that sort of discretion. But that jury has disappeared. Because prosecutors have substantial charging discretion, tying prosecutorial discretion closely to the views of their electorate (if expressed in some discernible way) could have provided an alternative path to the same end.").

153. See Brenner M. Fissell, *Jury Nullification and the Rule of Law*, 19 LEGAL THEORY 217, 222 (2013) ("[N]ullification can produce disparate outcomes in like cases and does so based upon something other than the formal law.").

154. According to Orin Kerr, the tendency to treat juries as representative of community sentiment is mistaken in a criminal system where a single juror can block a conviction. Orin Kerr, *The Problem with Jury Nullification*, WASH. POST (Aug. 10, 2015, 3:36 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/10/the-problem-with-jury-nullification> [https://perma.cc/JX82-9TJN]. Kerr advances an additional argument for why prosecutorial discretion is preferable to jury nullification. He correctly notes that prosecutors have access to relevant information that is frequently kept from juries, such as inadmissible evidence and the defendant's criminal record. *Id.*

155. Murray, *supra* note 148, at 217 ("When prosecutors exercise their robust discretion programmatically to nullify, pursuant to a policy for which they can legitimately claim public approval, they accomplish wholesale what juries once might have done retail.").

156. *But see id.* at 219 (explaining that a campaign promise to not enforce a particular law need not be reflective of a broadly shared community sentiment).

the affected electorate, the prosecutor at least plausibly serves as a conduit for popular sovereignty.<sup>157</sup>

Murray's account of prosecutorial nonenforcement does not fully address the questions raised by collusive prosecution, however. On one hand, we may think of collusive prosecution as a species of nonenforcement: the use of a fictional plea to subvert locally disfavored collateral consequences. Certainly, localities have long held the power to avoid imposing certain collateral consequences with which they disagree, whether through jury nullification or through outright dismissal by the prosecutor.<sup>158</sup> In this framing, collusive prosecution is yet another instance of local control over policies rendered at other more remote levels of the political process, whether state or national.<sup>159</sup> On the other hand, avoiding collateral consequences has traditionally been available only at a substantial cost to a locality—for example, by forfeiting conviction and all punishment, even for individuals who may be guilty of offenses that the local community wants to see punished.<sup>160</sup> This cost arguably insures against overuse of local nonenforcement powers. Fictional pleas, by contrast, permit prosecutors to tailor their nonenforcement discretion only to those policies that are at odds with community sentiment. Moreover, when there is geographic variation in the scope and application of collateral consequences, fictional pleas allow prosecutors to go even further. Not only can they “enforce” collateral consequences locally, but they can secure even more favorable bargaining terms (e.g., a longer sentence or an incentive to relocate) by trading away benefits that only accrue to other communities. In this way, fictional pleas may be a more cost-effective technique for a dissenting

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157. *Id.* at 208–09.

158. We acknowledge that jury nullification to avoid collateral consequences is a less frequent occurrence than nullification based on substantive disagreement with the criminal sanction, since jurors are typically prohibited from learning about the possible consequences of a conviction. *See, e.g.,* Jeffrey Bellin, *Is Punishment Relevant After All? A Prescription for Informing Juries of the Consequences of Conviction*, 90 B.U.L. REV. 2223, 2237 (2010) (“The prevailing rule in American courts forbids witnesses, attorneys, or judges from informing jurors of the consequences of conviction—whether through testimony, arguments of counsel, or jury instructions.”). Nevertheless, at least some collateral consequences are sufficiently well known to follow from specific convictions—for example, sex-offender registration—that jurors are capable of nullifying on that ground without direct evidence at trial.

159. Many of the most well-known collateral consequences are products of legislation at either the state or federal level. For example, removal of noncitizens is triggered by offenses specified in the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2). Likewise, sex-offender registration is required under state-specific statutes. *See infra* Section II.A. This Article therefore evaluates fictional pleas as instances of dissenting actors subverting the policy preferences of a larger legislative community. We note, however, that some collateral consequences, such as diminished housing and economic opportunities, are the product of choices by private actors and therefore do not follow this model. *See generally* Wayne A. Logan, *supra* note 36 (exploring the modern criminal justice reform movement's failure to address private collateral consequences).

160. *See, e.g.,* Donald Braman, *Criminal Law and the Pursuit of Equality*, 84 TEX. L. REV. 2097, 2130 (2006) (“Jury nullification . . . is normally seen as a choice between one of two great injustices: that of imposing an unjust sanction and that of failing to impose any sanction at all.”).

locality to achieve nullification and therefore a greater threat to state or national interests.<sup>161</sup> In the next Section, we take a different approach to consider the normative defensibility of collusive prosecution, using the lens of prosecutorial ethics.

## 2. The Ethics of Collusive Prosecution

Collusive prosecution raises difficult questions about prosecutorial ethics. Even if we accept the view that prosecutors are acting as a conduit for local community sentiment when deploying fictional pleas to avoid specific disfavored collateral consequences,<sup>162</sup> many nevertheless expect American prosecutors to represent more than just their local electorate.<sup>163</sup> Prosecutors are often said to have an amorphous obligation to “seek justice,” even when it is politically unpopular.<sup>164</sup> Baked into this obligation is an expectation that prosecutors will faithfully execute legitimately enacted statutes and ordinances, whether local, state, or national.<sup>165</sup> Because of this, the populist underpinnings of prosecutorial discretion do not definitively answer the question whether fictional pleas that intentionally seek to avoid collateral consequences are ethical or at least normatively attractive.<sup>166</sup>

This Section evaluates the ethical case for collusive prosecution, concluding that fictional pleas are likely defensible in the mine-run of cases in which

161. See *supra* Section I.C.1.

162. See *supra* Section I.C.1.

163. See generally Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203 (2020) (exploring normative theories about the role of prosecutors).

164. Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 612–18 (1999).

165. The National District Attorneys Association’s National Prosecution Standards explain that the obligation to seek justice “includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected.” NATIONAL PROSECUTION STANDARDS, *supra* note 113, § 1-1.1. But see Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 805 n.105 (2012) (explaining how the obligation to faithfully execute laws “should not be confused with the idea of full enforcement” in an age of overcriminalization).

166. Murray identifies a number of autonomy-promoting effects served by prosecutorial nonenforcement, at least when it reflects the will of the prosecutor’s electorate, which he believes normatively legitimates the practice. See Murray, *supra* note 148, at 197–208. We approach this question from a different angle, asking not whether the practice is worthy of “respect,” see *id.* at 200, but whether the prosecutor’s role entails a fiduciary duty on some occasions to act at odds with the electorate’s preferences. See Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 488–89 (2010) (“Fiduciary representation is distinguishable from some strains of deliberative-democracy theory, however, because it does not treat the public’s engagement in agency deliberation as an end in itself, nor does it rely upon the deliberative process to produce a legitimating social consensus. Instead, fiduciary representation views agency deliberation and transparency as principles that are necessary (albeit not sufficient) to ensure that discretionary agency lawmaking promotes the public welfare.” (footnote omitted)). For another approach to examining this question, see generally Ronald F. Wright, *Prosecutors and Their State and Local Politics*, 110 J. CRIM. L. & CRIMINOLOGY 823 (2020) (examining prosecutors’ competing loyalties to statewide voters and local voters).

prosecutors currently use them: collusive bargains to avoid immigration consequences. The case for collusive prosecution includes both ethical and economic dimensions. Ethically, we employ fiduciary theory to consider a prosecutor's responsibilities as an agent of multiple constituencies. Economically, we evaluate whether a prosecutor's public fiduciary obligations are satisfied whenever a prosecutor's choices are welfare enhancing across the aggregate of constituencies. We suggest that, all else equal, we can expect collusive prosecution to be welfare enhancing when the primary costs of nonenforcement are felt locally and thus are likely to be internalized by the community whose preferences the prosecutor represents. This Section therefore provides a contextually limited defense of collusive prosecution that lays the groundwork for evaluating collusive prosecution generally.

Although fiduciary theory emerged from the private-law domain, scholars employ it to analyze the proper role of many public-law actors, including judges,<sup>167</sup> legislators,<sup>168</sup> and administrative agencies.<sup>169</sup> Of particular relevance to our argument, Bruce Green and Rebecca Roiphe deploy fiduciary theory to examine the ethical responsibilities that prosecutors have to serve the public interest.<sup>170</sup> Their theory offers a framework for identifying limits on the exercise of prosecutorial discretion. In so doing, their theory pushes back on the too-oft-remarked observation that the power of the prosecutor is effectively total.<sup>171</sup>

The justification for a fiduciary relationship begins with concerns about a power imbalance: One person (the fiduciary) wields discretionary power over the material practical or legal interests of another person (the beneficiary).<sup>172</sup> Because this relationship renders the beneficiary vulnerable to the individual commanding such power, some ethical counterweight is essential if the relationship is to be a valuable one. The beneficiary must trust the fiduciary to act in the beneficiary's interest at the expense of the fiduciary's potential gains from self-dealing or shirking.<sup>173</sup> In the case of prosecutors, Green and Roiphe cast prosecutorial discretion—specifically with respect to charging and plea-bargaining decisions—as the relevant “power” that must be

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167. Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 705 (2013) [hereinafter Leib et al., *A Fiduciary Theory of Judging*].

168. D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 676–77 (2013).

169. Criddle, *supra* note 166, at 466–68.

170. Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805, 807 (2020).

171. See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 876–84 (2009) (explaining how the contemporary criminal justice system consolidates “all the important decisions in a criminal case with one actor who faces no outside check”). We concede that identifying such ethical limits does not ensure sufficient structural mechanisms are in place to ensure ethical compliance by prosecutors.

172. Leib et al., *A Fiduciary Theory of Judging*, *supra* note 167, at 705.

173. See Green & Roiphe, *supra* note 170, at 813; Leib et al., *A Fiduciary Theory of Judging*, *supra* note 167, at 705–06.

deployed in concert with the demands of the classic fiduciary duties of care and loyalty.<sup>174</sup>

Viewing elected local prosecutors as fiduciaries is particularly helpful, because it clarifies the distinct obligations that prosecutors may have with respect to members of the public who inhabit widely varying positions regarding prosecutorial policies and decision-making.<sup>175</sup> Although fiduciaries are often portrayed as having a single, identifiable beneficiary—e.g., a lawyer and a client or a guardian and a ward<sup>176</sup>—both public and private fiduciaries must often act in the interest of multiple, and at times competing, beneficiaries.<sup>177</sup> In this important sense, we should move beyond the analysis Green and Roiphe offer when they posit that a prosecutor’s beneficiary is broadly “the public.”<sup>178</sup> By mapping a prosecutor’s fiduciary responsibilities onto multiple distinct constituencies within the general public, we can provide a richer framework for evaluating the ethics of collusive prosecution that seeks to avoid collateral consequences.

To define the various beneficiaries of the prosecutor, qua fiduciary, we should begin by identifying all those who, in some sense, delegate to the prosecutor some authority over their legal or other interests and who therefore now stand vulnerable to the fallout of self-dealing prosecutorial discretion.<sup>179</sup> As leading scholars of public fiduciaries explain:

The paradox of much elective political representation, then, is precisely that the representative is selected locally and ‘represents’ her home district in some senses but that she also serves the people and wields power more broadly. Others’ interests, vulnerable to her

174. Green & Roiphe, *supra* note 170, at 813.

175. *See id.* at 819 (examining whether prosecutors “owe particularly strong obligations to some subgroup of the public”); Ethan J. Leib, David L. Ponet & Michael Serota, *Mapping Public Fiduciary Relationships*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 388, 390 (Andrew S. Gold and Paul B. Miller eds., 2014) [hereinafter Leib et al., *Mapping Public Fiduciary Relationships*] (“The challenge of identifying the appropriate constituency or constituencies to be represented has serious practical ramifications, given that the interests of different groups will often conflict.”).

176. *Cf.* Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1157–58 (2014) (contending that private fiduciary principles cannot be extended to the public law context because, in part, private fiduciaries have “a single beneficiary or a discrete class of beneficiaries” and “one or a set of agreed-upon ends, which are measured by a specific set of doctrinal maximands”).

177. *See* Leib et al., *A Fiduciary Theory of Judging*, *supra* note 167, at 712–13.

178. *See* Green & Roiphe, *supra* note 170, at 813. This framing of public law beneficiaries is simultaneously common and problematic, as it elides important nuance in the ways that public official discretion impacts members of the public differentially. *See* Leib et al., *Mapping Public Fiduciary Relationships*, *supra* note 175, at 395–98.

179. Leib et al., *A Fiduciary Theory of Judging*, *supra* note 167, at 719–20 (conducting a similar inquiry to identify the beneficiaries of fiduciary judges).

legal power over them, may thus need to be protected both by and against her activities.<sup>180</sup>

But who, precisely? Fortunately, a relational analysis can help us understand how a prosecutor's use of fictional pleas may affect specific groups.<sup>181</sup>

In the case of elected state prosecutors using fictional pleas to subvert immigration consequences, at least four distinct constituencies have some plausible claim to being a beneficiary of prosecutorial discretion.<sup>182</sup> First, and most obviously, a prosecutor is a fiduciary of their state's citizens. The state is, quite literally, the prosecutor's client.<sup>183</sup> In pursuing a prosecution, a prosecutor acts on the state citizenry's behalf, enforcing criminal laws typically passed at the state level.<sup>184</sup> Second, prosecutors have a distinct set of fiduciary responsibilities to their specific electorate or constituency.<sup>185</sup> Although these citizens comprise part of the state's citizens, they are also uniquely vulnerable to the discretion of local prosecutors. For one thing, prosecutorial priorities dictate the use of fiscal resources drawn from the relevant electorate.<sup>186</sup> For

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180. Ethan J. Leib, David L. Ponet & Michael Serota, *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91, 95 (2013) [hereinafter Leib et al., *Translating Fiduciary Principles*]. Our approach to public fiduciaries aligns with the "stakeholder" theory of private fiduciaries. See generally William M. Evan & R. Edward Freeman, *A Stakeholder Theory of the Modern Corporation: Kantian Capitalism*, in ETHICAL THEORY AND BUSINESS 97 (Tom L. Beauchamp & Norman E. Bowie eds., 3d ed. 1988) (concluding that "managers bear a fiduciary relationship to stakeholders").

181. See Leib et al., *Translating Fiduciary Principles*, *supra* note 180, at 94 ("Accordingly, to establish that public officials are in a meaningful sense public fiduciaries and what sort of duties should be applied to them (and by whom), it is essential to explore the relationships within the political landscape to better map who is the fiduciary for whom and to what degree.").

182. We acknowledge that this brief discussion elides nuances that arise in the cases of unelected prosecutors and prosecutors at other levels of government, such as U.S. Attorneys. A full examination of prosecutors' varied fiduciary relationships is beyond the scope of this Article. Here, we offer only a preliminary framework for considering how to reconcile competing claims of beneficiaries in a single example.

183. See Green & Roiphe, *supra* note 170, at 819.

184. Murray, *supra* note 148, at 177 (citing Kay Levine, *The State's Role in Prosecutorial Politics*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR 31, 31-32 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008) ("[T]he state is the source of formal penal legislation, but enforcement is determined exclusively by local prosecutors guided by community priorities and resources.")). But see Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1423-38 (2001) (detailing the expansive power of municipalities to pass criminal legislation).

185. See K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 331-32 (2014) ("[B]ecause prosecutors are often local officials, it is not necessarily unfeasible for them to succeed on a platform of equal enforcement of the law. Further, voter referendums have shown a turn towards diversion of certain offenses, and decriminalization of others."); see also CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION, *supra* note 48, § 3-1.3 ("The public's interests and views should be determined by the chief prosecutor and designated assistants in the jurisdiction.").

186. Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 719 (1996) ("In most jurisdictions, county prosecutors use local funds to operate their offices and therefore, prosecutors must be concerned about the cost of prosecution."). But see Kay L. Levine, *The State's Role in Prosecutorial Politics*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR

another, prosecutorial priorities affect behavior that is often geographically bounded, or at least concentrated, within the electoral district.<sup>187</sup> Third, we may also view citizens of the nation as potential beneficiaries to the extent that prosecutorial choices influence the effectiveness of national legislation and executive action. For instance, when a local prosecutor colludes with a defendant to evade collateral immigration consequences, the deal subverts duly enacted national policy that arguably represents the preferences of the nation's citizenry as a whole.<sup>188</sup> Lastly, we should view defendants themselves as a distinct class of beneficiary. While an individual defendant may well advance their own best interests in negotiating a fictional plea bargain, research amply demonstrates that defendants as a class are vulnerable to the various ways prosecutors exercise their discretion, including with respect to which terms they deem negotiable.<sup>189</sup>

When a fiduciary has obligations to multiple beneficiaries whose interests may be in conflict, the typical duty of loyalty “manifests itself as fairness and reasonableness.”<sup>190</sup> Fairness requires that similarly situated beneficiaries must be treated with equal dignity, ensuring that the law does not arbitrarily

32 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008) (“State-funded prosecution units give the state government a much larger role in local enforcement than the standard model envisions.”).

187. See Logan, *supra* note 184, at 1419–20 (footnotes omitted) (“[T]he human consequences and articulated explanations of crime are largely local in nature, as are police enforcement efforts.”).

188. Even though prosecutors do not affirmatively agree to enforce collateral consequences—such as immigration consequences—and do not typically represent national interests, the relevant fiduciary obligations arise from the *structure* of the relationship, rather than the consent of the fiduciary. When federal lawmakers design collateral consequences to follow from convictions for specific offenses, citizens in other states become structurally vulnerable to the exercise of a local prosecutor's discretion.

189. See, e.g., Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea Bargaining*, 59 B.C. L. REV. 1187, 1231 (2018) (“[W]hite defendants are more likely than [B]lack defendants to see their initial charges reduced as part of the plea-bargaining process.”); Bellin, *supra* note 163, at 1228–31 (outlining competing paradigms for the exercise of prosecutorial discretion in plea bargaining and its impact on diverse defendants); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 25, 31–38 (1998) (explaining how plea bargaining is “controlled entirely by the prosecutor” and how prosecutorial discretion often produces systemic racial inequality across cases); see also *id.* at 50–53 (arguing that prosecutors have an ethical duty to avoid discrimination, both in individual cases and in the implementation of programmatic policies).

190. Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 QUEEN'S L.J. 259, 265 (2005). Fox-Decent analogizes fiduciary “fairness and reasonableness” to similar concepts in administrative law. *Id.* at 264–65. But these concepts can also be seen in traditional fiduciary law. See Paul Finn, *The Forgotten “Trust”: The People and the State*, in EQUITY: ISSUES AND TRENDS 138 (Malcolm Cope ed., 1995) (“It is uncontroversial fiduciary law that where a fiduciary serves classes of beneficiaries possessing different rights . . . the fiduciary is . . . required to act fairly as between different classes of beneficiary in taking decisions which affect the rights and interest of the classes . . .”); RESTATEMENT (THIRD) OF TRUSTS § 79 cmt. b, c (AM. L. INST. 2007) (noting that a trustee with multiple, competing beneficiaries “is not to be influenced by the trustee's personal favoritism or animosity toward individual beneficiaries” and must “make diligent and good-faith efforts to identify, respect, and balance the various beneficial interests”).

discriminate among them.<sup>191</sup> One may conceive of this fiduciary duty of fairness as a “nondiscrimination” obligation. Reasonableness, meanwhile, reflects “the duty of decision-makers to base their determinations on grounds capable of justifying them.”<sup>192</sup> Importantly, fiduciary theory instructs us that a prosecutor’s reasons for action must be grounded in an assessment of the welfare of all of their diverse beneficiaries rather than in self-interest or exclusively in the interest of identifiable parties.<sup>193</sup> We may therefore think of the duty of reasonableness as a “due-consideration” obligation. In the case of prosecutors, Green and Roiphe maintain that the relevant “duties to fairly consider the interests of the public as a whole may involve at least offering reasons for prioritizing some criminal justice ends over others.”<sup>194</sup>

Examining these specific fiduciary responsibilities exposes the limitations of the popular sovereignty justification for fictional pleas. If a prosecutor employs fictional pleas as a means of enacting the policy preferences of their own electorate regarding collateral consequences—either out of an overweening professional self-interest or out of a sense of undivided, unreserved commitment to direct constituents—they arguably violate their fiduciary responsibilities to fairly consider the welfare of other beneficiaries.<sup>195</sup> Moreover, the meager content of these obligations betrays the limitations of fiduciary

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191. Fox-Decent, *supra* note 190, at 265–66; EVAN FOX-DECENT, SOVEREIGNTY’S PROMISE: THE STATE AS FIDUCIARY 35 (2011); *see, e.g., In re Estate of Forgey*, 906 N.W.2d 618, 635 (Neb. 2018) (“If a trust has two or more beneficiaries, a trustee has a duty of impartiality among beneficiaries.”); *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1379 (Fed. Cir. 2001) (“It is also well settled that where, as here, a trust is created for successive beneficiaries, the trustee owes a duty to act impartially as between or among them.”); *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 586 (1990) (Kennedy, J., dissenting) (“Trust law, in a similar manner, long has required trustees to serve the interests of all beneficiaries with impartiality.”).

192. Fox-Decent, *supra* note 190, at 264.

193. Green & Roiphe, *supra* note 170, at 829–31; FOX-DECENT, *supra* note 191, at 36; *see, e.g., He Depu v. Yahoo! Inc.*, 950 F.3d 897, 904 (D.C. Cir. 2020) (“[W]here a trust has multiple beneficiaries, trustees must act ‘impartially in . . . [the distribution of] trust property,’ paying ‘due regard’ to the ‘respective interests’ of each.” (quoting D.C. CODE ANN. § 19-1308.03 (2012)) (alterations in original)); *Pagliara v. Johnston Barton Proctor & Rose, LLP*, 708 F.3d 813, 818 (6th Cir. 2013) (“In the most general sense, a fiduciary duty is the duty to act with due regard for the interests of another.”); *White Mountain Apache Tribe*, 249 F.3d at 1379 (“[I]f a trust is created for beneficiaries in succession, the trustee is under a duty to the successive beneficiaries to act with due regard to their respective interests.” (quoting RESTATEMENT (SECOND) OF TRUSTS § 232 (AM. L. INST. 1959))).

194. *See* Green & Roiphe, *supra* note 170, at 820.

195. We note that this conclusion implicates an ongoing debate between shareholder primacy and stakeholder primacy views of fiduciaries as extended to the public-law domain. *See* Leib et al., *Mapping Public Fiduciary Relationships*, *supra* note 175, at 398–402. As Leib, Ponet, and Serota explain, “[m]apping fiduciary relationships in corporate law and elsewhere in private law is a contested, uncertain, and highly complex matter.” *Id.* at 395. The analysis in this Article is merely a preliminary sketch of how fiduciary principles might inform our understanding of prosecutorial ethics in a world with multiple competing constituencies.



theory itself in resolving claims between beneficiaries' competing interests.<sup>196</sup> Amorphous demands of "fairness" and "reasonableness" seem unlikely to us to provide sufficient guidance to prosecutors attempting to execute their fiduciary duties in good faith.

As a preliminary attempt to provide some substance to the prosecutor's fiduciary responsibilities of fairness and reasonableness, we turn to welfare economics. Specifically, we evaluate the conditions under which a prosecutor's decision to use a fictional plea is welfare enhancing across all beneficiaries. At some basic level, welfare-improving decisions require "not that all be either indifferent or better off, but that those who are better off are better off by enough to compensate those who are worse off for the harm the change causes them."<sup>197</sup> We offer this criterion as one potential measure of whether prosecutors are employing their discretionary powers reasonably—that is, whether the prosecutor has given due consideration to all potential beneficiaries' welfare.<sup>198</sup> Indeed, courts and commentators, in a variety of contexts, conclude that fiduciary duties are satisfied by—and indeed may even require—maximizing the aggregate welfare of competing beneficiaries.<sup>199</sup> Therefore, a prosecutor who seeks to maximize aggregate welfare is at least arguably fulfilling the duty of

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196. See Steven L. Schwarcz, *Fiduciaries with Conflicting Obligations*, 94 MINN. L. REV. 1867, 1869 (2010) ("Existing sources of law do not fully capture the dilemma of a fiduciary with conflicting obligations.").

197. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1002 (1995). Importantly, the better off need not actually compensate the worse off, so long as they are able to do so as a result of the proposed distribution. Economists refer to this principle as Kaldor-Hicks efficiency. We are not here attempting to repeat existing debates about the normative use of Kaldor-Hicks efficiency. See, e.g., Matthew D. Adler, *Beyond Efficiency and Procedure: A Welfarist Theory of Regulation*, 28 FLA. ST. U. L. REV. 241, 248–62 (2000). We acknowledge that important distributional questions may sometimes counsel in favor of outcomes that are not Kaldor-Hicks efficient. See generally JOHN RAWLS, A THEORY OF JUSTICE 78 (1971) (articulating the "difference principle," which prohibits reducing the welfare of the least well off in a society).

198. We do not intend to reject the possibility that other measures of reasonableness could fulfil the "due consideration" obligation of a public fiduciary. See Andrew S. Gold, *Reflections on the State as Fiduciary*, 63 U. TORONTO L.J. 655, 670 (2013) ("Fiduciary law is a variegated field, and the judge who seeks fiduciary templates may find multiple options among which to choose.").

199. See, e.g., Schwarcz, *supra* note 196, at 1883–84; Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 288 (1999) (identifying corporate directors' fiduciary duty "as a joint welfare function of all the individuals who make firm-specific investments"); Andrew S. Gold, *Dynamic Fiduciary Duties*, 34 CARDOZO L. REV. 491, 505 (2012) ("[C]ourts often assume that the parties would have opted for the most efficient terms."); John A.E. Pottow, *Bankruptcy Fiduciary Duties in the World of Claims Trading*, 13 BROOK. J. CORP. FIN. & COM. L. 87, 92 (2018) (noting that portfolio theory "counsel[s] the benefits of wealth maximization" in trust law); Amnon Lehavi, *The Law of Trusts and Collective Action: A New Approach to Property Deadlocks*, 89 U. CIN. L. REV. 388, 421 (2021) ("The extent to which a trustee would still be considered as meeting the duty of impartiality, even if some beneficiaries are disadvantaged by a particular action, would be measured by the trustee's ability to ensure genuine overall efficiency, to consider other options that could achieve the same or a close overall result, mitigate the disadvantage caused to some beneficiaries, and to adequately and transparently inform all beneficiaries of actions taken.").

reasonableness by rationally considering the relative benefits and burdens of a diverse group of beneficiaries who are sometimes at odds with each other.

Recall the use of fictional pleas that animated this inquiry: the programmatic use of such pleas by progressive prosecutors to avoid the removal of noncitizens in cases where the prosecutors (or their constituents) substantively disagree with national immigration policy. Because these policies are programmatic—that is, they apply across all defendants who come before these prosecutors’ offices—collusive prosecution of this sort arguably satisfies the duty of fairness by treating similarly situated defendants similarly.<sup>200</sup> What about the duty of reasonableness? At the broadest level, the use of a fictional plea in these circumstances imposes a cost on the nation’s citizens, who are structurally dependent upon local prosecutorial discretion to effect their policy preferences regarding the removal of noncitizens.<sup>201</sup> If a defendant is in fact guilty of a removable offense, the use of a fictional plea to avoid immigration consequences not only frustrates the desires of these citizens (at least plausibly a majority)<sup>202</sup> to see prosecutors implement their preferred policy, but it also subverts the functioning of duly enacted national legislation.<sup>203</sup>

However, the decision to collude with a defendant to avoid their removal also has a number of positive effects that may redound to the prosecutor’s other beneficiaries. Scholars have thoroughly documented the economic, psychological, and emotional costs of removal for noncitizens, their families,

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200. We do not mean to suggest that a prosecutor must seek to avoid removal through a fictional plea in all cases to satisfy their duty of fairness, but only that a prosecutor must apply the same criteria to all defendants and that these criteria must themselves be nondiscriminatory in intent. As a result, only some defendants may satisfy these criteria. We also recognize that disparities may arise for defendants prosecuted in different jurisdictions who are otherwise similar if different prosecutors adopt different charging policies, but this strikes us as inherent to any system of decentralized, discretionary prosecutorial power.

201. See *supra* note 188 and accompanying text.

202. Of course, there are many reasons why federal immigration laws may not in fact reflect the current policy preferences of a majority of Americans, including congressional inertia to repeal outmoded legislation and disproportionate Senate representation. For a discussion on congressional inertia, see Philip K. Howard, *The Crippling Hold of Old Law*, WALL ST. J. (Apr. 1, 2016, 2:51 PM), <https://www.wsj.com/articles/the-crippling-hold-of-old-law-1459536718> [<https://perma.cc/Q42V-XCGT>] (“American democracy is largely directed by dead people—past members of Congress and former regulators who wrote all the laws and rules that dictate choices today, whether or not they still make sense.”). For a discussion on disproportionate Senate representation, see Eric W. Orts, *Senate Democracy: Our Lockean Paradox*, 68 AM. U. L. REV. 1981, 1984–86 (2019). Ideally, a prosecutor’s fiduciary obligation would require considering, to the extent possible, the currently held policy preferences of all of the nation’s citizens (and maybe residents) taken together. See Leib et al., *Mapping Public Fiduciary Relationships*, *supra* note 175, at 401–02 (suggesting that a public representative has a fiduciary duty not only to a nation’s current citizens but perhaps also to future generations).

203. See Zachary S. Price, *Seeking Baselines for Negative Authority: Constitutional and Rule-of-Law Arguments over Nonenforcement and Waiver*, 8 J. LEGAL ANALYSIS 235, 255 (2016) (“[I]n the immigration context, more regularized, rule-like enforcement practice—and in particular a practice organized around prospective assurances of nonenforcement and conferral of otherwise unavailable legal benefits, as opposed to mere prioritization of other groups for removal—may chafe against statutory policy insofar as it establishes an effective rule of law distinct from the rule of the statute.”).

and society more generally.<sup>204</sup> Noncitizens are often well assimilated into their local community, and they contribute meaningfully both economically and socially.<sup>205</sup> Removal disrupts the operation of that community, perpetuating “severe harm to those family members, employers, and the residents themselves,”<sup>206</sup> often by far more than the offense of conviction or any benefits that may stem from the individual’s removal.<sup>207</sup> Family members left behind following removal may be financially dependent on the now-exiled defendant.<sup>208</sup> Employers may find themselves stranded without critical employees.<sup>209</sup> Removal threatens social cohesion and perhaps even public safety.<sup>210</sup> In fact, some jurisdictions have formally concluded that noncitizens contribute so much to the “broader social fabric” that they have passed laws specifically to *attract* immigrants and minimize the possibility of removal.<sup>211</sup>

Although plea bargains that avoid removal may further the interests of a much smaller population of beneficiaries, the total magnitude of these benefits may easily exceed any costs imposed on the more remote, national class of beneficiaries. True, prosecutors may fail to satisfy the immigration policy preferences of these national beneficiaries, but as a class, these beneficiaries otherwise have *relatively* little stake in the presence or absence of individual defendants elsewhere in the country.<sup>212</sup> It is therefore at least plausible that prosecutors can meet their fiduciary duty of reasonableness while using fictional

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204. See, e.g., Jacqueline Hagan, Brianna Castro & Nestor Rodriguez, *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799, 1818–22 (2010); David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1189–207 (2006).

205. See, e.g., Giovanni Peri, *Immigrants’ Complementarities and Native Wages: Evidence from California 17–19* (Nat’l Bureau of Econ. Rsch., Working Paper No. 12956, 2007) (finding that immigration in California has a positive impact on the real wages of citizens).

206. Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 134 (2012).

207. See *id.* at 133 (“In terms of a justificatory account predicated on informational advantage, a lawful permanent resident’s contact with criminal law enforcement offers little reliable data about that person’s belonging, assimilability, or desirability.”).

208. Hagan et al., *supra* note 204, at 1813–23.

209. Lisa Howard, *Research Shows Deporting Immigrants Hurts Local Economies*, U.C. DAVIS OFF. RSCH. (June 13, 2018), <https://research.ucdavis.edu/migration-research-cluster> [<https://perma.a.c.c/GNj9-7NGB>].

210. See Elina Treyger, *The Deportation Conundrum*, 44 SETON HALL L. REV. 107, 131–32 (2014) (“[T]he arrival of immigrants to some communities has had salutary effects on public safety and neighborhood social cohesion.”).

211. See Ingrid Eagly, *Reforming Criminal Justice in an Era of Mass Deportation*, HARV. L. REV. BLOG (Oct. 17, 2017), <https://blog.harvardlawreview.org/reforming-criminal-justice-in-an-era-of-mass-deportation> [<https://perma.cc/SL5P-JEH7>] (detailing the example of California).

212. We admit that a program of *systematically* avoiding removals—i.e., allowing many noncitizens to remain in the United States—may produce different calculations. For instance, a policy that seeks to avoid removals may theoretically encourage undocumented immigration whereas a single fictional plea to avoid one removal is unlikely to have such an effect. Our argument remains, however, that the local electorate is disproportionately likely to internalize any such costs.

pleas, provided that the practice produces an average improvement in welfare across the aggregation of beneficiaries.<sup>213</sup> While preference satisfaction is a nonquantifiable measure of welfare and interpersonal welfare comparisons are fraught,<sup>214</sup> prosecutors who are faithful to their fiduciary obligation of reasonableness must, at a minimum, attempt to assess these respective costs and benefits carefully.<sup>215</sup>

Importantly, the costs of *not* removing a noncitizen also fall primarily on the local electorate in most cases. Critics of fictional pleas, for example, are quick to suggest that they may weaken deterrence and reduce public safety.<sup>216</sup> Even though legislators, in theory, do not intend collateral consequences to be punitive, many people assume they increase the overall cost of committing crime.<sup>217</sup> If the public becomes aware that prosecutors are willing to negotiate plea agreements that allow defendants to evade these consequences,<sup>218</sup> crime rates may rise.<sup>219</sup> In addition, the decision not to charge a removable offense

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213. Our use of economic theory to invoke aggregate welfare is consistent with fiduciary theorists who emphasize relative vulnerability among competing beneficiaries. See Leib et al., *A Fiduciary Theory of Judging*, *supra* note 167, at 719–21. For these theorists, the strength of a fiduciary's duty to a given beneficiary is proportionate to the depth of that beneficiary's structural vulnerability in the relationship. See *id.* at 707–08 (“It typically follows that where residual control rights are particularly weak, the beneficiary's vulnerability to predation is greater and, therefore, the fiduciary must meet a higher standard of conduct.”). Although not a fiduciary theorist, Martha Fineman has constructed a positive political theory about the government's obligations to respond to vulnerability. See generally Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251 (2010) (discussing governmental responsibilities that arise from vulnerability); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008) (further developing the relationship between vulnerability and the responsibilities of government).

214. See Daniel M. Hausman, *The Impossibility of Interpersonal Utility Comparisons*, 104 MIND 473, 474 (1995).

215. Cf. Criddle, *supra* note 166, at 490 (“Because individual dignity entails freedom to define one's own ends, public preferences are always a relevant and important factor when public officials consider how best to promote the public welfare, and such preferences merit serious consideration within the deliberative processes of public lawmaking.”).

216. See Byrne, *supra* note 38, at 2991–93.

217. See *id.*

218. We note that averting removal for the sake of the community's health need not equate to any evasion of “consequences” for the individual defendant, so long as the prosecutor substitutes removal for some slightly less onerous increase in punishment. Jain, *supra* note 58, at 1226 (“Prosecutors seek a higher criminal penalty in exchange for avoiding a collateral consequence. The price of an immigration-safe deal might be ‘pleading up’ to a more serious crime or serving a longer criminal sentence that does not trigger deportation.”).

219. It is important to emphasize that these effects appear to be a consequence of a system of prosecutorial discretion more broadly, not fictional pleas in particular. Any plea agreement can be said to threaten deterrence and public safety in this way, since plea agreements necessarily reflect a reduction in total expected punishment compared to the baseline of trial. In addition, a prosecutor who is unable to resort to a fictional plea to resolve a case may instead opt for outright dismissal, which would be worse on this argument. McGregor Smyth, the former head of the Bronx Defenders' Civil Action Project, suggests that prosecutors sometimes view nullification “as

means that the defendant is more likely to return to the community, where they may reoffend.<sup>220</sup> Furthermore, a nonenforcement policy might also encourage immigration and relocation of undocumented individuals from other parts of the country to the community.<sup>221</sup> These effects require prosecutorial judgment about how best to balance community health and public safety with public trust, all essentially local matters.<sup>222</sup> In this context at least, the costs, if any,<sup>223</sup> are likely to be internalized by the community to which the prosecutor must ultimately answer.<sup>224</sup> Here, we see how the policy preferences of the prosecutor's electorate, while not decisive, might serve as an important signal for a prosecutor about how the aggregate group of beneficiaries views the balance of costs and benefits that accrue to them.

This analysis is consistent with the approach to immigration enforcement that Elina Treyger advocates.<sup>225</sup> Treyger argues that a socially optimal immigration regime would delegate the question of which noncitizens to remove to subfederal actors, such as states and localities.<sup>226</sup> This is because local actors are best situated to assess the costs and benefits of any particular removal

the only option that comports with basic principles of fairness," Jain, *supra* note 58, at 1217–18, particularly when otherwise confronted with "consequences that are absurd or disproportionate, or that affect innocent family members," Smyth, *supra* note 57, at 494–95.

220. *But see* Levine, *supra* note 186, at 34 ("Crime transcends individual state borders because of the inherent mobility of criminals and the ease of moving the tools and spoils of crime vast distances in a short time." (citation omitted)); Murray, *supra* note 148, at 240 ("[I]t is reasonable to expect some effects from a nonenforcement policy to spill into nearby political subdivisions.").

221. *Cf.* Dakota Smith, Cindy Carcamo, Molly O'Toole & Taryn Luna, *California Hits Back as Trump Threatens to 'Dump' Immigrants in 'Sanctuary Cities'*, L.A. TIMES (Apr. 16, 2019, 5:00 AM), <https://www.latimes.com/local/lanow/la-me-ln-california-sanctuary-city-trump-democrats-20190416-story.html> [<https://perma.cc/6595-AGUB>] (discussing the benefits of sanctuary jurisdictions that attract asylum-seekers). *But see* Benjamin Gonzalez O'Brien, Loren Collingwood & Stephen Omar El-Khatib, *The Politics of Refuge: Sanctuary Cities, Crime, and Undocumented Immigration*, 55 URB. AFFS. REV. 3, 6 (2017) (finding that "sanctuary city" policies do not encourage immigration or relocation of undocumented immigrants).

222. Given the set of relevant considerations, perhaps the quintessential cases for local control of collateral consequences involve "crimes committed within the jurisdiction, by residents, against residents." Murray, *supra* note 148, at 215.

223. The empirical evidence consistently shows that the presence of immigrant populations correlates with lower, not higher, crime rates. *See, e.g.*, Robert Adelman, Lesley Williams Reid, Gail Markle, Saskia Weiss & Charles Jaret, *Urban Crime Rates and the Changing Face of Immigration: Evidence Across Four Decades*, 15 J. ETHNICITY CRIM. JUST. 52, 52–53 (2017).

224. Daniel I. Morales, *Transforming Crime-Based Deportation*, 92 N.Y.U. L. REV. 698, 753 (2017) ("[B]ecause crime control is an issue for which local actors are held accountable by the electorate, local officials are far more likely to value the cooperation purchased with the embrace of migrants' human frailty than they are to value whatever abstract and marginal gains are available from increasing crime-based deportations.").

225. *See generally* Treyger, *supra* note 210 (proposing an "optimal" deportation regime that bifurcates immigration decision-making).

226. *Id.* at 137. By contrast, Treyger argues that "the character and the distribution of the direct and indirect costs of deportation" militate in favor of the federal government determining the appropriate levels of enforcement—what she calls "the 'how many' question." *Id.* at 113.

decision.<sup>227</sup> Costs and benefits include “economic, fiscal, and crime impacts” as well as any effects, good or bad, “on the social fabric of the community.”<sup>228</sup> These considerations are overwhelmingly experienced at the local level.<sup>229</sup> In this way, we might think of collateral immigration consequences as analogous to an *ex ante* rule that permits individualized exceptions *ex post*.<sup>230</sup> National immigration policy authorizes the removal of certain noncitizens under specific conditions, while local actors are most capable of determining whether any given removal is in fact optimal or wise.

Thus, under certain conditions, collusive prosecution—the use of fictional pleas to evade collateral consequences in ways that impose costs on external constituencies—is arguably justifiable. As a matter of historical practice, we can understand fictional pleas as an instance of a prosecutor’s general nonenforcement discretion. As a matter of prosecutorial ethics, however, we suggest that fictional pleas must reflect a faithful exercise of a prosecutor’s fiduciary duties of fairness and reasonableness to a diverse set of competing beneficiaries. Drawing specifically on the increasingly popular use of such pleas in the immigration context, we confirm that bargaining to avert removal is arguably fair and reasonable when the net benefits derived by the most-impacted group of beneficiaries (locals) exceeds the net costs suffered by other less-impacted beneficiaries (national citizens). Ethical collusion of this sort may be especially likely when the use of fictional pleas is a programmatic policy endorsed by the prosecutor’s electorate. We now turn to a lesser-known use of fictional pleas where these conditions arguably do not hold.

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227. *Id.* at 138–40; *see also id.* at 117 (“[S]ocially optimal enforcement calls for deportation until marginal costs of an additional deportation equal its marginal benefits.”). Murray reaches a similar conclusion by deploying a noneconomic lens. He adopts the “all-affected principle,” which “holds that ‘legitimate authority rests,’ at least as an initial matter, with ‘those moral agents most obviously affected by political decisions,’ and that legitimate coercion must be responsive to those agents’ ‘equal moral standing as . . . the subject and final author of that coercion.’” Murray, *supra* note 148, at 206 (alteration in original) (quoting Loren King, *Cities, Subsidiarity, and Federalism*, in *FEDERALISM AND SUBSIDIARITY* 291, 301 (James E. Fleming & Jacob T. Levy eds., 2014)).

228. Treyger, *supra* note 210, at 134.

229. *See id.* at 122–36.

230. In the criminal law context, the appropriate analogy may be the relationship between criminal prohibitions and a general excuse defense, such as the doctrine of duress. Duress permits an *ex post* assessment of information that is not available *ex ante* in order to tailor criminal prohibitions only to normatively desirable applications. *See, e.g.*, Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 370–74 (2005) (distinguishing between doctrines announcing rules of conduct *ex ante* and doctrines adjudicating violations of the rules of conduct *ex post*). Adam Cox and Eric Posner make a variation of this argument. *See* Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 844–52 (2007).

## II. COLLUDING WITH SEX-OFFENSE DEFENDANTS

A second context in which fictional pleas have found a foothold is the prosecution of sex offenses.<sup>231</sup> For an increasing number of sexual or sexually motivated crimes, a conviction triggers automatic, lengthy, and onerous registration and notification requirements (commonly shorthand as “SORN” laws).<sup>232</sup> SORN laws require individuals convicted of sex offenses to register with, and often periodically report in person to, law enforcement; to provide and keep current certain identifying information; and to pay periodic fees, potentially for life.<sup>233</sup> In addition, SORN laws require the public dissemination of a person’s sex-offender status and their identifying information (e.g., name, picture, and address), which can limit avenues of gainful employment, render housing opportunities unavailable or deficient, and hinder an individual’s reintegration into their community.<sup>234</sup> As with the threat of removal, looming sex-offender registration can provide strong incentives for defendants to seek out fictional pleas.<sup>235</sup> Unlike noncitizen removal, however, prosecutors may be much less motivated to bargain away SORN obligations within their own state,<sup>236</sup> notwithstanding the considerable social science evidence suggesting that prosecutors *ought* to be more open to this idea.<sup>237</sup>

In this Part, following a brief primer on SORN laws, we examine two serious questions that the use of fictional pleas raises in the sex-offense context. First, we consider outcome inequality among defendants. As Epstein’s story demonstrates, fictional pleas can be employed to adjust a defendant’s collateral consequences in states other than the state of prosecution. But this opportunity is valuable primarily to well-represented defendants with the resources to research state-to-state variation in the relevant collateral consequences and to relocate and rebuild. Second, we consider the possibility that prosecutors may structure fictional pleas precisely to induce individuals charged with sex offenses to leave their state. Using their state laws as a measure of beneficiaries’ preferences, such a use of prosecutorial discretion benefits residents of the state of conviction at the expense of residents of the state receiving the new resident. We explore the ethical implications of these two

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231. Johnson, *Fictional Pleas*, *supra* note 24, at 889 (“There is evidence that the practice of using fictional pleas to avoid sex offender registration is common.”).

232. Wayne A. Logan, *Sex Offender Registration and Notification*, 4 REFORMING CRIM. JUST. 397, 404 (2017).

233. *Id.* at 397–98.

234. Prescott & Rockoff, *supra* note 19, at 168.

235. Johnson, *Fictional Pleas*, *supra* note 24, at 889.

236. See Marissa Hoechstetter, *Can A Prosecutor Be Progressive and Take Sex Crimes Seriously?*, APPEAL (Jan. 8, 2020), <https://theappeal.org/progressive-prosecutors-metoo> [<https://perma.cc/KG9E-6YCW>] (chronicling the so-called “progressive” prosecutors who made campaign promises to more aggressively prosecute sex offenses).

237. See, e.g., Prescott & Rockoff, *supra* note 19, at 186 n.39.

possibilities using the fiduciary framework we establish in Part I. We conclude that this subset of collusive prosecutions is difficult to square with prosecutorial ethics.

### A. SORN LAWS

Laws requiring individuals convicted of sex offenses to register with their local authorities have a nearly hundred-year history.<sup>238</sup> But the modern SORN regime largely traces back to the high-profile abductions of Jacob Wetterling in 1989 and Megan Kanka in 1994. In the wake of those crimes, and with some nudging from first-adopting states where these crimes occurred, Congress passed both the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act,<sup>239</sup> which requires states to create and maintain registries of individuals with sex-offense convictions, and Megan's Law, which mandates that states disclose their sex-offender registry information to the general public.<sup>240</sup> SORN laws are now in place in every U.S. state and territory.<sup>241</sup>

Unlike immigration law and policy, SORN obligations are collateral consequences that largely remain a product of state law and exhibit meaningful variation from state to state. In 2006, Congress passed the Adam Walsh Child Protection and Safety Act, establishing a national sex-offender registry and mandating individual states to adopt minimum uniform registration criteria.<sup>242</sup> Only eighteen states substantially comply with the Walsh Act, however.<sup>243</sup> Some states, such as New York and Texas, consciously and explicitly reject the law's requirements on cost grounds.<sup>244</sup> Others, including Massachusetts and Ohio, contend that certain provisions of the law are in conflict with their state constitution.<sup>245</sup> More than fifteen years later, states continue to adjust the operation and scope of their own SORN laws to reflect evolving citizen

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238. See generally Deborah W. Denno, *Life Before the Modern Sex Offender Statutes*, 92 NW. U. L. REV. 1317 (1998) (analyzing the development and impact of sex-offender registration statutes after they first arose in the 1930s).

239. 42 U.S.C. § 14071.

240. See *Smith v. Doe*, 538 U.S. 84, 89–90 (2003) (explaining how Kanka's death inspired legislative action); see also Wayne A. Logan, *Origins and Evolution*, in *SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS: AN EMPIRICAL EVALUATION* 1, 8–14 (Wayne A. Logan & J.J. Prescott eds., 2021).

241. Logan, *supra* note 232, at 398. Additional collateral consequences for individuals previously convicted of a sex offense have since proliferated and include extensive residency, employment, and travel restrictions. See J.J. Prescott, *Portmanteau Ascendant: Post-Release Regulations and Sex Offender Recidivism*, 48 CONN. L. REV. 1035, 1038 (2016).

242. See 34 U.S.C. § 20927 (2019).

243. See *Substantially Implemented*, DEPT. OF JUST., OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, <https://smart.ojp.gov/sorna/substantially-implemented> [<https://perma.cc/5V6C-EDWJ>].

244. Haley Snarr & Susan Parnas Frederick, *The Complexities of Sex Offender Registries*, NAT'L CONF. STATE LEGISLATURES (May 2018), <https://www.ncsl.org/research/civil-and-criminal-justice/the-complexities-of-sex-offender-registries.aspx> [<https://perma.cc/Y8D5-6HBK>].

245. *Id.*



preferences and the political realities of regulating an emotionally fraught subject matter.<sup>246</sup>

The state-to-state variation in SORN laws is amplified by the fact that, like many categories of collateral consequences, sex-offender registration requirements are tied to states' criminal codes, which can also differ dramatically from one to another. Two states may disagree about whether a particular crime—indecent exposure, for instance—requires registration.<sup>247</sup> Those states may also disagree about whether particular conduct is a crime at all. This state-to-state variation in SORN laws is the reason why New Mexico's Department of Public Safety had to undertake a process of "translating" Jeffrey Epstein's Florida convictions into equivalent New Mexico crimes, if any, before determining whether Epstein would be required to register for his sex offense in the state.<sup>248</sup> Both Florida and New Mexico require sex-offender registration for the crime of soliciting a minor for prostitution.<sup>249</sup> But since New Mexico's age of consent is sixteen, the crime only applies to victims who are younger than sixteen.<sup>250</sup> In Arizona, to provide another data point, solicitation of prostitution, even when it involves a minor, is not prohibited by state law.<sup>251</sup>

#### B. FICTIONAL PLEAS AS PRIVILEGE

We may never know whether Epstein intentionally negotiated with prosecutors over his plea with an eye toward his eventual relocation to New Mexico, though we do know that he actively sought to elude registration and community notification requirements. In Florida, Epstein and his lawyers relentlessly negotiated to avoid them,<sup>252</sup> conceding only because it was a

246. See, e.g., Mary Katherine Huffman, *Moral Panic and the Politics of Fear: The Dubious Logic Underlying Sex Offender Registration Statutes and Proposals for Restoring Measures of Judicial Discretion to Sex Offender Management*, 4 VA. J. CRIM. L. 241, 290–91 (2016) (detailing recent reform efforts in Nevada and Missouri).

247. In Michigan, indecent exposure is a "Tier 1" registerable sex offense if the victim is a minor. See MICH. COMP. LAWS §§ 28.722(q), (r) (ii), 750.335a(2)(b) (West Supp. 2022). The same crime in Arizona is not registerable if it is a first offense, and indeed perhaps not even as a second offense, depending on the victim's age. See ARIZ. REV. STAT. ANN. § 13-3821(A)(15), (A)(18) (2010).

248. See Romero & Kulish, *supra* note 9.

249. *Id.*

250. *Id.*

251. It is prohibited by certain city ordinances, however. See, e.g., PHX., ARIZ., CODE § 23-52 (2018).

252. In a letter written to one of Epstein's lawyers during the period of negotiations, then-Assistant U.S. Attorney Ann Marie Villafaña accused Epstein's legal team of "proceeding in bad faith for several weeks—thinking that . . . you would 'fool' our office into letting Mr. Epstein plead to a non-registerable offense." Conchita Sarnoff & Lee Aitken, *Jeffrey Epstein: How the Hedge Fund Mogul Pedophile Got Off Easy*, DAILY BEAST (Aug. 19, 2019, 2:48 PM), <https://www.thedailybeast.com/jeffrey-epstein-how-the-hedge-fund-mogul-pedophile-got-off-easy> [https://perma.cc/Q5LX-J4M2] (alteration in original) (internal quotation marks omitted).

condition that kept federal prosecutors at bay.<sup>253</sup> In New York, he was able to sidestep ever checking in as a registrant under New York law by designating his home there as a “vacation” property and listing a permanent residence in the Virgin Islands.<sup>254</sup> What is abundantly clear, however, is that Epstein’s Florida prosecutors had little incentive to insist on formally documenting the actual age of Epstein’s victim if doing so would discourage him from accepting a plea bargain. As long as Florida defendants like Epstein admit to soliciting *someone* under the state’s age of consent, their conviction will trigger Florida’s sex-offender registration and notification requirements. The actual age of the factual victim in Epstein’s case was largely irrelevant from the perspective of the state.

Of course, most individuals facing sex offense charges do not have the resources or high-quality representation to negotiate a solution like Epstein’s. This is particularly true of individuals facing low-level offenses. A surprising number of registrable sex offenses are misdemeanors—charges like public lewdness, indecent exposure, voyeurism, prostitution, and public urination.<sup>255</sup> Indeed, misdemeanors often trigger collateral consequences with significant state-to-state variation.<sup>256</sup> The defense attorneys who handle these low-level offenses are normally public defenders with fixed salaries or “strictly-limited fee caps,”<sup>257</sup> assuming a defendant is able to secure representation at all.<sup>258</sup>

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253. U.S. DEP’T OF JUST., OFF. OF PRO. RESP., INVESTIGATION INTO THE U.S. ATTORNEY’S OFFICE FOR THE SOUTHERN DISTRICT OF FLORIDA’S RESOLUTION OF ITS 2006–2008 FEDERAL CRIMINAL INVESTIGATION OF JEFFREY EPSTEIN AND ITS INTERACTIONS WITH VICTIMS DURING THE INVESTIGATION i (Nov. 2020) (“At a July 31, 2007 meeting with Epstein’s attorneys, the USAO offered to end its investigation if Epstein pled guilty to state charges, agreed to serve a minimum of two years’ incarceration, registered as a sexual offender, and agreed to a mechanism through which victims could obtain monetary damages.”).

254. Romero & Kulish, *supra* note 9. Although this tactic should not have completely evaded New York’s registration requirement, the NYPD has since argued that it made his monitoring structure “murky” and took Epstein outside of its “realm of responsibility.” Hollie McKay, *After Epstein Death, Glaring Loopholes in National Sex Offender Registry Raise Concerns*, FOX NEWS (Aug. 15, 2019, 8:00 PM), <https://www.foxnews.com/us/jeffrey-epstein-sex-offender-registry-loopholes> [<https://perma.cc/UMQ9-8YYS>].

255. John D. King, *Beyond “Life and Liberty”: The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 28 (2013) (“In terms of scope, registries have expanded to include those convicted of even very minor misdemeanor offenses.”).

256. See Johnson, *Measuring the Creative Plea Bargain*, *supra* note 45, at 908 (“A review of the NICCC shows that there are 711 potential collateral consequences that may stem from a criminal conviction in Colorado, 814 in Massachusetts, 1027 in Washington State, and 1314 in New York.”); see also Johnson, *Fictional Pleas*, *supra* note 24, at 880 (“One only needs to peruse the American Bar Association’s exhaustive list of collateral consequences to understand how many seemingly petty criminal offenses lead to non-petty consequences outside of the criminal system.” (footnote omitted)); Jain, *supra* note 58, at 1207 (discussing the various collateral consequences that may attach to misdemeanors or even “minor arrests”).

257. Crane, *supra* note 59, at 825–26.

258. For instance, if a prosecutor charges an indigent defendant with a misdemeanor that does not carry incarceration as a possible punishment, then the defendant does not have a federal constitutional right to government-provided counsel. See *Scott v. Illinois*, 440 U.S. 367, 373–74

These lawyers are typically less experienced relative to their felony counterparts,<sup>259</sup> but they appear no less overworked, with caseloads well exceeding recommended limits.<sup>260</sup> As a result, these attorneys may lack the time or incentives to perform costly research into the interaction of various state SORN laws or other state-level collateral consequences.<sup>261</sup>

The opportunities that fictional plea bargaining dangles are often unrealistic on the prosecution's side as well—largely for the same reasons—unless prosecutorial or defense investments in prior cases happened to uncover a workable package. Misdemeanor prosecutors are often the least experienced in their office.<sup>262</sup> While they may be responsible for hundreds of cases at a time,<sup>263</sup> they commonly need approval from a supervisor to alter charges.<sup>264</sup> Junior prosecutors may personally be less willing to negotiate a creative plea deal, because they tend to be the “most deferential to supervisory authority

(1979). Even when they have a right to counsel, moreover, misdemeanor defendants are often denied counsel. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1340–42 (2012).

259. Crane, *supra* note 59, at 825; Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1787 (2013) (“[M]isdemeanor defenders typically have little experience.”).

260. See, e.g., Natapoff, *supra* note 258, at 1342–43; NAT'L ASS'N OF CRIM. DEF. LAWS., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11, 21 (2009), <https://www.nacdl.org/getattachment/20b7a219-b631-48b7-b34a-2d1cb758bdb4/minor-crimes-massive-waste-the-terrible-toll-of-america-s-broken-misdemeanor-courts.pdf> [<https://perma.cc/ER3W-GXNX>]; Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 470–72 (2007); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 318 (2011) [hereinafter Roberts, *Why Misdemeanors Matter*] (“Misdemeanor attorneys across the country handle caseloads that make almost any investigation difficult.”). Of course, stifling defense caseloads are not unique to misdemeanor attorneys. See Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 812 (2004) (“Most plainly, public defenders or court-appointed attorneys are assigned more cases than they can plausibly handle well; underfunding simply means too few lawyers for too many cases.”); Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 146–47 (2009) (describing “crushing caseload conditions” facing defense attorneys). That said, “individuals facing misdemeanor charges are more likely to suffer the consequences of the workload strain.” Roberts, *Why Misdemeanors Matter*, *supra* at 294.

261. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2534 (2004).

262. Crane, *supra* note 59, at 827.

263. Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 268–70 tbl.1 (2011) (giving examples from most of the country's largest cities, including Los Angeles, Chicago, Manhattan, Brooklyn, Miami, Philadelphia, and Dallas).

264. Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1128 (2008) [hereinafter Bowers, *Punishing the Innocent*] (“[L]ine prosecutors often must obtain supervisory approval before dismissing cases . . .”); Cade, *supra* note 259, at 1783 (“New prosecutors, cutting their teeth on misdemeanor cases, may need permission from supervisors to deviate significantly from the original charge.”).

and are therefore least likely to buck policy.”<sup>265</sup> Evidence also shows that new prosecutors tend to be “systematically harsher,” perhaps less willing and therefore less likely to trade away something the defendant might want or value even if doing so seems, at first blush, immaterial to the prosecutor’s own goals.<sup>266</sup>

By contrast, Epstein got the presidential treatment. His legal team included former Solicitor General Kenneth Starr and Harvard Law Professor Alan Dershowitz, both of whom later defended President Trump during his first impeachment trial before the U.S. Senate.<sup>267</sup> Meanwhile, Epstein’s state prosecutors were negotiating in coordination with Alex Acosta, then-U.S. Attorney and later Secretary of Labor under President Trump, who was overseeing a federal investigation based on the same underlying conduct.<sup>268</sup> In the end, Epstein’s guilty plea was the product of a three-year investigation and nearly twenty-three months of negotiations by some of the most powerful and prominent lawyers on the planet. Federal prosecutors have admitted that, at one point, they postponed Epstein’s indictment for more than five months to allow the defense team “to make presentations to the office to convince the office not to prosecute.”<sup>269</sup>

The lengthy investigation of Epstein’s conduct uncovered the kind of evidence that would send most people to prison for life.<sup>270</sup> But Epstein’s case resulted in just two low-level convictions and a thirteen-month stay in county jail (with generous work-release privileges).<sup>271</sup> This is due, in part, to the fact that the “superrich” Epstein had the additional luxury of going on the offensive

<sup>265</sup>. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1704 (2010).

<sup>266</sup>. Crane, *supra* note 59, at 828–29. As Ronald Wright and Kay Levine document in their recent study about the effect that experience has on prosecutors over time, “[e]ntry-level and junior prosecutors were more likely than their experienced colleagues to say that it is important to stick with the most serious charges during plea negotiations.” Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors’ Syndrome*, 56 ARIZ. L. REV. 1065, 1087–88 (2014). This is assuming they are aware of the consequences at all. See Ronald F. Wright, *Prosecutor Institutions and Incentives*, 18 CRIMINOLOGY, CRIM. JUST., L. & SOC’Y 85, 87 (2017) (“In some offices, line prosecutors resolve criminal cases without any reliable information about the collateral consequences of a criminal conviction . . .”).

<sup>267</sup>. Landon Thomas Jr., *Financier Starts Sentence in Prostitution Case*, N.Y. TIMES (July 1, 2008), <https://www.nytimes.com/2008/07/01/business/01epstein.html> [<https://perma.cc/332E-NB E4>]; Lisette Voytko, *Kenneth Starr, Alan Dershowitz: A Who’s Who of Trump’s Impeachment Team*, FORBES (Jan. 17, 2020, 11:44 AM), <https://www.forbes.com/sites/lisettevoytko/2020/01/17/kenneth-starr-alan-dershowitz-a-whos-who-of-trumps-impeachment-team> [<https://perma.cc/Y24AQT9>].

<sup>268</sup>. Brown, *supra* note 7. Acosta abruptly resigned from his cabinet position once details of his involvement in Epstein’s nonprosecution agreement became public. See David Smiley, Jay Weaver, Julie K. Brown & Alex Daugherty, *Acosta Resigns as Trump’s Labor Secretary Two Days After Defending Epstein Plea Deal*, MIAMI HERALD (July 12, 2019, 10:04 AM), <https://www.miamiherald.com/news/politics-government/national-politics/article232476467.html> [<https://perma.cc/GSS2-9N94>].

<sup>269</sup>. Sarnoff & Aitken, *supra* note 252.

<sup>270</sup>. Ken White, *The Jeffrey Epstein Case is Like Nothing I’ve Seen Before*, ATLANTIC (July 9, 2019), <https://www.theatlantic.com/ideas/archive/2019/07/jeffrey-epstein-indictment-hes-out-luck/593512> [<https://perma.cc/6R8U-YSD7>].

<sup>271</sup>. *Id.*

as part of his negotiation strategy.<sup>272</sup> Acosta later characterized Epstein as having conducted “a ‘year-long assault on the prosecution and prosecutors.’”<sup>273</sup> The defense team “investigated [individual] prosecutors and their families, ‘looking for personal peccadilloes that may provide a basis for disqualification.’”<sup>274</sup> Both the state and federal prosecutors’ offices involved in Epstein’s case have declined to explain how they selected an older, unnamed victim to showcase. Although we have no direct insight into Epstein’s thinking regarding the age of his admitted victim, it is not a stretch to surmise that this same defense team thoroughly evaluated the collateral consequences that their client faced under many future life scenarios (including “living” in New Mexico). According to a lawyer representing his victim, Courtney Wild, “[h]is attorneys would have negotiated who they were going to pick that was in a list of girls that they had.”<sup>275</sup>

As the Epstein example illustrates, fictional pleas may offer sex-offense defendants the potential to avoid onerous registration and notification requirements in other jurisdictions. However, if prosecutors are practically indifferent to what happens elsewhere,<sup>276</sup> and if defendants realistically must investigate and identify precise fictional pleas to secure their preferred arrangement, such pleas may be rare indeed. They may only be realistic for those privileged enough to hire counsel who can both research and build deals on the basis of the state-to-state variation in collateral consequences regimes. Poorer defendants, too frequently represented by inexperienced and overworked counsel (if represented at all), will not be able to push for, or probably even know about, the relative leniency in other jurisdictions that might be available to defendants *with* the right, possibly very specific, guilty-plea arrangement. This kind of outcome inequality in plea bargaining is nothing new, because plea negotiations are individualized, bargained-for outcomes that consistently privilege “wealth, sex, age, education, intelligence, and confidence.”<sup>277</sup>

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272. *Id.*

273. *Id.*

274. *Id.*

275. Romero & Kulish, *supra* note 9 (quoting Spencer Kuvin).

276. See Johnson, *Measuring the Creative Plea Bargain*, *supra* note 45, at 932 (“When it came to other collateral consequences, defenders typically reported that district attorneys did not care much about housing, employment, sex offender registration, probation and parole, and other consequences facing their clients.” (footnote omitted)). Yet it would be surprising if, in the long run, prosecutors did not pay closer attention to collateral consequences. See Johnson, *Fictional Pleas*, *supra* note 24, at 895 (“Collateral consequences, although of a different variety, have now become additional bargaining chips. Although they can be used to lessen the criminal penalty, they can also be a powerful strategic tool for prosecutors to use against defendants.” (emphasis omitted)); see also Jain, *supra* note 58, at 1232 (“This approach creates the risk that prosecutors will selectively enforce collateral consequences when it serves their own broadly defined interests but ignore them when it does not.”).

277. Bibas, *supra* note 261, at 2468.

The lens of fiduciary theory allows us to see how these forms of outcome inequality implicate prosecutors' ethical obligations. Prosecutors, as public fiduciaries, owe their beneficiaries a duty of fairness.<sup>278</sup> Among other responsibilities, the duty of fairness requires that a prosecutor should not treat similarly situated beneficiaries, including defendants, differently for essentially arbitrary reasons.<sup>279</sup> In this way, fairness is a crucial limitation on prosecutors' "seemingly limitless discretion."<sup>280</sup> Fictional plea-bargaining scenarios that seem certain to systematically benefit only the wealthy—as in Epstein's case, where devising a complex multi-state strategy and having the means to capitalize on it are beyond the reach of virtually all individuals charged with similar crimes—are unfair and thus unethical.

Framing the fiduciary duty of fairness as *ethical* is also particularly valuable, because the model rules governing prosecutorial conduct do not focus on the relative treatment of defendants across a range of cases.<sup>281</sup> Public confidence in our criminal justice system requires the perception (and ideally the reality) that law distributes its processes and punishments equally. Rules outlawing "buying" justice have been with us since the Magna Carta.<sup>282</sup> Similarly situated individuals achieving substantially different outcomes primarily as a function of wealth and representation is a known problem in the United States.<sup>283</sup> But allowing collusive prosecution in the context of sex-offense registration laws and similarly structured collateral consequences may provide an additional and, as of yet, unrecognized pathway to inequality.

### C. FICTIONAL PLEAS AS BANISHMENT

Epstein's Florida prosecutors seem to have had at best weak incentives to identify his victim as the fourteen-year-old Wild.<sup>284</sup> In this Section, we explore

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278. See *supra* text accompanying notes 190–93.

279. See Fox-Decent, *supra* note 190, at 265–66; *Humphrey v. Moore*, 375 U.S. 335, 340, 342–50 (1964).

280. Gary Lawson, Guy I. Seidman & Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415, 439 (2014) (“[T]he essence of [fiduciary] law was that unexplained or unjustified unfairness in the distribution of assets was a violation of an agent’s fiduciary duty, even when the instrument granted the agent seemingly limitless discretion.”).

281. See MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS’N 1983).

282. MAGNA CARTA [CONSTITUTION] 1215, cl. 40. (Eng.), translated in *English Translation of Magna Carta*, BRIT. LIBR. (July 28, 2014), <http://www.bl.uk/magna-carta/articles/magna-carta-english-translation> [<https://perma.cc/AD28-QHEF>] (“To no one will we sell, to no one deny or delay right or justice.”). The original Magna Carta was issued by King John in 1215, but the final version was issued in 1225. For a discussion of the differences, see Benjamin Plener Cover, *The First Amendment Right to a Remedy*, 50 U.C. DAVIS L. REV. 1741, 1754 n.37 (2017).

283. See, e.g., Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 299 (2007) (highlighting both race and class as sources of disparities in treatment by prosecutors).

284. To be clear, we use Wild’s name here only to identify her as a factual victim with a defined age at the time of the relevant offense, in contrast to an unspecified or fictional victim

the possibility that those prosecutors in fact had strong incentives *not* to identify Epstein’s victim, precisely to induce him to leave the state following his release from jail. If formal removal represents literal banishment, we might think of predictably and significantly lower collateral consequences in other states (i.e., a burden gradient that favors residing elsewhere) as “virtual” or “constructive” banishment. Prosecutors can pursue such banishment by ensuring both that the prosecuting state’s collateral consequences environment remains sufficiently hostile postconviction and that at least one viable, visible, and less-hostile alternative jurisdiction exists to lure the defendant away. Banishment in this form should not seem particularly far-fetched.<sup>285</sup> Outside of SORN laws, many of the primary collateral consequences for individuals with sex-offense convictions involve government dictates regarding movement and geography. Most notable may be residency restrictions, which typically bar registrants from living near “schools, child care facilities,” or playgrounds.<sup>286</sup> Taking things further, a recent wave of “public place” ordinances now restrict registrants across the country from merely entering parks, libraries, swimming pools, and public beaches.<sup>287</sup> The motivation for these laws is the assumption that proximity to potential targets plays a substantial role in recidivism.<sup>288</sup> Put simply, lawmakers claim that keeping potential sex-offense recidivists at a distance improves public safety. Virtual banishment would be attractive to prosecutors on a similar logic—another mechanism of social control over the spaces that these individuals may occupy.

Experience teaches us that the combination of harsh SORN laws and harsh, nonlegal sanctions from the community can be oppressive enough to drive away those subject to such laws. “People dread living near criminal offenders, particularly registered sex offenders.”<sup>289</sup> That dread has at times

who is merely “under eighteen.” Florida laws appropriately dictate that child victims of sexual violence be identified by a pseudonym, such as “Jane Doe.” 1995 Fla. Laws ch. 95-207 § 3. We do not mean to imply any criticism of that practice.

285. See Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831, 1855 (2005) (“[C]omments made during the legislative debates on SORNs show that a desire to deter sex offenders from choosing to reside within their jurisdictions motivated at least some of the legislatures enacting these laws.”); Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1078–79 (2012) (explaining how modern “super-registration” requirements make earlier sex-offender registration requirements seem “tame by comparison”).

286. Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 104 (2007).

287. See Ian Lovett, *Public-Place Laws Tighten Reign on Sex Offenders*, N.Y. TIMES (May 29, 2012), <https://www.nytimes.com/2012/05/30/us/sex-offenders-face-growing-restrictions-on-public-places.html> [<https://perma.cc/EK7Y-BKL9>].

288. We note that the best evidence undermines this foundational assumption. Tamara Rice Lave, *Arizona’s Sex Offender Laws: Recommendations for Reform*, 52 ARIZ. ST. L.J. 925, 938 (2020) (“Research overwhelmingly shows that residency restrictions do not lower the incidence of sex crimes against children, and for that and other reasons, they should be curtailed or abolished completely.”).

289. Amanda Y. Agan & J.J. Prescott, *Sex Offender Law and the Geography of Victimization*, 11 J. EMPIRICAL LEGAL STUD. 786, 788 (2014).

manifested as personal attacks that have driven registrants out of town or even out of state.<sup>290</sup> “Since the adoption of SORN [laws], sex offenders have been subjected to threats, vandalism of their property, physical assaults, and gunshots.”<sup>291</sup> SORN laws also deprive individuals of the opportunity to rebuild their social standing in the community. Because registries and notification requirements perpetually broadcast a person’s past offenses, it is challenging for released registrants to obtain employment or housing, or even build stable relationships. The alienating effects of registration and notification laws even drive some registrants to suicide.<sup>292</sup>

While prosecutors may have incentives to avoid the removal of noncitizens, prosecutors will often have little incentive to help defendants avoid sex-offender registration in their own community. To begin with, SORN laws largely reflect state, rather than federal, preferences, and many of the attendant collateral consequences, such as geographic limitations, are even more local.<sup>293</sup> A prosecutor acting on behalf of their locality may feel more beholden to enforce rules with origins much closer to home. In fact, because so many sex offenses are low-level crimes—misdemeanors and minor felonies that will end with the defendant returning to the community—a common motivation for prosecution in the first place is ensuring the eventual imposition of registration obligations and related collateral consequences.<sup>294</sup> Furthermore, SORN laws remain popular with the public despite mounting evidence of their inefficacy and cost. Prosecutors are thus likely to benefit from signaling a “tough on crime” stance to their constituency at the expense of a particularly unsympathetic class of defendants.<sup>295</sup> In several instances, news that prosecutors had used plea bargaining to contract around SORN laws resulted in community

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290. See, e.g., Abril R. Bedarf, *Examining Sex Offender Community Notification Laws*, 83 CALIF. L. REV. 885, 907–08 (1995) (recounting patterns of violence and vengeance against individuals convicted of a sex offense that include arson, breaking and entering, death threats directly at family members, and violent assaults).

291. Teichman, *supra* note 58, at 387 (footnotes omitted).

292. *Id.* at 391.

293. See Gina Puls, *No Place to Call Home: Rethinking Residency Restrictions for Sex Offenders*, 36 B.C. J.L. & SOC. JUST. 319, 322 (2016) (estimating that over one-hundred and fifty localities in Florida alone have imposed residency restrictions on individuals convicted of a sex offense).

294. Crane, *supra* note 59, at 794 (explaining that the collateral consequence may be a prosecutor’s “most potent and enduring weapon against future public safety risks”). Indeed, even most felony convictions result in little or no actual jail time. See Bowers, *Punishing the Innocent*, *supra* note 264, at 1145 n.139.

295. See, e.g., Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1167 (1999) (“Sex offenders are the scourge of modern America . . .”); Alison Virag Greissman, Note, *The Fate of “Megan’s Law” in New York*, 18 CARDOZO L. REV. 181, 181 (1996) (“Sexual crimes disgust, anger, and frighten Americans in a way that no other human act does.”).



outrage.<sup>296</sup> Even scholars have been critical of “creative plea bargaining” in the sex-offense context, arguing that it deprives law enforcement of useful information about past offenses.<sup>297</sup> Other scholars’ arguments imply that colluding to avoid SORN laws may impede necessary treatment and rehabilitation for defendants.<sup>298</sup>

American courts historically have prohibited interstate banishment in lieu of punishment. For example, in 1930, the Michigan Supreme Court ruled that “citizens of the United States cannot be ‘dumped’ or exiled upon sister states and that interstate banishment is disruptive of the Union and against public policy.”<sup>299</sup> Several states have constitutional provisions or statutes prohibiting or restricting the exile of citizens.<sup>300</sup> Courts have even applied other constitutional prohibitions (e.g., against takings) to cabin excessively burdensome sex-offender regulations that make residency in a state near

296. See Laura A. Bischoff & Kevin Grasha, ‘It’s a Lie. It’s a Fraud,’ Says Ohio Supreme Court Justice of Some Plea Bargains, CINCINNATI ENQUIRER (Jan. 20, 2022), <https://www.cincinnati.com/story/news/2022/01/20/ohio-supreme-court-judge-wants-truth-plea-bargains-rule/8723170002> [<https://perma.cc/9F67-FSLL>]; Kurt Hanson, *How Plea Deals Are Uniquely Negotiated for Sex Offenders*, DAILY HERALD (Aug. 20, 2017), <https://www.heraldextra.com/news/2017/aug/20/how-plea-deals-are-uniquely-negotiated-for-sex-offenders> [<https://perma.cc/DF5M-FK2J>]; Teichman, *supra* note 58, at 393 & n.193.

297. Teichman, *supra* note 58, at 393–94.

298. Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1395–96 (2003) (asserting the importance of admitting wrongdoing in the treatment of individuals convicted of a sex offense); Stefan J. Padfield, Comment, *Self-Incrimination and Acceptance of Responsibility in Prison Sex Offender Treatment Programs*, 49 U. KAN. L. REV. 487, 498 (2001) (noting that acceptance of responsibility is a key part of the treatment of individuals at risk of committing a sex offense); Richard G. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance?*, 18 BEHAV. SCIS. & L. 375, 389 (2000) (pointing out that notification forces individuals who have committed sex offenses “to be honest and accept responsibility for their” crimes).

299. Shelley Ross Saxer, *Banishment of Sex Offenders: Liberty, Protectionism, Justice, and Alternatives*, 86 WASH. U. L. REV. 1397, 1406 (2009) (quoting Brett T. Lynch, *Exile Within the United States*, 11 CRIME & DELINQUENCY 22, 25 (1965)). See generally *People v. Baum*, 231 N.W. 95 (Mich. 1930) (arguing that allowing banishment “would tend to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the several states which is the basis of the Union itself”). Cf. *People v. Blakeman*, 339 P.2d 202, 202–03 (Cal. Dist. Ct. App. 1959) (“It was beyond the power of the court to impose banishment as a condition of probation” and public policy does “not permit[] one political division to dump undesirable persons upon another.”).

300. See, e.g., ALA. CONST. art. I, § 30 (“That immigration shall be encouraged; emigration shall not be prohibited, and no citizen shall be exiled.”); ARK. CONST. art. II, § 21 (“[N]or shall any person, under any circumstances, be exiled from the State.”); GA. CONST. art. I, § 1, para. XXI (“Neither banishment beyond the limits of the state nor whipping shall be allowed as a punishment for crime.”); ILL. CONST. art. I, § 11 (“No person shall be transported out of the State for an offense committed within the State.”); MASS. CONST. pt. I, art. XII (“And no subject shall be arrested, imprisoned . . . exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.”); TEX. CODE CRIM. PROC. ANN. art. 1.18 (West 2005) (“No citizen shall be outlawed, nor shall any person be transported out of the State for any offense committed within the same.”).

impossible.<sup>301</sup> Yet “as many as ten states” may currently “allow[] some form of banishment.”<sup>302</sup> Interestingly, a few permit banishment when it is the result of a voluntary plea bargain or involves some element of defendant choice.<sup>303</sup>

In our framework, a key problem with using collusive prosecution to constructively banish individuals is that it potentially imposes negative externalities on communities that are completely unrepresented at the plea-bargaining table. In this respect, we can analyze this dynamic as a form of NIMBYism.<sup>304</sup> States with clever prosecutors and more robust SORN laws have the option of “exporting negative externalities in the form of increased social welfare costs associated with offender reentry (e.g., job training, treatment), and to the extent criminal propensity is displaced, criminal victimization and its costs.”<sup>305</sup> In effect, prosecutors can carefully construct a conviction, or a factual record, that would be easier for a defendant to bear elsewhere, with no sacrifice on the part of local beneficiaries if the defendant decides to stay. Regardless of whether the collusive bargain that Epstein struck with prosecutors in Florida made the offenses he committed in New Mexico possible, the simple fact is that under New Mexico law, Epstein’s actual behavior would have made him subject to SORN laws in that state. By constructing the fictional plea as they did, prosecutors traded away New Mexico’s preferences in exchange for a local benefit—i.e., Epstein pleading guilty to a registerable crime in Florida.

The fiduciary duty of reasonableness clarifies precisely why there are ethical concerns with prosecutors banishing individuals convicted of sex offenses through the mechanism of carefully tailored fictional pleas. While prosecutors may heavily weigh the preferences of their local constituency for the obvious reason that they are accountable to their electorate, fiduciary theory holds that prosecutors have an ethical obligation to reasonably assess the effects of their discretionary decision-making on all parties who are structurally vulnerable.<sup>306</sup> That a collusive prosecution of this sort may benefit both the prosecutor and the defendant is insufficient; the relevant ethical consideration is whether the

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301. See *Mann v. Georgia Dep’t of Corr.*, 653 S.E.2d 740, 742 (Ga. 2007) (“Under the terms of that statute, it is apparent that there is no place in Georgia where a registered sex offender can live without being continually at risk of being ejected.”).

302. Yung, *supra* note 286, at 113.

303. See, e.g., *Rutherford v. Blankenship*, 468 F. Supp. 1357, 1360 (W.D. Va. 1979); *Mansell v. Turner*, 384 P.2d 394, 395 (Utah 1963).

304. See Barak D. Richman & Christopher Boerner, *A Transaction Cost Economizing Approach to Regulation: Understanding the NIMBY Problem and Improving Regulatory Responses*, 23 YALE J. ON REGUL. 29, 37–50 (2006).

305. Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 21–22 (2006) (footnotes omitted).

306. See Leib et al., *A Fiduciary Theory of Judging*, *supra* note 167, at 720.

bargain is reasonably likely to be socially attractive overall—that is, welfare enhancing—across all beneficiaries.<sup>307</sup>

Unlike avoiding removal to prevent certain defendants from leaving the community, where prosecutorial incentives and fiduciary duties are likely to align,<sup>308</sup> constructive banishment is more ethically problematic, because it is less likely to occur only when it is welfare enhancing, at least in the case of collateral sex-offender registration and notification requirements. In other words, in banishment scenarios, prosecutorial incentives and fiduciary duties will often point in opposite directions, meaning that ethical obligations of reasonableness should more often bar the use of fictional pleas that prosecutors would otherwise find attractive. Importantly, many or most of the welfare-relevant considerations implicated by constructive banishment occur in other states, which prosecutors have no political incentive to consider. Unlike with removal, the nonlocal effects of a fictional plea are no longer likely to be *de minimis*. Indeed, the sheer magnitude of the costs and benefits involved means that misalignment of the prosecutor's political incentives and the aggregate welfare of all beneficiaries is more likely to occur.

The prosecutor's locality benefits from constructive banishment insofar as the prosecutor is able to secure a plea bargain with slightly greater ease or to secure a punishment they deem more appropriate, as well as by potentially reducing local recidivism or other harms in the event the defendant relocates. With banishment as a practical possibility, local incentives to spend to punish appropriately also drop (since the costs of punishment are felt locally but the benefits may ultimately accrue elsewhere, saving resources).<sup>309</sup> Meanwhile, the out-of-state community receiving the banished person acquires any corresponding increase in recidivism risk, as well as other potential costs or harms.<sup>310</sup> Moreover, banishing individuals convicted of crimes to other states and away from their support structures is likely to increase total recidivism, especially if the sending state punishes the individual inappropriately following their conviction. Finally, the collusive plea bargain misleads the receiving state into improperly treating the transplant under the state's collateral

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307. See Fox-Decent, *supra* note 190, at 265–66; see also Criddle, *supra* note 166, at 477–78 (explaining that the fiduciary duties of fairness and reasonableness require “due regard” for each beneficiary’s interests and “deliberative rationality” in exercising discretion).

308. See *supra* text accompanying note 224. The basic idea with avoiding removal is that when *local* net benefits of a fictional plea are positive (which prosecutors care about), the net benefits for national beneficiaries, if they are negative, are likely to be much smaller. Therefore, the fact that a prosecutor may “ignore” national beneficiaries does not lead to unethical outcomes.

309. This may shed additional light on Epstein’s unprecedented thirteen-month sentence in Florida, despite nearly three dozen individual victims that came forward to local authorities. See Musgrave et al., *supra* note 5.

310. For instance, if the individual reoffends, induced relocation merely shifts the costs of the offense to a new population rather than reducing it. Similarly, if the individual contributes productively to society after reentry, the gains of the receiving population are offset by equivalent losses to the banishing state.

consequences regime. If collateral consequences regimes have positive value,<sup>311</sup> banishment by a fictional plea that allows an individual to sidestep such regulations is welfare reducing.<sup>312</sup> Even if collateral consequences are welfare reducing, as SORN laws may well be according to research,<sup>313</sup> fictional pleas that avoid those collateral consequences only in other states still frustrate the preferences of the citizens in the receiving states.<sup>314</sup>

Thus, in cases of banishment, many of the benefits gained by one set of beneficiaries (residents of the state of conviction) are at best reciprocal with—and therefore offset by—costs imposed on another set of beneficiaries (the residents of the receiving state).<sup>315</sup> Yet the accounting above offers many reasons to anticipate that exported costs will usually be much higher than any benefits secured locally. While a prosecutor may save a modicum of resources with a collusive bargain by nudging a guilty plea over the line, thereby saving trial costs, the practice on the whole seems likely to induce relocation that disrupts duly enacted collateral consequences in other states, skews other prosecutorial incentives regarding punishment, appears inconsistent with reentry research on reducing recidivism, and is self-defeating from a national perspective.<sup>316</sup>

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311. As we note above, the obligation to register with authorities may affect the likelihood of recidivism, *supra* note 19 and accompanying text, thus burdening the receiving community at a level that exceeds the safety gains of the sending community.

312. One might reasonably object that receiving states have only themselves to blame for prosecutors in other states devising fictional bargains that allow defendants to evade registration and other collateral consequences within their borders. To wit—it is New Mexico's fault that Epstein was not subject to SORN requirements there. New Mexico legislators could have rewritten their SORN laws to eliminate any asymmetry with Florida SORN laws at any time after Epstein's relocation, and because they did not, they are responsible for the outcome. While New Mexico can adjust its laws to account for prosecutorial practices in other states, as we note below, it seems impossible to expect states to anticipate or respond legislatively to every such asymmetry that clever prosecutors can leverage, notwithstanding that collateral consequences can apply retroactively. Such an expectation also seems to impinge on each state's prerogative to design their collateral consequences regime. At a minimum, we can describe plea bargains that force states to adjust their laws in defensive ways as creating a negative externality.

313. Amanda Agan & J.J. Prescott, *Offenders and SORN Laws*, in *SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS: AN EMPIRICAL EVALUATION*, *supra* note 240, at 102, 109.

314. We recognize that deals that allow would-be registrants in one state to avoid being subject to SORN laws in another state, leaving aside Epstein's illustrative but unrepresentative example, may actually be welfare enhancing if SORN laws are generally costly and ineffective or even criminogenic, as they very well may be. *See generally id.* (finding no evidence that SORN laws increase public safety and examining the possibility that SORN laws increase overall offending). We generally agree with this objection as a policy matter, but from an ethical perspective, we must put ourselves in the shoes of a prosecutor who not only believes that SORN laws improve public safety but also understands that citizens in other states would prefer that the defendant in question be subject to SORN laws. Otherwise, we would expect to see fictional pleas in which the prosecutor allows the defendant to avoid registration *locally*, which we actually do when the prosecutor believes SORN laws are inappropriate in a particular case. *See, e.g.,* Johnson, *Fictional Pleas*, *supra* note 24, at 856, 874–76. Regardless, if there are scenarios in which collateral consequences do make policy sense, the dynamic we describe and subject to ethical scrutiny certainly exists in the real world.

315. Teichman, *supra* note 285, at 1861.

316. *See* Saxer, *supra* note 299, at 1431.

While pernicious collusive prosecutions are easy to imagine in the context of SORN laws, the basic structure of the ethical problem holds even more broadly. Collateral consequences regimes vary tremendously across states, attaching many types of restrictions or obligations to many kinds of crimes. While relocation is rarely easy or costless, many collateral consequences seem likely to produce constructive banishment through burden gradients. For instance, it is not difficult to imagine circumstances in which the right fictional plea can preserve one's ability to obtain an essential professional license—e.g., a real estate broker's license—or access to housing or benefit payments in another state, even while the proper limitations, given the actual offense facts, remain in place at home.<sup>317</sup> While it is beyond the scope of this Article to demonstrate our claim's generality at great length, a couple of example scenarios suffice to make our point.

First, collusive fictional plea bargains might be attractive to aspiring career politicians who are facing possible public corruption charges. Several states categorically bar persons convicted of felonies or misdemeanors from seeking or holding public office. Others statutorily bar persons convicted of only specific offenses involving political graft. For example, Indiana categorically bars anyone convicted of a felony from holding public office and even statutorily authorizes a court to impose a ten-year ban for misdemeanor bribery or other misconduct.<sup>318</sup> Across the border, in Michigan, a similar ban appears to apply only to persons convicted of offenses involving public corruption.<sup>319</sup> If a corrupt Indiana state legislator violates 18 U.S.C. § 1346 by engaging in a bribe and kick-back scheme,<sup>320</sup> a federal prosecutor might offer a fictional plea—to wrongful appropriation under 10 U.S.C. § 921 or tax evasion under 26 U.S.C. § 7201—to help the politician preserve his political aspirations in nearby Michigan.

Second, collusive fictional plea bargains seem likely to be attractive to individuals who are philosophically committed to gun ownership.<sup>321</sup> The loss of firearm rights is a common postconviction collateral consequence across

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317. To create a few of your own, see *National Inventory of Collateral Consequences of Conviction*, NAT'L REENTRY RES. CTR., <https://niccc.nationalreentryresourcecenter.org> [<https://perma.cc/UT9B-G9TP>].

318. IND. CODE ANN. §§ 3-8-1-5(d)(3), 35-50-5-1.1(a) (West 2021).

319. MICH. CONST. art. XI, § 8; see also *Conyers v. Garrett*, No. 22-1494, 2022 WL 2081475, at \*4 (6th Cir. June 10, 2022) ("Section 8 is narrowly tailored . . . Section 8 applies only to those who have convictions for a small group of felonies—those 'involving dishonesty, deceit, fraud, or a breach of the public trust.' Moreover, those convictions must have 'related to the person's official capacity while the person was holding' certain government positions." (citation omitted) (quoting MICH. CONST. art. XI, § 8, cl. 1)).

320. In *Skilling v. United States*, 561 U.S. 358, 409 (2010), the Supreme Court interpreted the law's scope narrowly, holding that "§ 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law."

321. Alec C. Ewald, *Collateral Consequences in the American States*, 93 SOC. SCI. Q., 211, 226 (2012) ("[S]everal of the individuals pardoned by President George W. Bush submitted to him that regaining the right to bear arms was a crucial reason they were seeking a pardon." (citation omitted)).

the states, although these restrictions vary in scope, limitations, and procedures. Some restrictions closely mirror a federal ban by excluding convicted felons,<sup>322</sup> while others employ more stringent standards that bar firearm possession by individuals with juvenile convictions or specific misdemeanor convictions. If a strong proponent of Second Amendment gun rights commits an aggravated assault in West Virginia,<sup>323</sup> any plea bargain involving assault (whether felony or misdemeanor) will cost the individual his firearm rights at home.<sup>324</sup> However, if the prosecutor wants to nudge the individual to relocate to Kentucky, perhaps a short drive away, the parties might agree to a misdemeanor assault charge: In Kentucky, a person only loses their firearm rights for felony convictions.<sup>325</sup>

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In the absence of ethical constraints, like those offered by fiduciary theory, prosecutors—as in Epstein’s case—may simply yield to the strong economic and electoral incentives they face to accept and even propose such deals. The asymmetry in costs is concerning, because locally elected prosecutors have no institutional constraints requiring that they make ethical bargains. The supposed beneficiaries of constructive banishment are the local communities that prosecutors belong and answer to, while those who bear any costs of relocation reside in other states (like New Mexico) and are effectively powerless to change prosecutorial behavior, at least in the short run.

In the long run, we should expect to see defensive legislative activity to make receiving states less attractive, with states redrafting their statutes regularly to avoid newly discovered gaps from being exploited by prosecutors in other states and defensively enacting increasingly broad and harsh collateral consequences to discourage transplants and engage in their own banishment.<sup>326</sup> Banishment is therefore likely to contribute to costly reciprocal legislation. Since evidence suggests that SORN laws are ineffective, if not counterproductive,<sup>327</sup> the practice of collusive prosecution in this domain may even lead to more sex crime nationally as it supports an expensive race to the

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322. Under 18 U.S.C. § 922(g), federal law restricts nine classes of individuals, including convicted felons, from possessing, shipping, transporting, or receiving firearms or ammunition.

323. W. VA. CODE ANN. § 61-2-9 (West 2020).

324. W. VA. CODE ANN. § 61-7-7(a)(8).

325. KY. REV. STAT. ANN. § 527.040 (West 2016); *Posey v. Commonwealth*, 185 S.W.3d 170, 181 (Ky. 2006) (affirming the constitutionality of Kentucky’s regulation of people’s right to bear arms).

326. See Sarah Geraghty, *Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner’s Perspective*, 42 HARV. C.R.-C.L. L. REV. 513, 514 (2007) (“Sex offenders are arguably the most despised members of our society, and states and municipalities are in a race to the bottom to see who can most thoroughly ostracize and condemn them.”); see also Teichman, *supra* note 285, at 1861 (“Criminal law is a type of fence a community builds around itself that raises the cost of committing crimes. Hence, jurisdictions ignoring the negative externalities created by the policies they adopt will be driven, over time, to adopt an increasingly harsh criminal justice system despite the fact that they would be better off agreeing collectively on a more lenient system.”).

327. See Prescott & Rockoff, *supra* note 19, at 164.

bottom.<sup>328</sup> In the next Part, we consider modest, tailored reforms to reduce the potential for deleterious interstate competition of this sort.

### III. POLICING COLLUSIVE PROSECUTION

Fictional pleas create an ethical quandary for prosecutors. As Part I demonstrates, parties may deploy fictional convictions and agreed-to facts in a manner consistent with a prosecutor's fiduciary obligations. As Part II makes clear, however, such agreements may also be pernicious, reducing aggregate welfare and externalizing harm. Moreover, it may be extremely tempting, as it surely was in Epstein's case, for a self-interested prosecutor to resort to unjustifiable, unethical fictions in order to secure a plea agreement in a given case. Even a well-intentioned prosecutor may fail to accurately assess the overall welfare implications of a particular collusive bargain. What can be done to ensure prosecutors are making ethical bargains?

In this Part, we briefly offer two approaches to regulating plea bargaining that may reduce the likelihood that collusive prosecution runs afoul of fiduciary obligations. The first is an enhanced plea colloquy. This approach calls on judges to serve as impartial arbiters of both the fairness and reasonableness of any proposed fictional plea bargain. Judges are especially fitting for this task, because they are less likely to be self-interested in any resolution negotiated by the parties and, indeed, judges have their own set of fiduciary duties to consider.<sup>329</sup> Our proposal mirrors a traditional, but rarely discussed, judicial function to protect the public interest when evaluating parties' agreements in civil litigation.<sup>330</sup> The second is legislative-driven reform that encourages the consistent application of collateral consequences like SORN laws across states, either by procedural reforms that will enhance the factual record associated with fictional pleas or by equalizing the triggers for these consequences and the burdens they will impose on defendants.

#### A. ENHANCING THE PLEA COLLOQUY

Prosecutors typically do not have to justify their plea bargains to other legal actors.<sup>331</sup> Although judges are constitutionally required to conduct a

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328. The precise resolution of costs and benefits is necessarily more complicated, including the observed criminogenic effects of notification (as opposed to registration). *See id.* at 181. This Article offers a preliminary sketch of these considerations to highlight the potential downsides of collusive prosecution and the need for mechanisms to police the practice.

329. *See* Leib et al., *A Fiduciary Theory of Judging*, *supra* note 167, at 719–21.

330. *See generally* Omri Ben-Shahar, David A. Hoffman & Cathy Hwang, *Nonparty Interests in Contract Law* (Univ. of Va. Sch. L. Pub. L. & Legal Theory Paper, Paper No. 22-17, 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4038584](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4038584) [<https://perma.cc/HS9Q-Q3X9>] (detailing how courts use default rules and interpretive practices to protect the interest of nonparties in contract disputes).

331. Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973, 996–97 (2021) (“[B]ecause the negotiations are off the record, prosecutors do not need to concern themselves with providing any justification for factually baseless bargains.”).

plea colloquy in open court before accepting a plea bargain, the focus of this proceeding is almost exclusively on defendants and their consent to the bargain—in particular, whether they are giving up their trial rights knowingly and voluntarily.<sup>332</sup> Despite the substantive centrality of plea colloquies to modern criminal justice, courts conduct even these proceedings “in a ‘rote and perfunctory’ manner,”<sup>333</sup> almost invariably engaging in little or no interrogation of the underlying bargain struck.<sup>334</sup> Judges have historically been loath to become too involved in plea bargaining for fear of losing the appearance of impartiality or becoming improperly entangled in the negotiations.<sup>335</sup> But this fear is legally unfounded. “In fact, caselaw suggests that neither reviewing the agreement’s terms nor conducting a thorough plea inquiry to ensure that the plea is voluntary, knowing, and factually based amounts to improper judicial participation.”<sup>336</sup> And recent survey data suggest that judges have begun taking a more active role in facilitating criminal settlements than previously believed.<sup>337</sup> Indeed, the judicial role seems ideally designed for evaluating the propriety of potentially collusive plea agreements, because judges, unlike prosecutors or defendants, have ostensibly little to gain from accepting an unethical fictional plea.<sup>338</sup>

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332. See, e.g., *Boykin v. Alabama*, 395 U.S. 238, 242–44 n.5 (1969) (holding that a court may not constitutionally accept a guilty plea absent an on-the-record showing that the plea was both “intelligent and voluntary”); see also Brandon L. Garrett, *Why Plea Bargains Are Not Confessions*, 57 WM. & MARY L. REV. 1415, 1428 (2016) (“[T]he judge must approve the plea, ensuring that it is voluntary, and then inform the defendant of the essential elements of the crime and the constitutional rights waived.”).

333. Turner, *supra* note 331, at 1017 (quoting Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 751 (2010)).

334. *But see* Jolly & Prescott, *supra* note 52, at 1050 n.9 (“Judges can and do reject proposed agreements for many reasons, including that a proposal would not give the defendant their just desserts in light of their crimes, that it would not deter either the individual charged or the general public in the future, and that it would result in an unfavorable public reaction.”).

335. A majority of jurisdictions explicitly prohibit judicial involvement in plea bargaining. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1124 (2011). Likewise, Federal Rule of Criminal Procedure 11 restrains judges from making comments that might even indirectly influence plea bargaining between the parties. FED. R. CRIM. P. 11; Turner, *supra* note 90, at 202–03. Survey research finds that judges are less willing to intervene in plea bargaining—either implicitly or explicitly—and see less value in judicial involvement when their state’s policy prohibits it. Kelsey S. Henderson, Erika N. Fountain, Allison D. Redlich & Jason A. Cantone, *Judicial Involvement in Plea-Bargaining*, 28 PSYCH. PUB. POL’Y & L. 356, 363–64 (2021). For a criticism of limiting judicial involvement as a matter of state policy, see Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1123–34 (1976).

336. Turner, *supra* note 331, at 1018.

337. See generally Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325 (2016) (explaining the results of the study evidencing more judicial involvement).

338. Jolly & Prescott, *supra* note 52, at 1053 (“[A] judge cannot lawfully be cut into the parties’ bargain in any significant way (i.e., the parties cannot directly share the surplus of any theoretical three-way bargain with a judge) . . .”).



To adequately address collusive prosecution, however, the scope of a judge's questioning during the plea colloquy must expand and the direction of the inquiry must anticipate potential collusive harms. Rather than narrowly focus on the defendant's waiver of rights, as is standard practice today, a judge needs to evaluate a prosecutor's *justification* for resorting to possible factual fictions. Such colloquies would depart rather dramatically from what we traditionally understand as a plea colloquy at present toward something more like what occurs in civil litigation when a beneficiary challenges a fiduciary's decisions in court.<sup>339</sup> According to fiduciary theorists, judicial supervision of fiduciary discretion is particularly warranted when it can protect vulnerable beneficiaries against the pitfalls of self-dealing<sup>340</sup>—a fundamental concern with collusive prosecution, where prosecutors and defendants effectively share surplus value created at the expense of remote beneficiary interests. We therefore see potential for judges as gatekeepers of the public interest, at least—if perhaps not only—in cases involving a proposed fictional plea.

Heightened judicial involvement in plea colloquies would not be unprecedented, and scholars recommend more wide-ranging and thorough proceedings to address other concerns with plea bargaining. In advocating for a more searching plea colloquy, Jenia Turner details the ways in which military tribunals depend on more robust judicial involvement.<sup>341</sup> The nature of military plea colloquies is more akin to a dialogue than it is to working through a checklist, allowing defendants space to share their own narrative and understanding of the underlying events.<sup>342</sup> “The dialogue is supposed to entail a genuine effort to elicit the true facts, and judges are not supposed to ask leading questions that produce simple ‘yes’ and ‘no’ responses.”<sup>343</sup> Encouraging or requiring judicial exploration of the justification and potential consequences of particular charges, fictional or not, does not seem particularly far-fetched.

Robust judicial involvement in plea colloquies is also common in several European countries.<sup>344</sup> Germany, for instance, provides its judges with substantial

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339. See *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 117–18 (2008) (explaining how a court should assess self-dealing by interrogating the procedural reasonableness of a fiduciary's decision-making process).

340. D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1483–84 (2002); see, e.g., Evan J. Criddle, *Fiduciary Law's Mixed Messages*, in RESEARCH HANDBOOK ON FIDUCIARY LAW 17–18 (D. Gordon Smith & Andrew S. Gold eds., 2018).

341. Turner, *supra* note 331, at 1018–19.

342. See Note, *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 HARV. L. REV. 937, 951–52 (2010). For arguments in favor of military-style plea colloquies in cases that do not raise concerns of collusion, see William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2035 (2008).

343. Turner, *supra* note 331, at 1019.

344. See generally EUR. COMM'N FOR THE EFFICIENCY OF JUST., CONTRACTUALISATION AND JUDICIAL PROCESS IN EUROPE 39–42 (2010), [https://rm.coe.int/european-commission-for-the-efficiency-](https://rm.coe.int/european-commission-for-the-efficiency)

control over the choice of charges.<sup>345</sup> German judges, rather than prosecutors, are uniquely empowered to withdraw an indictment or amend the charges that the defendant faces.<sup>346</sup> In exercising this discretion, judges are free to investigate the underlying facts of the case, including questioning witnesses or requesting that the prosecution provide additional information to supplement the investigative file compiled by police.<sup>347</sup> In some instances, judges “conduct several days of proceedings before they conclude what an appropriate disposition might be.”<sup>348</sup> One advantage of this approach is that parties would likely be forthcoming about the specific benefits of a fictional plea, which will open the door to questions about effects on other beneficiaries.

A number of scholars argue in their work that courts ought to make more searching inquiries of the factual basis for pleas as part of routine judicial practice. For example, Turner proposes that judges conduct factual-basis inquiries at earlier stages of the plea negotiations, allowing both prosecutors and defendants opportunities to bargain more truthfully.<sup>349</sup> Likewise, in his work, William Stuntz suggests that judges searchingly review plea agreements for a factual basis, also following the model of military courts, which review case documents and extensively question defendants, rather than rely on factual stipulations.<sup>350</sup> In the same vein, Máximo Langer endorses requiring that all plea agreements be accompanied by sworn affidavits from the prosecutor containing a summary of the evidence against the defendant.<sup>351</sup>

Parties who have experienced active judicial involvement in plea negotiations report several benefits consistent with our view that robust guardrails are important for achieving ethical collusive prosecution.<sup>352</sup> A fundamental criticism of centering the U.S. criminal justice system on plea bargaining is that legal

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of:justice-cepej-contractualisa/1680747658 [https://perma.cc/XB4G-NH5P] (describing judicial control over pleas in countries such as France, Poland, and the Netherlands).

345. Turner, *supra* note 90, at 215.

346. *Id.* at 217–18. German prosecutors have some additional charge-bargaining authority in misdemeanor cases but not in felony cases. *Id.* at 218.

347. *Id.* at 215.

348. *Id.* at 228.

349. *Id.* at 259–61.

350. STUNTZ, *supra* note 138, at 302–03; Turner, *supra* note 331, at 1018–19.

351. Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 276–77 (2006).

352. See King & Wright, *supra* note 337, at 329 (“On balance, we believe routine or selective judicial participation in plea negotiation can add value, particularly in jurisdictions with multiple judges and when carefully limited in scope.”); see also MASS. R. CRIM. P. 12 (as amended Jan. 29, 2015) (Reporter’s Notes) (“[I]n order to promote fair and efficient plea bargaining and to establish rules to govern the previously unregulated and widely varying practice of lobby conferences, amended Rule 12 provides for judicial participation in plea negotiations at the request of a party and requires that plea discussions with judicial participation be recorded.”).

outcomes are increasingly detached from underlying truth.<sup>353</sup> Pressure from prosecutors, along with fear of a “trial tax,”<sup>354</sup> can cause completely innocent people to plead guilty.<sup>355</sup> Even in run-of-the-mill cases, plea bargains curtail factual investigations, limit or eliminate discovery, and may permit prosecutors to withhold exculpatory information.<sup>356</sup> Enhanced judicial involvement often serves as a “reality check” for parties who get too attached to their own view of the case.<sup>357</sup> Zealous advocacy has a tendency to devolve into tunnel vision, with counsel and client myopically overlooking weaknesses in their case that may be spotted by a more neutral outside observer.<sup>358</sup> Interestingly, evidence indicates “that judicial input usually leads to sentences that are more lenient

353. Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism*, 57 WM. & MARY L. REV. 1505, 1518–19 (2016) (“[T]he findings of fact that emerge from plea bargaining are not subject to any meaningful testing. . . . [P]lea bargaining often results in ‘inaccurate’ punishment of the guilty, at least when measured on the retributive metric.”); see also Caldwell, *supra* note 93, at 65–66 (“[W]henver a prosecutorial agency files charges that are disproportionate or misrepresentative of the defendant’s actions, that agency rules afoul of the ethical guidelines governing prosecutors, abuses its prosecutorial power, and compromises the justice system as a whole.” (footnotes omitted)).

354. “Trial tax” refers to the difference between the sentence a prosecutor is willing to offer in exchange for a guilty plea and the sentence that a prosecutor will pursue, or a judge will impose, if a conviction is obtained after a trial. See Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2668 (2013) (“[The] criminal justice system [] punishes many individuals convicted after trial much more harshly than those convicted after a guilty plea, in what has been characterized as a ‘trial tax.’”). If the gap between these two sentences is very large, the risk of a conviction at trial can create an overwhelming incentive for a defendant to plead guilty, even when factually innocent. FOUND. FOR CRIM. JUST., 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* 17 (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf> [https://perma.cc/CS3Q-JTMW] (“Numerous scholars have examined the innocence problem of plea bargaining and have estimated that anywhere from 1.6 [percent] to [twenty-seven percent] of defendants who plead guilty may be factually innocent.”). But see generally Ronald F. Wright, Jenny Roberts & Betina Cutaita Wilkinson, *The Shadow Bargainers*, 42 CARDOZO L. REV. 1295 (2021) (demonstrating that plea-bargaining considerations are often motivated by considerations outside of the “trial-prediction framework”).

355. According to the National Registry of Exonerations, more than twenty percent of exonerated criminal defendants pled guilty. See *Detailed View*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> [https://perma.cc/XK8M-6A7X].

356. Although plea bargaining has effectively replaced trials in resolving criminal prosecutions, courts are sharply divided on whether constitutional due process rights extend to plea negotiations. On one hand, the Supreme Court has held that criminal defendants are entitled to effective representation during plea negotiations. *Lafler v. Cooper*, 566 U.S. 156, 165 (2012); *Missouri v. Frye*, 566 U.S. 134, 140 (2012). On the other hand, the Court has held that impeachment evidence, which prosecutors must disclose before trial, need not be disclosed during plea negotiations. *United States v. Ruiz*, 536 U.S. 622, 625 (2002).

357. See King & Wright, *supra* note 337, at 367.

358. See *id.* at 367–68 (“A defense attorney remarked, ‘[As] advocates, we get tunnel vision. We are like little children; it is helpful to have a mediator-type figure to shed light on it.’”) (alteration in original).

than the sentences defense attorneys would obtain for their clients if they had to deal with the prosecutor alone.”<sup>359</sup> This finding hints that judges may be more sensitive than prosecutors to potential unfairness to defendants and can serve as effective checks on undue severity. Perhaps judges are also ready and able to police welfare-reducing collusive bargains, if only by reminding prosecutors to consider costs imposed on more remote beneficiaries.

Judicial involvement as a remedy to collusive prosecution would require minimal changes to many criminal proceedings, but it might necessitate legislative or procedural reforms in states that have formally limited the judicial role in plea negotiations. In Colorado, for example, a state law mandates that “[t]he trial judge shall not participate in plea discussions.”<sup>360</sup> The law does provide an opportunity for the judge to endorse or reject a proposed plea agreement prior to the plea being entered,<sup>361</sup> but Colorado judges may nevertheless be reticent to engage in a more searching inquiry of the prosecutor’s considerations and motivations when confronted with a fictional plea given the character and emphasis of state policy.<sup>362</sup> Legislative reform may therefore be essential to clarify the permissible role of judges as investigators of the factual and ethical underpinnings of a fictional plea. In other states, such changes may be achieved by less-far-reaching reforms, such as modifications of court rules,<sup>363</sup> or may not require reforms at all.<sup>364</sup>

More judicial intervention in the plea-bargaining process need not prevent parties from employing fictional pleas when they are both mutually beneficial and reflect ethical decision-making by the prosecutor. But judges should conduct a more searching inquiry than they typically do today into the acts underlying the guilty plea and the justifications for the proposed plea agreement when vulnerable third parties are in the mix. Judges should identify and explore deviations from, or unaccountable vagueness in, the underlying factual record, and they should understand the purposes of these fictions. In Epstein’s case, such attention to the plea bargain’s details may have uncovered its potential harm and questionable ethical character in time to restructure it.

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359. *Id.* at 371.

360. COLO. REV. STAT. § 16-7-302(1) (2022).

361. *Id.* § 16-7-302(2).

362. See Henderson et al., *supra* note 335, at 363–64 (finding that judges in states that explicitly prohibit judicial involvement in plea negotiations are significantly less likely than judges in other states to offer sentence recommendations or suggest alternative approaches to the parties during plea negotiations); cf. *People v. Clark*, 515 P.2d 1242, 1243 (Colo. 1973) (holding that judicial involvement in plea negotiations is “fundamentally unfair and brings to bear the full force and majesty of the court on a defendant”).

363. See, e.g., GA. UNIF. SUPER. CT. R. 33.5(A) (“The trial judge should not participate in plea discussions.”).

364. See, e.g., N.C. GEN. STAT. ANN. § 15A-1021(a) (West 2022) (“The trial judge may participate in the discussions.”).

B. LEGISLATING FACTUAL FIDELITY

An alternative approach to dealing with the ethical challenges posed by fictional pleas would be legislative-driven reforms that alter the operation and application of the collateral consequences that spawn parties' interest in collusive prosecution. To illustrate our ideas without loss of generality, we focus on the operation of SORN laws when a potential registrant relocates. We outline two such reforms. First, states may consider incorporating a modified version of the procedure courts use to support "real-offense sentencing," focusing particularly on establishing a true factual account in plea bargaining. This reform approach involves nontrivial legislative intervention but also has the upside of bolstering criminal justice legitimacy. Second, states may opt to revise their sex-offender registration and notification requirements to decouple SORN obligations from the offense of conviction. Some states already take this approach, but we may see additional reform if fictional pleas become increasingly frequent in sex-offense prosecutions or in prosecutions for crimes that regularly trigger collateral consequences. Reforms of this nature could either replace or supplement the defensive race-to-the-bottom dynamic we postulate at the end of Part II.

1. Real-Offense Recordkeeping

The promulgation of the U.S. Federal Sentencing Guidelines in 1987 brought to the fore of scholarly discourse a distinction between so-called charge-offense sentencing and so-called real-offense sentencing.<sup>365</sup> Both labels are "something of a misnomer."<sup>366</sup> Charge-offense sentencing grounds a defendant's punishment in the offense of conviction, modified perhaps by consideration of a few narrow outside factors, such as the defendant's criminal history.<sup>367</sup> "Under a pure charge-offense system, two defendants convicted of violating the same statute would receive the same sentence, without regard to any aggravating or mitigating factors."<sup>368</sup> Implicit in such a system is that final sentences spring primarily from the charges, enhancements, and mitigators the parties negotiate and present to the court. Real-offense sentencing, by contrast, attempts to tailor punishment to the totality of potentially pertinent on-the-ground facts, even those not proven at trial nor essential to the conviction.<sup>369</sup> Real-offense sentencing tends to involve more third-party investigation to develop a sentence's factual predicates.

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365. See David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 417-19 (1993). Although some features of real-offense sentencing existed in state systems prior to the adoption of the Guidelines, the practice was at best "sporadic and unpredictable." *Id.* at 419.

366. *Id.* at 406 n.8, 408.

367. *Id.* at 406-07.

368. *Id.* at 407.

369. *Id.* at 408.

Faced with a choice between these two schemes,<sup>370</sup> the original version of the Guidelines largely favored real-offense sentencing.<sup>371</sup> “The Guidelines contain charge-related constraints but require the consideration of a variety of ‘real’ facts that in many cases constitute the predominant factors in determining the appropriate sentencing range.”<sup>372</sup> Justice (then-Judge) Stephen Breyer, a member of the Sentencing Commission that promulgated the Guidelines, justifies the choice of real-offense sentencing on the premise that it permits individualized assessments of just punishment:

A bank robber, for example, might, or might not, use a gun; he might take a little, or a lot, of money; he might, or might not, injure the teller. The typical armed robbery statute, however, does not distinguish among these different ways of committing the crime. Nor does such a statute necessarily distinguish between how cruelly the defendant treated the victims, whether the victims were especially vulnerable as a result of their age, or whether the defendant, though guilty, acted under duress.<sup>373</sup>

Following the federal adoption of real-offense sentencing, several states reformed their sentencing practices in a similar manner.<sup>374</sup>

To effectuate real-offense sentencing, the federal courts, and the states that followed them, embraced new procedures designed to accurately elicit the factual information necessary for courts to assign a sentence. In particular, the Guidelines emphasized offense characteristics—such as the quantity of money stolen, the amount of planning involved, or the use of a dangerous

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370. Conceptually, charge-offense sentencing and real-offense sentencing are merely opposite ends of a spectrum of sentencing schemes from which the drafters could choose. *See id.* at 404 (“Real-offense and charge-offense sentencing are like a Scylla and Charybdis through which drafters of sentencing guidelines must attempt to navigate.”). The authors of the Guidelines ended up selecting what might be deemed a “modified real-offense sentencing” scheme. *See* Julie R. O’Sullivan, *In Defense of the U.S. Sentencing Guidelines’ Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1348 (1997) (“The Commission adopted a compromise position on this informational continuum that, like pre-Guidelines sentencing practice, is best summarized as modified real-offense sentencing.”).

371. *See* Yellen, *supra* note 365, at 404–05 (“The Sentencing Commission’s decision to employ a strong version of mandatory real-offense sentencing, particularly its inclusion of alleged related-offense sentencing, is unprecedented in the history of American sentencing systems.”).

372. O’Sullivan, *supra* note 370, at 1348.

373. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 9–10 (1988) (footnote omitted).

374. *See* Griffin Edwards, Stephen Rushin & Joseph Colquitt, *The Effects of Voluntary and Presumptive Sentencing Guidelines*, 98 TEX. L. REV. 1, 10 (2019) (“By 2002, one estimate found that around seventeen states had adopted mandatory sentencing guidelines, which required trial judges to consider various aggravating or mitigating factors and assign a punishment according to a specified formula or worksheet.” (citing Rodney L. Engen, *Assessing Determinate and Presumptive Sentencing—Making Research Relevant*, 8 CRIMINOLOGY & PUB. POL’Y 323, 323 (2009))).

weapon<sup>375</sup>—that a judge must find by a preponderance of the evidence.<sup>376</sup> To help the judge in making this determination, the Guidelines require that federal probation officers complete a presentence investigation and draft a report regarding the factual conduct underlying the initial charging decision,<sup>377</sup> rather than deferring to the assertions of the parties. Defendants are given notice of these investigative findings and an opportunity to contest inaccurate information.<sup>378</sup> When either party disputes a key fact, the court may hold hearings and must provide an opportunity for both the prosecutor and the defendant to present information, without regard to evidentiary admissibility, that bears on the underlying conduct.<sup>379</sup> State schemes are similar.<sup>380</sup>

U.S. Supreme Court rulings around the turn of the century muted the practice of real-offense sentencing.<sup>381</sup> Nevertheless, the procedures that support real-offense sentencing in federal and state courts continue to uncover, establish, and document conduct that may be relevant to the application of collateral consequences at the state level, including SORN requirements. Information found in presentence reports is relevant and useful to these determinations because courts largely treat sex-offender registration—like many collateral consequences—as regulatory, not criminal, meaning their imposition requires a lower burden of proof.<sup>382</sup> Although the issue is contested, more than a few courts have suggested that facts relevant to sex-offender registration

375. Yellen, *supra* note 365, at 423–44 (citing U.S. SENT’G GUIDELINES MANUAL §§ 2B1.1(b)(1), 2B1.1(b)(5), 2D1.1(b)(1) (U.S. SENT’G COMM’N 1993)).

376. O’Sullivan, *supra* note 370, at 1388.

377. U.S. SENT’G GUIDELINES MANUAL § 6A1.1 (U.S. SENT’G COMM’N 1993).

378. *Id.* § 6A1.2.

379. *Id.* § 6A1.3; *see also* O’Sullivan, *supra* note 370, at 1387 n.177 (“It is clear from the increase in the amount of time consumed by sentencing hearings under the guidelines that some judges are exercising this discretion to afford fuller hearings.”).

380. *See State Policies and Legislation*, CTR. FOR SENT’G INITIATIVES, <https://www.ncsc.org/csi/in-the-states/state-activities/state-policies-and-legislation> [<https://perma.cc/7T9Z-SQ6Y>].

381. *See* *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be . . . proved beyond a reasonable doubt”); *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (holding that the “statutory maximum” for *Apprendi* purposes is the maximum a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant); *United States v. Booker*, 543 U.S. 220, 244 (2005) (holding that the mandatory nature of the Federal Sentencing Guidelines violates the Sixth Amendment).

382. *See, e.g.,* *Smith v. Doe*, 538 U.S. 84, 96 (2003); *see also* *Renchenski v. Williams*, 622 F.3d 315, 331 (3d Cir. 2010) (concluding that due process requires only “minimum procedures which will result in ‘an effective but informal hearing’” before labeling a prisoner as a sex offender); *Brown v. Montoya*, 662 F.3d 1152, 1168–70 (10th Cir. 2011) (concluding that due process requires at least “notice of the charges, an opportunity to present witnesses and evidence in defense of those charges, and a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action” before a nonprisoner can be made to register as a sex offender (quoting *Gwinn v. Awmiller*, 354 F.3d 1211, 1219 (10th Cir. 2004))).

must only be supported by clear and convincing evidence<sup>383</sup> or perhaps even by a preponderance of the evidence.<sup>384</sup>

Encouraging, or even requiring, the consistent use of presentence investigations and hearings to develop a robust factual record at sentencing, notwithstanding the negotiated offense of conviction (fictional or otherwise), can reduce the practical scope of collusive prosecution. To avoid suffocating even welfare-enhancing bargains, however, careful thought ought to be given to the precise facts (or absence of facts) likely to support problematic deals that may externalize harm. For instance, a detailed factual accounting of victim characteristics and the number and character of crimes can be indispensable to subsequent assessments of a defendant's SORN obligations, particularly following registrant relocation to a new state.<sup>385</sup> As the Epstein example demonstrates, registration processes in the wake of relocation have historically been procedurally deficient and even *ad hoc*,<sup>386</sup> and the information on which authorities rely is too often suspect.<sup>387</sup>

Unlike our call for a more searching judicial inquiry during or prior to a plea colloquy, a countermeasure that focuses on identifying and interrogating the considerations and motivations of a prosecutor proposing a fictional plea agreement, the goal of these record-keeping reforms is eliciting and documenting on-the-ground facts underlying a conviction. To operationalize this recommendation, legislatures or courts could make presentence investigations and reports unwaivable, shortcutting a common tactic used to facilitate plea bargaining.<sup>388</sup> They might also mandate that judges read all factual findings into the record at sentencing, including—perhaps especially—

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383. See, e.g., *Doe v. Sex Offender Registry Bd.*, 41 N.E.3d 1058, 1061 (Mass. 2015); N.Y. CORRECT. LAW § 168-n (McKinney 2005).

384. See, e.g., *People v. Mosley*, 344 P.3d 788, 792 n.4 (Cal. 2015); W. VA. CODE § 15-12-2A(f) (2022).

385. See *infra* text accompanying notes 403–07.

386. See, e.g., *Meredith v. Stein*, 355 F. Supp. 3d 355, 365 (E.D.N.C. 2018) (“In determining that an individual must register as a sex offender because his out-of-state conviction is ‘substantially similar’ to a reportable conviction, North Carolina provides neither prior notice nor a hearing. In fact, North Carolina provides nothing at all.”).

387. See *Romero & Kulish*, *supra* note 9 (explaining that Epstein’s eligibility for sex-offender registration in New Mexico was ultimately determined by relying on a police report that erroneously listed the victim’s age as seventeen).

388. For a time, the Federal Rules of Criminal Procedure explicitly permitted defendants to waive the presentence investigation and report. See FED. R. CRIM. P. 32(c)(1) (1975). Although *defendants* are no longer permitted to waive presentence reports, *judges* may nevertheless choose to proceed without a report, see FED. R. CRIM. P. 32(c)(1)(ii); U.S. SENT’G GUIDELINES MANUAL § 6A1.1(b) (U.S. SENT’G COMM’N 2004), and they commonly do so when presented with a negotiated charge and sentence. See, e.g., *United States v. Brown*, 557 F.3d 297, 300–01 (6th Cir. 2009). Many state courts continue to allow defendants to unilaterally waive presentence investigations and reports. See, e.g., ARIZ. R. CRIM. P. 26.3(a)(1)(B), 26.4(a)(2).



those not admitted by the defendant as part of the plea.<sup>389</sup> Either approach may well have made a difference in how New Mexico categorized Epstein.

Adopting real-offense procedures in plea bargaining would also help to mitigate one of the arguably worst features of fictional pleas—that they construct and crystalize a new truth with lasting legal effects. As Thea Johnson explains, too often today’s fictional pleas become tomorrow’s criminal history.<sup>390</sup> In future prosecutions, defendants who agree to fictional pleas may be unable to profess their actual innocence with respect to their past convictions, the structure of which may trigger unintentional and unexpected recidivism enhancements or other collateral consequences later.<sup>391</sup>

Johnson highlights this problem for a defendant who admitted to three misdemeanor sex offenses instead of a registrable felony offense:

These three payoffs are likely worth the fiction he agreed to present to the court. But he should be mindful that now, instead of a single charge, the defendant has admitted to unlawful sexual touching on three occasions. What might this mean for his ability to secure bail in a future case? What might it mean if he is rearrested? Will he be seen as someone who has already committed three offenses and does not, therefore, deserve a ‘fourth’ chance?<sup>392</sup>

This kind of divergence of legal reality from on-the-ground facts confounds criminal justice reformers, who increasingly seek evidence-based, data-driven solutions to systemic problems.<sup>393</sup> Legislating factual fidelity would be a step in the right direction and such recordkeeping would likely have systemic benefits beyond limiting unethical collusion.

## 2. Revising Collateral Consequences Laws

An alternative strategy to control the harms of collusive prosecution is legislative refinement—not of criminal law or procedure but of collateral consequences laws themselves. A typical state SORN law regime ties the duty to register to the offense of conviction.<sup>394</sup> State statutes establish a list of specific offenses—such as rape, trafficking, prostitution, or kidnapping—that

389. In discretionary sentencing schemes, found in many states, defendants do not have a right to notice of the facts found that bear on their punishment. *See* Stephen A. Fennell & William N. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1613, 1631–32 n.86 (1980) (collecting cases). As a result, state-court judges too often do not make comprehensive factual findings on the record during sentencing, especially following a guilty plea.

390. This is a paraphrase of one of Thea Johnson’s statements during her interview with Barry Lam on the Hi-Phi Nation podcast. *See* Lam, *supra* note 116.

391. Johnson, *Fictional Pleas*, *supra* note 24, at 897–900.

392. *Id.* at 869.

393. *See, e.g.*, Thea Johnson, *Lying at Plea Bargaining*, 38 GA. ST. U. L. REV. 673, 720–24 (2022).

394. Logan, *supra* note 232, at 404.

trigger mandatory registration.<sup>395</sup> Within this scheme, many states choose to engage in offender-specific tailoring of registration or notification requirements based on individualized assessments of dangerousness or recidivism risk.<sup>396</sup> But a qualifying triggering offense remains a prerequisite, and the same is true for other “regulatory” collateral consequences.

When a registrant relocates to a new state, the receiving state’s laws determine whether the individual must register in that state. In many states, SORN laws merely declare that registration is required when the individual’s prior offense is “substantially similar” to a registrable offense in the receiving state.<sup>397</sup> Some laws even expressly identify the procedures by which the state must make the substantial similarity determination.<sup>398</sup> In other states, however, the process is relatively ad hoc, with police or sheriff’s departments, or departments of corrections, conducting the inquiry without further statutory guidance.<sup>399</sup> States use a variety of approaches to complete this process, from comparing statutory elements for registrable crimes,<sup>400</sup> to examining the underlying conduct proven at trial or admitted at the plea colloquy.<sup>401</sup>

It is precisely because collateral consequences laws vary from state to state that collusive prosecution involving fictional pleas may be attractive to both prosecutors and defendants. In the SORN context, by selecting a charge that is registrable in the state of conviction but not (or not necessarily) in the receiving state—or by admitting to facts or sterilizing the record with the same effect—prosecutors and defendants can use their negotiations to extract surplus value from the receiving state.<sup>402</sup> Thus, receiving states have an incentive to protect themselves from the negative externalities of collusive prosecution, a tit-for-tat dynamic that could evolve into a nationwide race to

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395. See, e.g., ARIZ. REV. STAT. ANN. § 13-3821(A)(1)–(22) (Supp. 2022).

396. See Kristen M. Zgoba et al., *The Adam Walsh Act: An Examination of Sex Offender Risk Classification Systems*, 28 SEXUAL ABUSE 722, 724 (2016).

397. See, e.g., IND. CODE ANN. § 1-1-2-4(b)(3) (West Supp. 2022); TEX. CODE CRIM. PROC. ANN. art. 62.001(10) (West 2018).

398. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 62.003(a) (requiring the Department of Public Safety to determine whether an out-of-state offense “contains elements that are substantially similar to the elements of an offense under the laws of this state”).

399. See, e.g., *Brown v. Montoya*, 662 F.3d 1152, 1169 (10th Cir. 2011) (finding unconstitutional a process where sex-offender registration was at the complete discretion of a corrections officer); *Meredith v. Stein*, 355 F. Supp. 3d 355, 360, 365–66 (E.D.N.C. 2018) (finding unconstitutional a process where the substantial similarity determination “was made by a deputy in the sheriff’s office . . . without consultation with the Wake County District Attorney’s Office or the North Carolina Attorney General’s Office, and” where “North Carolina law does not ‘require a court hearing or other process’ prior to determining that a sex offender must register on the basis of substantial similarity”).

400. See, e.g., *Johnson v. Commonwealth*, 674 S.E.2d 541, 544 (Va. Ct. App. 2009) (“Both statutes share common essential elements, and as such, we hold that the two statutes are similar.”).

401. See, e.g., *Lingle v. State*, 172 N.E.3d 977, 984–86 (Ohio 2020) (explaining that a substantial similarity determination requires examining “why the [out-of-state] offender was ordered to register as a sex offender” and whether that reason is substantially similar to Ohio’s requirements).

402. See *supra* text accompanying notes 308–13.

the bottom.<sup>403</sup> Importantly, this sort of defensive tactic is unlikely to produce changes in laws that apply only to relocating individuals and so it has implications for all individuals convicted of triggering offenses in the state, not just those with collusive bargains.

A simple legislative reform could avoid the necessity of broader, more punitive, changes to state collateral consequences regimes: States should consider uncoupling collateral consequences from the specific crime of conviction. With respect to SORN laws, several states have taken this step already, to varying levels of generality. On the more specific end, consider the statutory scheme of Minnesota. The Minnesota legislature structured their SORN laws specifically to prevent defendants from negotiating around registration requirements—state law now requires that a person register if they were *charged* with a registerable offense and convicted of any “offense arising out of the same set of circumstances.”<sup>404</sup> A revision of this sort would drastically reduce the value of fictional pleas (at least postindictment) to defendants, although it still necessitates some level of factual investigation by the receiving state.

On the more general end of the spectrum, the Indiana legislature revised their definition of “sex offender” in 2006 to include individuals who are required to register in *any* state.<sup>405</sup> A law of this breadth arguably tasks state law enforcement officers with knowing the registration requirements in all fifty states and comparing them to a relocating individual’s charged conduct. Full enforcement of this mandate is likely unworkable in practice.<sup>406</sup> And, in fact, the cases tend to show that the statute is principally invoked when an individual is already on a registry in their home state.<sup>407</sup> A more modest

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403. See *supra* text accompanying notes 325–27.

404. MINN. STAT. ANN. § 243.166(1b)(4) (West 2022). On its face, this particular revision may still fail to reach fictional pleas in which parties plea in way that documents facts that are completely different from those involved in the original charge. Simultaneously, this provision may needlessly impose registration requirements on individuals who were merely subject to overcharging—adding registrable offenses that were only weakly supported by the evidence and a poor fit for the “circumstances.” Nevertheless, the Minnesota amendment hints at the possibilities of legislative limits on creative plea bargaining.

405. IND. CODE ANN. § 11-8-8-4.5(b)(1) (West 2016).

406. State sex-offender registration typically relies on self-reporting, see, e.g., IND. CODE § 11-8-8-7 (2013), as well as communication between states, see, e.g., N.Y. CORRECT. LAW § 168-j(3) (McKinney 2017). An individual who is not registered (or not required to register) in their home state seems unlikely to self-report the fact of a prior conviction to local law enforcement and, indeed, is unlikely to know enough about registration requirements in other states to be on notice of the duty to register. Cf. *United States v. Hester*, 589 F.3d 86, 93 (2d Cir. 2009) (noting that fair notice requires “circumstances which might move one to inquire as to the necessity of registration” (internal quotation marks omitted)).

407. See, e.g., *Hope v. Commissioner of Indiana Dep’t of Corr.*, 9 F.4th 513, 519 (7th Cir. 2021) (en banc) (involving six individuals who each had to register in another state).

legislative reform would therefore require registration only when the individual is relocating from a state where they are currently on a registry.<sup>408</sup>

One crucial factor counseling in favor of modest reforms, however, is the importance of equal treatment. If sex-offender registration in a receiving state is tied to registration in the home state, relocating registrants may end up receiving more punitive treatment under the law than do residents who committed the same crime in the receiving state. Recall again the difference between Michigan and Arizona respecting first-offense indecent exposure to a minor: The offense requires registration in Michigan but does not require registration in Arizona.<sup>409</sup> If someone on the Michigan registry for this offense relocates to Arizona, a law requiring them to register in Arizona would treat them differently than the law would treat those who commit the offense in Arizona. While such discrepancies in treatment are not disqualifying,<sup>410</sup> legislatures considering such reforms should weigh their interest in deterring the relocation of other states' registrants against their interest in uniform treatment of state residents convicted of similar sex offenses.

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Attempts to eliminate fictional pleas, such as by passing legislation banning them outright, might restrict this species of problem solving in the criminal justice system. Such a blunt approach would have real social costs. Fictional pleas create gains from trade for both prosecutors and defendants, and even the extraction of value from nonconsenting third parties through collusive prosecution is at least contextually defensible as consistent with prosecutorial ethics when it enhances overall welfare.<sup>411</sup> Moreover, by removing prosecutorial flexibility, such bans would drastically increase the incidence of extreme and often arbitrary outcomes. A self-interested prosecutor seeking to evade harsh collateral consequences would be left with a choice between two very different paths. One option would be to decline prosecution outright.<sup>412</sup> This option may come at a cost to community safety and, arguably,

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408. This is the policy in, for example, Texas. There, state law identifies such individuals as "extrajurisdictional registrants" and ties both the duty to register and the *length* of registration to the laws of the home state. See TEX. CODE CRIM. PROC. ANN. art. 62.001(10).

409. See *supra* note 246 and accompanying text.

410. Because sex-offender registries are considered civil regulation aimed at enhancing public safety rather than punishing offenders, such discrepancies need only survive the extremely forgiving "rational basis" test. *E.g., Hope*, 9 F.4th at 528–29 (remanding Equal Protection challenge of relocated sex-offense registrants for rational basis review). Since one purpose for requiring registration solely for relocating individuals may be to deter the migration of individuals with sex-offense convictions into the receiving state, we expect that courts will uniformly uphold such requirements.

411. See *supra* Sections I.A & I.C.2.

412. See Johnson, *Fictional Pleas*, *supra* note 24, at 895–96. Thinking beyond the confines of an individual case, Johnson also highlights the possibility that prosecutors may join lobbying

to justice.<sup>413</sup> The other option would be to proceed with prosecution, in which case the unavailability of fictional pleas may lead to harsh or counterproductive collateral consequences more frequently.

For this reason, this Part sketches a few alternative responses to collusive prosecution involving fictional pleas that we narrowly tailor to the specific problems arising in sex-offense cases and crimes that trigger other highly variable state-level collateral consequences. These balms retain the agency of prosecutors and defendants to use fictional pleas when both necessary and valuable, while hopefully limiting uses that are hard to justify under fiduciary theory. Our reform discussion also implicitly shines light on the moving parts that make fictional and even collusive plea bargains possible in our criminal justice system. While these reforms represent only a few of the many potential responses to fictional pleas, the moderate and, in our view, plausible responses we introduce show that it is possible to reduce the harms of unethical fictional pleas without resorting to wholesale abolition and its attendant costs.

#### CONCLUSION

In this Article, we make four contributions to the academic literature regarding the use of fictional pleas in criminal cases. First, we construct a model of fictional pleas as a “win-win” solution for prosecutors and defendants when collateral consequences create asymmetric incentives for the parties and matter to different constituencies differently. To support this model, we show how prosecutors can and do deploy fictional pleas (1) when they are troubled by the harsh immigration consequences that often follow criminal convictions for undocumented immigrants (notwithstanding a potential contrary national preference) and (2) when they wish to convince a defendant to plead guilty and can do so by helping them avoid collateral consequences in other communities without similarly weakening such consequences locally. Our model allows us to frame such pleas as collusive bargains—a sharing of surplus welfare that the bargaining parties extract from third parties by agreeing to deviate from factual fidelity in representing the crime of conviction.

Second, we examine the conditions under which such collusive bargains raise ethical issues for prosecutors—and, more generally, when they might be welfare reducing. Contrary to preliminary studies of fictional pleas that have

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efforts in the hopes of reforming or repealing laws that produce harsh collateral consequences. *Id.* at 896–97.

413. See Byrne, *supra* note 38, at 2991–93. Note, however, that recent studies show prosecutorial declinations of misdemeanor offenses produce a reduction in subsequent arrest rates, suggesting that, for some crimes, public safety can be enhanced by declining to prosecute. Amanda Y. Agan, Jennifer L. Doleac & Anna Harvey, *Misdemeanor Prosecution* 2–8 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28600, 2022). Others suggest that such declinations, if not fully transparent to the public, may also have value in continuing to deter formally criminal conduct. See Luna, *supra* note 165, at 800 (“Because most individuals hear the conduct rule of full criminalization and not the decision rule of prosecutorial decriminalization, some people might be deterred from crime that they otherwise would have committed.”).

challenged the practice wholesale, we argue that fictional pleas may—within specified limits and under appropriate conditions—be an effective way for prosecutors to faithfully discharge their ethical obligations to their various constituencies because collusive bargains can be welfare enhancing. We reach this conclusion by characterizing prosecutors as public fiduciaries with multiple, competing groups of beneficiaries, not solely as political animals whose customary incentives—in the absence of separate, externally imposed ethical obligations—link directly and exclusively to the preferences of a local voting constituency. We suggest that prosecutors owe all of their beneficiaries the duties of reasonableness and fairness, which implies, at a minimum, that prosecutors ought to identify and weigh the costs and benefits of their decision-making even with respect to remote, nonvoting beneficiaries.

Third, we highlight a novel and previously unnoticed possibility for fictional pleas in the context of sex-offender registration and notification requirements and other similarly structured collateral consequences regimes. Both hardline prosecutors and wealthy defendants may have incentives to negotiate well-crafted fictional pleas to avoid collateral consequences in other jurisdictions. This form of collusive bargaining can benefit the negotiating parties at the expense of innocent third parties. In particular, prosecutors may self-interestedly seek to “banish” but really lure defendants to neighboring jurisdictions. Well-resourced defendants may be better able to negotiate a fictional plea that allows for collateral-consequence-free relocation, a benefit probably unavailable to similarly situated defendants with fewer means. Collusive prosecution under these circumstances seems at odds with a prosecutor’s fiduciary obligations of fairness and reasonableness and will likely catalyze costly offsetting reforms in nearby states. Policymakers and judges should guard against such bargains.

Lastly, we offer two potential structural remedies that we argue may discourage the use of ethically suspect collusive prosecution. The first is enhanced judicial intervention in plea colloquies. While traditional colloquies center on a defendant’s waiver of constitutional rights, enhanced colloquies would interrogate a prosecutor’s considerations and motivations in choosing a fictional plea and seek to create a more disciplining factual record. Second, legislative reforms may reduce the threat of pernicious fictional pleas. Specifically, states may mandate more robust factual recordkeeping in line with detailed federal presentencing reports to support accurate eligibility determinations elsewhere. Alternatively, or in combination, states may choose to revise their registration requirements and other collateral consequences laws so that they are triggered not by the offense of conviction but by the substantive conduct at issue or eligibility in the state of conviction.