The "Why" and the "Should" of Plea Bargaining in Sex Crimes Cases: A Response to *Collusive Prosecution*

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ABSTRACT: Under what circumstances is it appropriate for a prosecutor to offer a fictional plea bargain? This is the question that Ben A. McJunkin and J.J. Prescott ask in their thought-provoking article, Collusive Prosecution. *In this response, I argue that although McJunkin and Prescott make a compelling argument that fictional pleas are an acceptable exercise of prosecutorial discretion in cases where a defendant is facing immigration consequences, their arguments about the ethics of such pleas for those facing sex offender registration are less persuasive. The root of my disagreement with McJunkin and Prescott is about why prosecutors make fictional plea offers in sex crimes cases. McJunkin and Prescott propose that prosecutors will "collude" with defendants for the purpose of pushing sex offenders from the offending jurisdiction into other states. Under this theory of "why," McJunkin and Prescott find that prosecutors should not, under a fiduciary theory of prosecution, offer such pleas. But, as this response argues, there are more likely reasons that prosecutors agree to fictional pleas in sex crimes cases, namely to achieve some vision of justice for the parties or merely to get to a speedy resolution on the case. If these more prosaic reasons provide an explanation for this deal-making, then such pleas may be an appropriate use of discretion under the fiduciary theory.*

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INTRODUCTION

In their article, *Collusive Prosecution*, Ben A. McJunkin and J.J. Prescott rightly ask the question: Do prosecutors misuse their discretion when they offer fictional pleas?[1] As I have written about elsewhere, fictional pleas involve "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."[2] But McJunkin and Prescott take on the implications of what these bargains tell us about prosecutorial discretion more broadly. And to explore these questions they use the fiduciary theory proposed by Bruce Green and Rebecca Roiphe,[3] focusing on the prosecutorial choices involved in reaching these bargains and the various parties that may be affected by those choices. The paper, which contributes to a robust conversation on the role of the modern prosecutor,[4] asks important questions about the ethical limits of prosecutorial collaboration with defendants to achieve these fictions. McJunkin and Prescott explore the fiduciary obligations of prosecutors by looking at the use of fictional pleas in two scenarios: first, where the defendant uses it to avoid immigration consequences and, second, where the defendant uses it to avoid sex offender registration.

As this response argues, while McJunkin and Prescott make a compelling and nuanced argument about using these bargains in the immigration context, their arguments about how the same bargains operate in the context of sex offense are less persuasive. Sex crimes plea bargaining offers a more difficult case study in the use of fictional pleas because, unlike the use of fiction to evade immigration consequences, it is much less clear why prosecutors are willing to trade away sex offender registration. McJunkin and Prescott believe the "why" in these cases is, at least in part, motivated by a prosecutorial desire to drive defendants from the offending jurisdiction into other states.[5] They rely heavily—and, as this response argues, mistakenly—on the Jeffrey Epstein case to prove their point that fictional pleas are being used to promote a form of "constructive banishment."[6] This response proposes other more likely reasons that prosecutors offer and accept fictional pleas in

1. Ben A. McJunkin & J.J. Prescott, *Collusive Prosecution*, 108 IOWA L. REV. 1653, 1667–69 (2023).

2. Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 857 (2019).

3. Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U.L. REV. 805, 806–09 (2020).

4. *See, e.g.*, Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 178–82 (2022); Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1416–18, 1420–25 (2021); Jeffrey Bellin, *Theories of Prosecution*, 180 CALIF. L. REV. 1203, 1218–20 (2020); David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 495–98 (2016); Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 633–37 (1999).

5. McJunkin & Prescott, *supra note* 1, at 1699.

6. *Id.*

sex crimes cases, namely that they feel they are acting in the broader interests of justice to secure a just outcome for the defendant and victim (regardless of the defendant's sex offender status in other states); or that they simply want to resolve the case and a fiction allows them to achieve an outcome without trial. If this is the case, then McJunkin and Prescott's claims about the ethics of these pleas under a fiduciary theory are less convincing.

Finally, although this response disagrees that banishment is a driving force for plea bargaining, many of the authors' suggestions for reform would have salutary effects on the plea system because they focus on transparency and consistency. Such reforms are welcome changes in a system that lacks both.

I. FICTIONAL PLEAS AND IMMIGRATION CONSEQUENCES

As a starting point, McJunkin and Prescott focus on fictional pleas because they allow prosecutors the ability "to tailor their nonenforcement discretion only to those policies that are at odds with community sentiment."[7] In this way, prosecutors can "subvert locally disfavored collateral consequences," at a low cost to the locality.[8] They conclude that there are times when such negotiation between the parties is indeed collusive and that such collusive agreements may be ethically problematic. McJunkin and Prescott ultimately conclude, "when the benefits of fictional pleas come at a cost to others outside of the negotiation, amounting to a negative externality on others beyond any cost to the integrity of the criminal justice system itself, the bargain becomes collusive."[9]

To explore whether these collusive bargains violate ethical norms, McJunkin and Prescott apply the fiduciary theory of prosecution developed by Green and Roiphe.[10] The theory holds that "[p]rosecutors . . . are fiduciaries who represent the public but are appointed or elected to pursue a particular abstract public interest, the interest in justice."[11] The fiduciary theory focuses on the "duties of care and loyalty that a prosecutor owes to the public as a beneficiary or client."[12] McJunkin and Prescott focus particularly on the duties of fairness and reasonableness embedded within these broader duties to think about how prosecutors should approach their broad discretion at plea bargaining.[13]

They first apply the theory to an examination of the ethical implications of fictional pleas in immigration cases. Many prosecutors have openly embraced a policy of creative bargaining to assist local non-citizen defendants

7. *Id.* at 1678.
8. *Id.*
9. *Id.* at 1667–68 (footnotes omitted).
10. Green & Roiphe, *supra* note 3, at 806–09.
11. *Id.* at 809.
12. *Id.*
13. McJunkin & Prescott, *supra* note 1, at 1683–86.

in avoiding federal immigration consequences.[14] Those prosecutors are clear that, say, deporting a non-citizen for a minor drug offense does not align with their communities' sense of justice. There are also prosecutors who do not advertise such policies but informally adopt or allow fictional pleas in cases where the defendant faces serious immigration issues.[15] For prosecutors who quietly engage in what the authors term collusive prosecution, we have less evidence of their reasons, but it is likely that they also do not feel that deportation is the just result for the offense. They also may just want to get the case settled, and a fictional plea helps them get to "yes."

But answering *why* prosecutors collude with defendants does not answer the larger question of whether they *should* collude. The "should" question is what interests McJunkin and Prescott. As they note, when thinking of the impact of fictional pleas in the immigration context, there are four constituencies that prosecutors ought to consider: (1) the state's citizens; (2) the specific electorate; (3) the citizens of the nation (4) and the defendant.[16] Each of these constituencies may have a different interest in the fictional plea, and the fiduciary theory is particularly helpful in weighing these competing interests because it gives structure to the necessary cost-benefit analysis. In the case of immigration consequences, even if one assumes that the nation's citizens have an interest in stringent immigration enforcement, it is the local population who feels the impact of nonenforcement by the local prosecutor. Where "the primary costs of nonenforcement are felt locally and thus are likely to be internalized by the community whose preferences the prosecutor represents[,]" then collusive prosecution to avoid immigration consequences is defensible.[17] McJunkin and Prescott conclude that:

> [U]nder 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 prosecutorial ethics [ ] 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

14. Johnson, *supra* note 2, at 871–74; McJunkin & Prescott, *supra* note 1, at 1671–73.

15. Heidi Altman, *Prosecuting Post-*Padilla*: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 28–29 (2012) (reporting that prosecutors may modify pleas to mitigate negative immigration consequences, even in offices with no specific policy on the issue).

16. McJunkin & Prescott, *supra* note 1, at 1682–83.

17. *Id.* at 1680.

> the use of fictional pleas is a programmatic policy endorsed by the prosecutor's electorate.[18]

McJunkin and Prescott make a compelling case for "ethical collusion" because they focus on how prosecutors should approach these competing constituencies. They move away from the facile separation of powers argument that often animates this conversation about whether a prosecutor should or should not enforce federal immigration law. Indeed, prosecutors constantly make choices to enforce certain laws and not others. The fact that the laws they are failing to enforce are federal, as McJunkin and Prescott make clear, further justifies the nonenforcement if it is fair and reasonable vis-à-vis the local community.

McJunkin and Prescott could further explain why we should see these prosecutorial decisions as a form of *collusion*, though. When prosecutors allow a defendant to avoid immigration consequences, are they colluding with the defendant against the national population? Do prosecutors have an ethical obligation to trigger collateral consequences for *other* jurisdictions or populations? As Green and Roiphe argue in a later paper on fiduciary theory in the context of progressive prosecutors, "[a]s fiduciaries . . . prosecutors represent the local community, the state, and, to a lesser degree, the nation, in their pursuit of justice . . . . [T]hey must prioritize the interests that all citizens share in justice in a broad sense."[19] The problem, as Green and Roiphe see it, is when prosecutors entirely abandon consideration of one of their constituencies for ideological purposes, as progressive prosecutors are sometimes accused of doing.[20] But if a prosecutor is weighing the interests of and outcomes for various groups, is this collusion or prosecutors engaging in the cost-benefit analysis we want them to engage in? While I am compelled by McJunkin and Prescott's arguments about the justification for these sorts of bargains, I am less certain that collusion is the correct term for what is happening, especially when viewed through the lens of fiduciary theory.

II. FICTIONAL PLEAS AND SEX OFFENDER REGISTRATION

After examining the use of fictional pleas in immigration cases briefly, McJunkin and Prescott move into the meat of the paper, examining whether prosecutors violate any duties when they collude with sex offender defendants to avoid sex offender registration.[21] They focus on two problems they identify as specifically arising from the use of fictional pleas in sex offender cases. The first problem is outcome inequality, the concern that some defendants are getting better deals than other defendants.[22] The second problem they

18. *Id.* at 1690.

19. Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Progressive Prosecution*, 60 AM. CRIM. L. REV. 1431, 1451 (2023).

20. *See id.* at 1433, 1451–53.

21. McJunkin & Prescott, *supra* note 1, at 1691, 1697–98.

22. *Id.* at 1691, 1697.

identify is the possibility that prosecutors are using fictional pleas to "banish" defendants, either willingly or unwillingly, from the jurisdiction of conviction.[23]

Sex offenders, unlike non-citizen defendants, do not have vocal community supporters. As such, there also are no prosecutors who have adopted open policies that promise relief from sex offender registration in appropriate cases. Yet, we know that prosecutors are indeed helping defendants escape sex offender registration in the same way that they help defendants escape immigration consequences.[24] I am currently researching a dataset of nearly five hundred sex crimes cases out of Ohio, where it appears quite clear that prosecutors allowed defendants charged with serious sex offenses to plead guilty to non-sex offenses with no registration requirements, even after the defendants were indicted on sex charges.[25] Approximately thirty-seven percent of the cases in the dataset involve fictional pleas, such as transforming a charge of child pornography possession into an assault.[26]

The problem is that McJunkin and Prescott seemed to move away from the pressing "should" question that they addressed in the section on immigration consequences; and instead, spend more time trying to answer the "why" question. Why are certain defendants getting the benefit of these pleas? Or, as McJunkin and Prescott would put it, why are prosecutors colluding with defendants in this way? The "why" question is much easier to answer in the context of immigration. Many (progressive) prosecutors are advertising their use of creative plea bargains to help non-citizens avoid immigration consequences that they and their community do not believe are fair. But what if, as I argue here, we are less clear about the "why" in sex crimes cases? What insights can the fiduciary theory of prosecution provide when prosecutors may have a range of reasons that they agree to these almost always secret deals?

A. THE JEFFREY EPSTEIN PROBLEM

Before diving into the answer to that question, I acknowledge that one of my concerns with their focus on the "why" question is that I simply disagree with McJunkin and Prescott about the reasons they propose that prosecutors make deals with defendants in sex offense cases. McJunkin and Prescott propose that prosecutors and defendants collude to craft bargains that will require sex offender registration in the offending jurisdiction but not other states, thereby encouraging – or pushing – the defendant to move to other

23. *Id.* at 1691, 1700–04.

24. Johnson, *supra* note 2, at 888–90; Thea Johnson & Tina Zottoli, *Lateral Pleas: Plea Bargaining in Sex Crimes Cases* (unpublished manuscript) (on file with the *Iowa Law Review Online*) (the data in the study focuses on cases that were indicted as sex offenses but were then resolved with a plea bargain to a non-sex offense).

25. Johnson & Zottoli, *supra* note 24.

26. *Id.*

states. They rely heavily on the Jeffrey Epstein case to make this point. The Epstein case, however, fails to support the argument.

For those not familiar with the case, Jeffrey Epstein was accused of sexually assaulting dozens of teenage girls.[27] Epstein directed his associates to find unsuspecting girls to come to his home with the promise of money in exchange for a non-sexual massage. Once they were in the home, he would assault them. Epstein continued to offend for many years before he was finally arrested in Florida. Through a fictional plea, he secured a deal to a single count of soliciting a prostitute.[28] There were no prostitutes involved. This plea was a fiction. Further, the way the deal was structured essentially hid the ages of Epstein's victims, some of whom were as young as fourteen years old. Epstein had to register as a sex offender in Florida, but because of his Florida plea, Epstein—rich beyond all imagination—was able to spend time at his vast estate in New Mexico without registering as a sex offender. This is because New Mexico has less stringent sex offender laws than Florida. Specifically, McJunkin and Prescott note that because the age of Epstein's victims was unclear, New Mexico did not require registration, even though it was clear that Epstein's crime had involved a minor.[29]

As McJunkin and Prescott argue, the plea agreement that Epstein reached in Florida encouraged him to move to New Mexico. Their theory is that prosecutors will collude with defendants like Epstein to come to agreements that will help them escape sex offender registration in states outside the state of conviction. Or alternatively, prosecutors will craft these bargains themselves to nudge—or force—defendants to move from the state of conviction.[30]

I understand the great appeal of using Jeffrey Epstein as an example. I have used his case as an example in many of my papers because it is such a fascinating case study in the absolute perversion of the plea system.[31] But the problem with using Epstein as an example to prove this particular point about collusive prosecution—namely that prosecutors are trying to push the defendant out of state through the use of the fictional plea—is that it is clear from the reporting on the case that Florida was trying to help Epstein precisely because they wanted him to *stay in Florida*.[32]

Epstein was politically well-connected, and a huge donor to the Democratic Party in the Palm Beach area.[33] Both state and federal prosecutors

27. JULIE K. BROWN, PERVERSION OF JUSTICE: THE JEFFREY EPSTEIN STORY 87 (2021).

28. *Id.* at 160–61.

29. McJunkin & Prescott, *supra* note 1, at 1656.

30. *Id.* at 1698–1706.

31. *See, e.g.*, Thea Johnson, *Lying at Plea Bargaining*, 38 GA. ST. U. L. REV. 673, 677 n.4, 718 (2022); Thea Johnson, *Review: Punishment Without Trial: Why Plea Bargaining is a Bad Deal*, CRIM. L. & CRIM. JUST. BOOKS, (June 2022), https://clcjbooks.rutgers.edu/books/punishment-without-trial-why-plea-bargaining-is-a-bad-deal [https://perma.cc/2VWG-D3JC].

32. BROWN, *supra* note 27, at 87–89, 148.

33. *Id.* at 90.

were eager to assist him. Julie K. Brown was the journalist who first broke the Epstein story for the Miami Herald and has since written the definitive account of the Epstein saga. As she reported, at one point, a prosecutor on the case wrote to Epstein's lawyers about their plea negotiations, "I have been spending some quality time with . . . [the criminal code] looking for misdemeanors."[34] In fact, the first offer to Epstein would have guaranteed him no sex charges and no jail time.[35] He rejected that plea.[36]

Although the eventual plea to a fiction required sex offender registration, Epstein's counsel was convinced "that they would . . . be able to downgrade or even remove his sex registration requirement" *in Florida*.[37] Further, prosecutors did not require Epstein to wear an ankle monitor on home confinement, or enroll in a sex offender treatment program, which are typically required of sex offenders in Florida.[38] Indeed, Epstein was allowed out on work release during his brief incarceration, despite the fact that sex offenders were ineligible for work release in Palm Beach County, and no other inmate with a sex offense had ever been allowed out on work release.[39] Prosecutors willingly entered into this agreement, even though as McJunkin and Prescott acknowledge, "Epstein's conduct uncovered the kind of evidence that would send most people to prison for life."[40]

So, although I disagree generally with the use of the term "collusion" in these cases, I think it is clear that prosecutors were colluding with Epstein. And it is even likely that they were trying to assist Epstein in avoiding sex offender registration in other places where he maintained homes.[41] But it is not clear that they wanted to banish him from Florida. Prosecutors in Florida were seemingly colluding to help Epstein at the expense of the people of Florida. Prosecutors were not thinking about any of the constituencies that McJunkin and Prescott identified earlier in the paper. They did not seem to care about the population of young girls in Florida—to say nothing of New Mexico—who would be preyed upon by Epstein. I am not sure I agree with McJunkin and Prescott that "prosecutors [in Florida] traded away New

34. *Id.* at 159 (internal quotation marks omitted).

35. *See id.* at 88.

36. *Id.* at 89.

37. *Id.* at 161.

38. *Id.* at 244.

39. *Id.* at 251–52

40. McJunkin & Prescott, *supra* note 1, at 1696.

41. As Julie K. Brown noted, "[b]y picking a victim who was seventeen, it made it easier for Epstein not to have to register as a sex offender in some jurisdictions where it was legal to have sex with a girl who was seventeen." BROWN, *supra* note 27, at 247. But even this concession was likely to appease Epstein, not to push him out. Interestingly, at least one news report claims that authorities in New Mexico did not rely on the plea, but rather on an erroneous police report, in making their determination that Epstein did not have to register. 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.

Mexico's preferences in exchange for a local benefit—[sex offender registration] in Florida."[42] Prosecutors weren't interested in a "local benefit" for the people of Florida. If they had been, they would have pursued the significant sentences associated with the charges of which Epstein was guilty, making post-release supervision almost a secondary matter. Further, they also made considerable (and successful) efforts to hide the deal from the victims.[43] It is hard to see this use of prosecutorial discretion as being motivated by a desire to secure a "benefit" for the local population. Indeed, Epstein maintained his home in Florida and continued to spend time there after his conviction.[44]

And it was not just Florida prosecutors who tried to entice Epstein to *stay* in their state. Prosecutors in New York City worked on behalf of Epstein to lower his sex offender registration level in New York state.[45] The State of New York Board of Examiners of Sex Offenders, an independent body that assigns a potential risk level to sex offenders in New York, recommended that Epstein be classified as a Level 3 sex offender, the highest possible registration level.[46] The Manhattan District Attorney's office disputed the finding by the state board and argued to a judge that Epstein should receive a Level 1 classification, the least restrictive classification.[47] New York prosecutors later said that because Epstein had not been indicted on all charges, they had mistakenly thought that the Level 3 status did not apply to Epstein.[48] This would seemingly back up McJunkin and Prescott's argument that Epstein's Florida plea deal meant an externality was passed onto New York City, since prosecutors mistakenly thought he should receive the lowest level of registration.

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42. McJunkin & Prescott, *supra* note 1, at 1702.

43. *See* BROWN, *supra* note 27, at 246–47.

44. Curt Anderson, *Florida Sheriff Investigates Epstein's Time Spent Outside of Jail*, PBS (July 19, 2019), https://www.pbs.org/newshour/nation/florida-sheriff-investigates-epsteins-time-spent-outside-of-jail (on file with the *Iowa Law Review*) ("Epstein was allowed to spend most days at his office after a little more than three months [of a thirteen-month sentence] in the county jail . . . . Epstein had his own driver to take him to and from his office . . . six days a week."). Even after his sentence was completed, Epstein spent time in his Palm Beach home. He still owned the home at the time of his death in 2019. Rachael Bunyan, *Good Riddance! Epstein's $18Million Florida Beach Estate Where He Abused Underage Girls Is Demolished by New Owner*, DAILY MAIL (April 22, 2021, 1:00 PM) https://www.dailymail.co.uk/news/article-9489349/Demolition-begins-Epsteins-former-Florida-mansion.html [https://perma.cc/T8AJ-MYRD].

45. Eric Levenson & Sonia Moghe, *Manhattan DA's Office Asked Judge to Lower Jeffrey Epstein's Sex Offender Status in 2011*, CNN (July 9, 2019, 6:45 PM), https://www.cnn.com/2019/07/09/us/jeffrey-epstein-sex-offender/index.html [https://perma.cc/3QN6-RC7X] (explaining that the prosecutor's office disagreed with the State of New York Board of Examiners of Sex Offenders' assessment that Epstein "classified as a Level 3 sex offender, the highest possible risk level").

46. *Id.*

47. *Id.*

48. Jan Ransom, *Cyrus Vance's Office Sought Reduced Sex-Offender Status for Epstein*, N.Y. TIMES (July 9, 2019), https://www.nytimes.com/2019/07/09/nyregion/cyrus-vance-epstein.html (on file with the *Iowa Law Review Online*).

But when prosecutors made their argument in favor of the lowest registration level, they had already seen the report by the independent Board of Examiners of Sex Offenders. In that report, the Board had determined that the evidence supported the most serious registration level.[49] Judge Ruth Pickholz noted, when she decided against the DA's recommendation, that she had never seen the DA's Office argue for a downward departure from the recommendation of the Board.[50] So why would the DA's Office make an exception in this case? One can only speculate, but a pretty good guess would be that Epstein's lawyers prevailed upon someone in the DA's office to make it easier for him *to stay* in New York City and his multi-million-dollar Upper East Townhouse.

B. EVADING SEX OFFENDER REGISTRATION

I am unconvinced that relocation will be a major driver for the negotiation of fictional pleas. For one thing, the vast majority of defendants are poor.[51] The number of defendants who will be able to relocate after a sex offense conviction seems incredibly small. There may be defendants, like Epstein, who will seek to relocate based on sex offender status. But I think it is much more likely that the collusion involved in these pleas will be for the purposes of avoiding sex offender registration *in the first place*, something that would have been nearly impossible for Epstein given the egregiousness and scope of his crimes.

This is not to say that defendants will not ever move because of sex offender registration. As Corey Rayburn Yung has written, sex offender laws in certain places do, at times, force defendants into a form of "exile" either within the state or sometimes even out of the state.[52] Extreme restrictions on where a person can live after conviction on a sex offense sometimes makes it impossible to find suitable housing. An entire tent city of registered sex offenders emerged under a bridge in Florida because they simply could not

49. *Id.*, (noting that the DA made arguments in favor of Epstein "even though the New York state panel that evaluates people convicted of sex crimes – the Board of Examiners of Sex Offenders – had calculated that Mr. Epstein had a high risk of reoffending. His risk assessment was 130 – 'solidly above' the 110 threshold for a level 3 offender[.] . . . The board had based its decision, in part, on a 22-page affidavit from detectives in the Palm Beach Police Department that detailed complaints from minors who said that Mr. Epstein had molested them – a document [the DA] also had."

50. *Id.* An observation, I will note, I anecdotally support from being a paralegal many, many years ago charged with reviewing the Board's decisions for the Manhattan DA Office's Sex Crimes Unit.

51. THE RELATIONSHIP BETWEEN POVERTY & MASS INCARCERATION: HOW MASS INCARCERATION CONTRIBUTES TO POVERTY IN THE UNITED STATES, CTR. FOR CMTY. CHANGE, MASS. LEGAL SERVS. 1, https://www.masslegalservices.org/system/files/library/The_Relationship_between_Poverty_and_Mass_Incarceration.pdf (on file with the *Iowa Law Review Online*) ("People who enter the criminal justice system are overwhelmingly poor. Two-thirds detained in jails report annual incomes under $12,000 prior to arrest.").

52. Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 104, 135–39 (2007).

find a place where they could legally live under Florida's registration laws, but also because they could not afford to move to a state with more lax registration requirements.[53]

But it seems that prosecutors would not negotiate *for the purpose* of banishment because, first, it is difficult to achieve such tailored pleas, and second, it seems, unlike the negotiation of a plea to assist a non-citizen, so totally at odds with any vision of prosecutorial ethics. A prosecutor who tries to save children from being raped in State A by purposely pushing what he believes to be a dangerous sex offender into State B does not seem like a close ethical call. As such, it is also not likely to happen much. McJunkin and Prescott seem to acknowledge this, "if prosecutors are practically indifferent to what happens elsewhere, and if defendants realistically must investigate and identify precise fictional pleas to secure their preferred arrangement, such pleas may be rare indeed."[54] Part of the reason the Epstein case became a national scandal is because the level of collusion between the defendant and the state, without any regard for the population, was a total abdication of prosecutorial ethics. In Epstein's case, the collusion was to assist him to stay, but the same would be true for collusion that assisted him to move.

The authors use other potential examples to back up their proposal that fictional pleas will be used for the purposes of banishment. The main example that McJunkin and Prescott provide is the use of fictional pleas to push corrupt politicians out of one state and into other jurisdictions, where they are not barred from political office by the plea they accepted in the initial jurisdiction.[55] Putting aside the occasional carpetbagger, this also seems unlikely given that politics is the ultimate local job. You run for office in the place where you have roots, connections, and the ability to fundraise. The idea that a defendant will negotiate a plea that bans him from running for office in State A so he can go make his political fortunes in State B seems almost vanishingly small. Indeed, the authors offer no examples of such a bargain being struck.

I am also skeptical (although much less so) about McJunkin and Prescott's claim that rich defendants will fare better than poor defendants when it comes to who gets the benefit of fictional pleas.[56] Mostly, I think the problem with this theory is that we have so little information on plea bargains in general and, particularly, fictional pleas. Further, we have some reasons to believe that public defenders, whose clients are necessarily poor, might be in a better position to achieve fictional pleas. In prior work, I have written about the ways that public defenders creatively negotiate around collateral consequences.[57] Public defenders are likely in the best position to understand

53. Beth Schwartzapfel, *Banished*, THE MARSHALL PROJECT (Oct. 3, 2018, 7:00 AM), https://www.themarshallproject.org/2018/10/03/banished (on file with the *Iowa Law Review*).

54. McJunkin & Prescott, *supra* note 1, at 1697 (footnote omitted).

55. *Id.* at 1705.

56. *Id.* at 1697.

57. *See* Thea Johnson, *Measuring the Creative Plea Bargain*, 92 IND. L.J. 901, 919–29 (2017).

the range of options available to a defendant for many reasons. First, public defenders are likely to be familiar with the particular prosecutor or judge and their attitudes towards fictional pleas because they are repeat players. Further, they are attuned to which DAs in their jurisdiction care about which collateral consequences.[58] Finally, there is good reason to believe that public defenders are in the best position to understand how to reach a fictional plea in any given case. Although we expect any practicing criminal lawyer to have a deep knowledge of the criminal code and any corresponding collateral consequences, public defenders likely have the most experience with the code and the ability to move creatively within it. I agree with McJunkin and Prescott that public defenders will likely be in a worse position to deeply research and compare sex offender registration across states than very well-resourced lawyers.[59] But there is certainly reason to believe that indigent defendants may benefit more from fictional deals than moderately wealthy defendants who hire private attorneys. And, as I explain in more detail below, I think the most common reasons that prosecutors and defendants reach these deals has nothing to do with banishment.

There will absolutely be unequal outcomes when it comes to fictional pleas. There are some defendants who get the deal and some who don't. In my research, I've observed co-defendant cases where one party negotiates a fictional plea with all its attendant benefits, and the other co-defendant does not.[60] But it is (currently) a mystery as to why one defendant got the deal and the other did not. Part of the problem with plea bargaining overall is that the lack of transparency means we have no idea how and why certain defendants secure certain bargains.[61]

This all leads back to my initial concern: the "why" of fictional pleas in sex crimes cases is hard to grasp. I suspect that McJunkin and Prescott would respond to my concerns by noting that you must ask the "why" question to get to the "should" question. As I've noted, I disagree with their "why." Below, I propose two more likely reasons (than banishment) that prosecutors are agreeing to fictional pleas in these cases and then asking whether fiduciary theory gives us some sense of whether, given these reasons, they should make such offers.

The first reason I propose that prosecutors offer a fictional plea to a defendant in a sex crime case is they do not believe the punishment of sex offender registration fits the crime. In the case of a teenager charged with a sex offense for exchanging nude photos with his also underage partner, it may not make sense to put that kid on the sex offender registration, even if the original charge requires registration. In several of the cases in the Ohio dataset I am researching, the victim and defendant were family or had a

58. *Id.* at 930–34.

59. McJunkin & Prescott, *supra* note 1, at 1694–95.

60. Johnson and Zottoli, *supra* note 24.

61. Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973, 975–76 (2021).

domestic relationship.[62] Perhaps these families are prevailing upon the prosecutor to forgo registration, which will make it harder for the defendant to secure employment or housing, a potential hazard for the entire family. As Lara Bazelon and Bruce Green have noted in their work on victims and restorative justice, even in sex crimes cases, victims may not want to see the full brunt of the criminal process brought down on defendants.[63]

Another reason that prosecutors may be willing to agree to a fictional plea in a sex crimes case is because they simply want to end the case and get to an agreement. There are defendants who would not resolve a case if it involves sex offender registration.[64] It is such an onerous burden that many defendants are willing to bargain away quite a bit in exchange for no registration or take the risk at trial. In this sense, sex offender registration can operate on defendant decision-making in a similar way to immigration consequences. As the Supreme Court acknowledged in *Padilla v. Kentucky*, many noncitizen defendants will take their chances at trial rather than accept a plea that carries deportation consequences, even if those chances are bad.[65] Defendants charged with sex offenses may have the same mindset. For a prosecutor who wants to "get to yes" on a plea, the only option may be a plea with no sex offender registration.

Given these potential alternative reasons for the presence of fictional pleas in sex crimes cases, the question remains whether prosecutors *should* be making these offers? Or, as McJunkin and Prescott frame the question, "Do prosecutors have a responsibility to ensure the faithful operation of collateral consequences when negotiating plea agreements?" [66]

If we apply McJunkin and Prescott's analysis from the immigration section of their paper to sex offender registration, it seems clear that we do not get the same result. We get to a different result because the national community is not the one trying to enforce the norms against the wishes of the local community. We don't have any clear party, except for the defendant, who wants sex offenders to avoid registration. Further, the local community is the one that will internalize the harm of allowing the defendant to avoid the registry. So, regardless of whether banishment is the goal, it would seem these pleas cannot be allowed under the fiduciary theory, as McJunkin and Prescott apply it in the immigration context.

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62. Johnson & Zottoli, *supra* note 24 (finding that approximately 23 of the cases list an explicit family or domestic relationship, although it appears from the types of charges that the numbers are likely higher within the dataset).

63. Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 331–32 (2020).

64. *See* Johnson, *supra* note 57, at 922–23; Rachel Marshall, *I'm a Public Defender. My Clients Would Rather Go to Jail than Register as Sex Offenders.*, VOX (July 5, 2016, 8:00 AM), https://www.vox.com/2016/7/5/12059448/sex-offender-registry [https://perma.cc/2MS8-5EEG].

65. *See* Padilla v. Kentucky, 559 U.S. 356, 365–67, 373–74 (2010).

66. McJunkin & Prescott, *supra* note 1, at 1657.

I am not entirely sure I agree with this outcome. Prosecutors are seemingly quietly rebelling against sex offender registration in opposition to public sentiment. If we assume that they are doing it for reasons related to their vision of "justice," then perhaps the fiduciary theory of prosecution, as articulated by Green and Roiphe, would allow such maneuvering. As they note, "[t]he discretionary power of prosecutors at the core of their fiduciary mission derives from making . . . calculations in the best interest of the public rather than at its behest."[67] Indeed, they argue that decisions in individual cases should "be insulated from popular input and control."[68] The question, though, is whether prosecutors are "engag[ing] in a deliberate and transparent process of seeking to define justice in a consistent and rational way within the context of the traditions, policies, and practices of the office."[69] This, of course, is harder to define. As I argue above, we do not know if prosecutors are being consistent in how they make these offers. But if we assume that, at least in a subset of these cases, prosecutors are not weighing communities of interest, but rather broader interests of individual justice, as dictated by the office's policy commitments (expressed or not) and the individual facts of the case, then there is a way to see such fictional pleas as in line with their ethical duties. A fiduciary justification for fictional pleas may even hold up where prosecutors are trying to resolve these cases efficiently, as long as doing so does not lead to injustice and is based on guiding principles within the office.[70] We give prosecutors broad discretion for precisely this reason—to determine how and when to plea bargain a case in the interest of justice.

CONCLUSION

Finally, although I disagree that banishment is a problem that needs to be addressed through reform, I think the solutions that the authors propose will have broader salutary effects on the criminal system. For instance, they draw from the work of Jenia Turner[71] in suggesting an enhanced plea colloquy that moves away from the current practice of focusing narrowly on the defendant's waiver of rights and instead to a searching evaluation of "a prosecutor's *justification* for resorting to possible factual fictions."[72] The recent Plea Bargain Task Force Report (of which I was the Reporter) makes a similar suggestion, noting that, "in the current system, nearly all scrutiny at the plea colloquy is on the defendant, but the Task Force encourages judges to

67. Green & Roiphe, *supra* note 3, at 812.

68. *Id.*

69. *Id.* at 820.

70. Although, as I have argued previously, a narrow focus on efficiency by criminal lawyers poses serious problems. Thea Johnson, *The Efficiency Mindset and Mass Incarceration*, 75 OKLA. L. REV. 115, 125–27, 140 (2022).

71. Turner, *supra* note 59, at 1017–19.

72. McJunkin & Prescott, *supra* note 1, at 1709.

scrutinize the actions of the prosecutor as well before accepting a plea."[73] Such inquiry could give all parties, but especially the public, more faith that the plea represents a fair and true outcome. It also rightly places a burden on the government to prove that the plea was not obtained through coercive incentives and represents an accurate representation of the facts as the parties believe them to be at the time of the plea.

McJunkin and Prescott also suggest "uncoupling collateral consequences from the specific crime of conviction."[74] While they propose a model that still requires mandatory sex offender registration, I would argue that such uncoupling without mandatory registration requirements might open the door to fairer and more transparent bargaining. A defendant could receive a sex offender conviction while not being required to register. This would allow the state to "mark" the defendant as a sex offender without dooming him to all the debilitating consequences that come from registration.

McJunkin and Prescott begin an important conversation about the ethical dilemmas presented by fictional pleas in the context of collateral consequences, but their focus on banishment in the sex offender context narrows that conversation too significantly. The insights of the fiduciary theory allow for a broader conversation about how prosecutors should use their vast discretion to dole out justice. The paper begins to tease apart, but could go further, in figuring out when and how negotiating around sex offender registration is an appropriate use of discretion.

73. PLEA BARGAIN TASK FORCE, CRIM. JUST. SECTION, AM. BAR ASS'N, PLEA BARGAIN TASK FORCE REPORT 22 (2023), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf [https://perma.cc/L2D9-UW85].

74. McJunkin and Prescott, *supra* note 1, at 1719.