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Cover Page Footnote

J.D. Candidate, 2005, Fordham University School of Law. Special thanks to my adviser and mentor, Professor Bruce Green, for his invaluable insight and assistance on this Note. I also would like to thank Jeremy, Rick, and Candy Shweder for challenging my arguments, and Sol and Vicky Shaz for their support.

NOTE

DONATING DEBT TO SOCIETY: PROSECUTORIAL AND JUDICIAL ETHICS OF PLEA AGREEMENTS AND SENTENCES THAT INCLUDE CHARITABLE CONTRIBUTIONS

*Sylvia Shaz Shweder**

INTRODUCTION

Stephen Fagan's stated reason for kidnapping his daughters from his ex-wife, Barbara Kurth, in 1979[1] was that Kurth suffered from alcoholism and was "unable to care for" the children.[2] Fagan brought the girls down to Florida and lied to them that their mother had died in a car accident.[3] He created a new life for himself and his daughters in Florida by furnishing them with new names and identities.[4] There, he married a wealthy woman and the family lived in luxury.[5] Kurth devoted two years of her life to searching for her daughters to no avail.[6] Twenty years after the abduction, Fagan pleaded guilty to kidnapping in exchange for a suspended jail sentence, five years of probation, 2000 hours of community service, and a $100,000 charitable contribution.[7] Without the plea agreement, he could have faced up to

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1. Ellen O'Brien, *A Plea, and a Family Saga Concludes: Fagan Pleads Guilty to Kidnapping; Prison Sentence is Suspended*, Boston Globe, May 29, 1999, at A1. The couple had been divorced for about a year when Fagan kidnapped his children. Joanna Coles, *The Mother Whose Children Were Stolen*, Times (London), July 21, 1999, § 3 (Features), at 39.

2. Ellen O'Brien, *Fagan Lawyer Calls the Media Unfair*, Boston Globe, May 30, 1999, at B3. His ex-wife, Barbara Kurth, denied Fagan's assertions and said that she suffered from narcolepsy. *Id.*; *see also* Jack Sullivan, *Ex-Wife Signs off on Fagan No-Jail Plea Deal*, Boston Herald, May 28, 1999, at 1.

3. *Fagan Pays $100,000 as Part of Plea Deal*, Boston Globe, July 24, 1999, at B4.

4. *See* O'Brien, *supra* note 2, at B3.

5. Jules Crittenden, *Fagan Lawyer Cries Media Treated his Client Badly*, Boston Herald, May 30, 1999, at 20.

6. *See* O'Brien, *supra* note 2, at B3.

7. John Laidler, *DA Coakley: The First Eight Months*, Boston Globe, Aug. 29,

twenty years in prison.[8] He and his daughters proudly told their story on several television programs,[9] where Fagan boasted that, in retrospect, he would abduct his children all over again.[10]

The plea agreement disturbed Kurth.[11] She said that the prosecutor deceived her by allowing Fagan to avoid jail.[12] Further, Kurth was frustrated by the media attention surrounding the plea agreement because it turned "'Fagan into some kind of hero,'" while the situation had been devastating for her.[13] Several journalists agreed and condemned the agreement as a way for the wealthy to avoid jail time[14] and as an inappropriate "wrist-slap sentence" that encourages others to similarly break the law.[15] The district attorney, however, defended the plea agreement as the best arrangement in this situation[16] because Fagan's daughters wanted to testify that they were grateful that their father had taken them from their mother,[17] thus prompting a fear of jury nullification.[18]

Allowing charitable contributions to be a part of plea agreements is not unique to Fagan's case. Although this type of alternative sentence is unusual, some courts have permitted contributions to be part of plea agreements.[19] Legal opinions state that sentences that include charitable contributions allow defendants in certain situations to be rehabilitated more successfully than they do with traditional sentences, because the contributions allow defendants to confront the harm that they have done.[20] Additionally, for certain defendants

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1999, City Weekly, at 1. Kurth chose the charitable organization that received the money. *See Fagan Pays $100,000 as Part of Plea Deal*, *supra* note 3, at B4.

8. Pamela Ferdinand, *Father Pleads Guilty to Girls' '79 Abduction: Prison Term Avoided; Daughters Support Him*, Wash. Post, May 29, 1999, at A2.

9. Margery Eagan, *Mom Says DA Forced Her to Accept Kidnapper Fagan's Deal*, Boston Herald, June 1, 1999, at 1.

10. Coles, *supra* note 1, at 39.

11. *See* Eagan, *supra* note 9, at 1.

12. *Id.*

13. *Id.*

14. *See, e.g.*, Editorial, *Getting Away with Crime*, Boston Herald, June 2, 1999, at 32.

15. Editorial, *Kidnap Probation Sentence Galling*, Sun-Sentinel (Fort Lauderdale, Fla.), June 2, 1999, at 2A; *see also* Joan Vennochi, Op-Ed, *An Unrepentant Fagan Thumbs His Nose at us All*, Boston Globe, June 4, 1999, at A23.

16. *See* Sally Jacobs, *Martha Coakley's Permanent Campaign*, Boston Globe, Nov. 28, 1999, Magazine, at 12.

17. *See* Laidler, *supra* note 7, at 1; O'Brien, *supra* note 1, at A1.

18. Jury nullification is when a jury determines that a defendant is not guilty even though the prosecutor has proven the case beyond a reasonable doubt because the jurors believe the law is "immoral or unwise" or that the defendant has been "'punished enough' already." Joshua Dressler, Understanding Criminal Law § 1.02, at 5 (3d ed. 2001). Jury nullification is lauded as a "'conscience of the community,'" but it is criticized because jurors violate their oath and may perpetuate criminal behavior by refusing to punish offenders. *Id.* at 6 (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 & n.15 (1968)).

19. *See infra* notes 167-86, 201-26 and accompanying text.

20. *See infra* notes 167-81 and accompanying text.

these sentences appear to provide greater deterrence than traditional sentences because they generate more publicity than traditional sentences and serve as a continual reminder to the defendant of the wrongdoing.[21] Yet, the potential for abuse or the appearance of abuse in a system that allows charitable contributions to be part of plea agreements may render these arrangements unethical.[22] For example, if a victim, like Fagan's ex-wife, feels that a prosecutor or judge allowed a defendant to escape punishment by "buying" his way out of jail, then allowing the charitable contribution to be a part of the sentence could be unethical.

Courts and bar committees that have addressed this issue differ as to whether prosecutors and judges ethically can allow charitable contributions as a part of plea agreements.[23] Although certain factors tend to make commentators view the practice as ethical[24] or unethical,[25] this overall lack of consensus complicates whether prosecutors and judges should permit these types of plea agreements. The ethical rules themselves are similarly unclear.[26] A few courts and bar committees permit the contributions because ethical rules do not specifically prohibit the sentences, particularly for prosecutors.[27]

This Note addresses whether permitting charitable contributions in plea agreements is an ethical practice for prosecutors who enter into these types of agreements with defendants and for judges who accept the agreements. Part I describes a prosecutor's role in plea bargaining and the ethical issues that arise from engaging in plea bargaining. This part details the ethical rules that are implicated by including charitable contributions in plea agreements. Then, this part examines the judicial ethics involved in sentencing and the ethical canons that may be invoked when judges permit charitable contributions in sentences.

Part II analyzes how courts and bar committees have addressed using charitable contributions as part of plea agreements and sentences in light of judges' and prosecutors' roles in handling

21. *See infra* notes 177-78 and accompanying text.

22. See *infra* Parts II.A.1 and II.B.1 for a discussion of the ethical rules that judges and prosecutors must consider when including conditions of charitable contributions in plea agreements and sentences, including prejudicing the administration of justice, creating a conflict of interest, and avoiding the appearance of impropriety.

23. *See infra* Part II.

24. For example, charitable contributions are generally permitted in sentences and plea agreements when the contributions would help to rehabilitate the defendant. *See infra* notes 167-74, 213-14 and accompanying text.

25. For example, charitable contributions are generally not permitted in sentences and plea agreements when the judge or prosecutor has an interest in the charitable organization receiving the contribution. *See infra* notes 146-49, 194-96 and accompanying text.

26. *See infra* Parts I.B-C.

27. *See infra* notes 202-03 and accompanying text.

criminal cases.[28] Few courts and bar committees have addressed this issue for prosecutors.[29] Those that have addressed this issue generally consider the practice ethical unless the prosecutor had a connection to the charitable organization to which the defendant was giving a contribution.[30] Conversely, courts and bar committees who have addressed this issue for judges generally have not considered it ethical for judges to approve of charitable contributions in sentences because doing so fosters the appearance of impropriety.[31]

Part III proposes that the justice system could allow charitable contributions in an ethical manner as part of plea bargains in certain criminal cases by recommending that a uniform system be created to help determine the appropriateness of this alternative sentence. This part recommends a system that permits charitable contributions in plea agreements and sentences only if prosecutors and judges consider the defendant's offense and financial situation, the degree to which contributions can be incorporated into sentences, and the charities that are appropriate for this purpose. Part III concludes by applying this system to hypothetical situations that reflect the issues presented in Part II.

I. PROSECUTORS' AND JUDGES' ETHICAL RESPONSIBILITIES IN PLEA BARGAINING

Plea bargaining is a device that prosecutors use to aid in settling cases without a trial.[32] Traditionally, plea agreements have included jail time, fines, or probation in exchange for guilty pleas.[33] Allowing defendants to give charitable contributions legally can be part of the punishment as well. Using charitable contributions in this way, however, may raise ethical concerns for prosecutors and judges. The various codes of ethics do not address these ethical concerns specifically,[34] but the more general rules governing prosecutors' and judges' conduct can guide prosecutors and judges in evaluating charitable contributions. Part I.A discusses the benefits and drawbacks of plea bargaining and the function of prosecutors in the process. Part I.B focuses on the ethical rules that are associated with

28. There is little case law and academic material on this precise topic. Therefore, this Note relies heavily on the available state and federal cases, bar committees' advisory opinions, and news articles to analyze the current viewpoints on this topic and to draw conclusions.

29. For examples of courts and bar committees that have addressed this issue, see *infra* notes 194-96 and 201-03 and accompanying text.

30. *See infra* notes 194-96, 201-03 and accompanying text.

31. *See infra* notes 141-52 and accompanying text.

32. *See* 1 Wayne R. LaFave et al., Criminal Procedure § 1.3(o), at 124-25 (2d ed. 1999).

33. 5 *id.* § 21.1(h), at 24, 26.

34. *See infra* Parts I.B-C.

plea bargaining. Part I.C addresses the ethical rules that bind judges when they accept plea agreements and sentence defendants.

A. *Prosecutors' Role in Plea Bargaining*

Prosecutors have long used plea bargaining[35] to resolve cases while avoiding trial.[36] Plea bargaining is justified as a way to conserve resources[37] and to reduce prosecutors' tremendous caseload burden[38] because the trial process can be lengthy.[39] Defendants may be persuaded to plead guilty to a less serious offense to avoid higher penalties or social stigma.[40] Further, plea bargaining reduces the time between an offense and punishment, allowing defendants who are incarcerated pending trial to be released more quickly.[41] This decrease in time also assists victims to move forward once justice has been served. Moreover, defendants may feel a more immediate connection between the crime committed and the punishment associated with it, which may combat recidivism.[42] Finally, plea bargaining can ensure that a defendant is punished, which he otherwise might avoid because of jury nullification or because a victim or other witness refuses to testify.[43]

Despite these potential benefits, plea agreements can be unfair.[44] A defendant who accepts a plea agreement bargains for a prosecutor to recommend a lighter punishment than for a defendant who exercises his constitutional right to trial.[45] A prosecutor makes this concession to resolve the case without the burden of a trial.[46] Further, the plea

35. Plea bargaining is a "[n]egotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, usu[ally] a more lenient sentence or a dismissal of the other charges." Black's Law Dictionary 1173 (7th ed. 1999).

36. Plea bargaining has been part of the judicial system for at least 150 years. 5 LaFave et al., *supra* note 32, § 21.1(b), at 7. Most criminal cases are resolved by plea agreements. 5 *id.* § 21.1(a), at 4; *see also* John Jay Douglass, Ethical Issues in Prosecution 262 (1988) (noting that 90% of felony convictions are the product of plea agreements).

37. Brady v. United States, 397 U.S. 742, 752 (1970) (upholding the constitutionality of plea bargaining).

38. *See* 5 LaFave et al., *supra* note 32, § 21.1(c), at 8-9; *see also* 1 *id.* § 1.2(b), at 37.

39. *See* 1 *id.* § 1.3(q), at 133.

40. *See* 5 *id.* § 21.1(a), at 5.

41. *Brady*, 397 U.S. at 752; *see also* Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 Tul. L. Rev. 695, 704 (2001).

42. *See Brady*, 397 U.S. at 753 (noting that a defendant who is willing to admit his crime may rehabilitate more quickly); *see also* Colquitt, *supra* note 41, at 704-05.

43. For example, in the Fagan case, where the father said that he is trying to help his children and his children will testify likewise, it is possible that the prosecutor did not believe that a jury would convict the defendant even though he had admitted to the abduction. *See supra* notes 1-18 and accompanying text.

44. *See infra* text accompanying notes 45-48.

45. *See supra* note 35.

46. *See* Colquitt, *supra* note 41, at 704, 706.

bargaining process is not uniform. Defendants who are able to afford attorneys that have significant time to spend on their cases may have more control over the process than others.[47] In addition, when a plea bargain is struck, prosecutors replace juries in determining a defendant's guilt,[48] which may be unfair because the jury system is grounded on the concept that a collection of the defendant's fellow citizens will assess the defendant's guilt. Finally, innocent defendants might accept punishment to avoid the risk of a trial and the potential of a longer sentence[49] that may be mandated by the federal sentencing guidelines if they are found guilty.

Prosecutors have considerable discretion in charging and trying crimes[50] because they must balance effective law enforcement and the rights of the accused.[51] Some scholars have asserted that prosecutors are the "most powerful lawyers"[52] because they represent the government as well as citizens within their jurisdiction.[53] Hence,

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47. *Id.* at 706.

48. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 Fordham L. Rev. 2117, 2120 (1998).

49. *See* 5 LaFave et al., *supra* note 32, § 21.1(d), at 11.

50. *See* Douglass, *supra* note 36, at 220 (explaining that a "prosecutor's authority to charge is a highly discretionary power as to whom to charge, when to charge, what charges to bring and whether to dismiss charges").

51. *See* 4 LaFave et al., *supra* note 32, § 13.2(a), at 10-11 (citing Pugach v. Klein, 193 F. Supp. 630, 634 (S.D.N.Y. 1961)). Recently, Attorney General John Ashcroft issued a policy directive highlighting that the federal sentencing guidelines direct federal prosecutors to "[p]ursue the [m]ost [s]erious, [r]eadily [p]rovable [o]ffense in [a]ll [f]ederal [p]rosecutions." John Ashcroft, Memorandum, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing, *at* http://news.findlaw.com/hdocs/docs/doj/ashcroft92203chrgmem.pdf (Sept. 22, 2003). The directive deters plea bargaining by limiting prosecutorial discretion. *See* Mark Hamblett, *Ashcroft Memo Discourages Plea Bargains*, N.Y. L.J., Sept. 23, 2003, at 1; Eric Lichtblau, *Ashcroft Limiting Prosecutors' Use of Plea Bargains*, N.Y. Times, Sept. 23, 2003, at A1. Plea bargaining often includes an agreement that the defendant will be charged with a less serious offense if he pleads guilty and avoids a trial. *See* 5 LaFave et al., *supra* note 32, § 21.1(a), at 5.

52. Bruce A. Green, *Why Should Prosecutors Seek Justice?*, 26 Fordham Urb. L.J. 607, 626 (1999) (discussing the history of prosecutors' unique responsibilities).

53. *See* Model Code of Prof'l Responsibility EC 7-13(1) (2004). Ethical Consideration 7-13(1) explains that prosecutors have a special duty because "the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute." *Id.* Three states use a version of the Model Code: New York, Ohio, and Oregon. *See* A.B.A. Compendium of Professional Responsibility Rules and Standards 561 (2003 ed.). The New York Code of Professional Responsibility does not similarly list ethical considerations. *See* N.Y. Comp. Codes R. & Regs., N.Y. Code of Prof'l Responsibility tit. 22, § 1200 (2004). The Model Rules of Professional Conduct also do not list ethical considerations. *See* Model Rules of Prof'l Conduct (2003). Forty-three states, the District of Columbia, and the U.S. Virgin Islands use a version of the Model Rules. *See* A.B.A. Compendium of Professional Responsibility Rules and Standards 637 (2004 ed.). Puerto Rico and the following states do not use the Model Rules: California, Iowa, Maine, Nebraska, New York, Ohio, and Oregon. *Id.* A "vast majority of state and federal jurisdictions" adopted the Model Code after it was created in 1969. *Id.* at 7. A "rethinking of the ethical premises and problems of the

prosecutors possess the power and resources of the government, whereas the defendant is, in many cases, indigent or limited by significantly fewer resources.[54] Additionally, prosecutors make decisions on behalf of their client,[55] unlike defense lawyers who must serve the objectives of their client. Further, prosecutorial discretion is virtually unchecked[56] and unreviewable[57] because judicial review of prosecutors, who serve an executive function,[58] would violate constitutional separation of powers principles. In 1993, the U.S. Court of Appeals for the Seventh Circuit noted that "[t]he Department of Justice wields enormous power over people's lives, [which is] beyond effective judicial or political review."[59] Further, a prosecutor has the power to compel production of evidence, subpoena witnesses, and grant immunity.[60]

The Fourteenth Amendment of the United States Constitution governs prosecutorial misconduct through the Due Process Clause.[61]

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legal profession" led the American Bar Association to adopt the new restatement, the Model Rules, in 1983, which most states now follow. *Id.* at 7-8. Although the Model Rules do not contain the "aspirational" ethical considerations of the Model Code, *see* Model Code of Prof'l Responsibility, Preliminary Statement, the current Model Code and the Model Rules are substantially similar as to the rules discussed in this Note.

54. *See* Green, *supra* note 52, at 626.

55. *See* Model Code of Prof'l Responsibility EC 7-13(2). Ethical Consideration 7-13(2) provides that the prosecutor's special duty extends because "during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all." *Id.* The New York Code does not similarly list ethical considerations. *See* N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.

56. *See* Green, *supra* note 52, at 627.

57. *See* Douglass, *supra* note 36, at 226. A prosecutor bases his decision on his "personal judgment... without further technical and potentially artificial restrictions." *Id.* at 227.

58. At the federal level, the President appoints the Attorney General and the United States Attorneys, but the United States Attorneys generally hire their assistants on a "non-partisan, merit-oriented basis." 1 LaFave et al., *supra* note 32, § 1.2(f), at 54 nn.228, 230. At the state level, most local prosecutors are elected, and they may or may not hire assistants based on political affiliation. 1 *id.*

59. United States v. Van Engel, 15 F.3d 623, 629 (7th Cir. 1993) (reversing a judge's dismissal of several counts against a defendant because the prosecutor's "ineptitude" and "misconduct" was insufficient to justify acquitting a defendant, as is true in all but the most egregious cases).

60. *See* Green, *supra* note 52, at 626 (quoting N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 683, at 3 (1996)). The United States Attorneys' Manual and ethical rules caution prosecutors to use this discretion soundly. Dep't of Justice, Dep't of Justice Manual, U.S. Attorneys' Manual tit. 9, § 9-27.110 (2d ed. 2004) (stating that a "prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of Federal criminal law" and further noting that the Constitution charges the executive branch with ensuring that laws are "faithfully executed") [hereinafter Dep't of Justice Manual]; Standards Relating to the Admin. of Criminal Justice Standard 3-1.2(b) (3d ed. 1992) (stating that "the prosecutor must exercise sound discretion"). *See generally* Model Code of Prof'l Responsibility EC 7-13, 7-14.

61. *See* Green, *supra* note 52, at 619.

The Due Process Clause[62] protects people from arbitrary governmental procedures by requiring all defendants to be afforded similar treatment by the justice system. This includes treating lawbreakers equally and not punishing them "more harshly than deserved."[63] As a "minister of justice and not simply . . . an advocate," a prosecutor should be disinterested.[64] Furthermore, prosecutors are expected to deliver justice "impartially"[65] by ensuring the fairness of the justice system and acting with an overall view toward the public good.[66] Prosecutors have an additional duty of ensuring that the defendant receives procedural justice.[67] Thus, a prosecutor serves the dual role of protecting the defendant[68] as well as representing the government.

Defense attorneys suggest that prosecutorial power in plea bargaining is too great, especially if it limits a defendant's right to a fair trial.[69] When he was a criminal defense attorney, Judge Jed S. Rakoff of the United States District Court for the Southern District of New York wrote that many indigent defendants plead guilty mainly because "they quickly ascertain that their appointed counsel cannot

62. *See* U.S. Const. amend. XIV, § 1.

63. *See* Green, *supra* note 52, at 634.

64. Model Rules of Prof'l Conduct R. 3.8 cmt. 1 (2003); Model Code of Prof'l Responsibility EC 7-13. Ethical Consideration 7-13 provides that "[t]he responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict" (citing Berger v. United States, 295 U.S. 78, 79 (1935)). *Id.* The New York Code does not similarly list ethical considerations. *See* N.Y. Comp. Codes R. & Regs tit. 22, § 1200 (2004). For more discussion of a prosecutor's obligation of neutrality, see H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 Fordham L. Rev. 1695, 1697 (2000).

65. *Berger*, 295 U.S. at 88.

66. *See* Model Code of Prof'l Responsibility EC 7-13(2); Dep't of Justice Manual, *supra* note 60, at tit. 9, § 9-27.730(A)(2) (noting that one reason for a prosecutor to recommend a sentence is when "[t]he public interest warrants an expression of the government's view concerning the appropriate sentence").

67. N.Y. Comp. Codes R. & Regs tit. 22, § 1200.3(5) (codifying the Model Code); Model Code of Prof'l Responsibility DR 1-102(A)(5) ("A lawyer shall not [e]ngage in conduct that is prejudicial to the administration of justice."); Model Rules of Prof'l Conduct R. 8.4(d) ("It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice."); Model Rules of Prof'l Conduct R. 3.8 cmt. 1 (stating that a prosecutor's role is as a "minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence"); *see also* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 Vand. L. Rev. 45, 49 (1991) (clarifying prosecutors' abstract ethical duty to seek "justice").

68. *See* Uviller, *supra* note 64, at 1697.

69. Jed S. Rakoff, *How Can You Defend Those Crooks?*, N.Y. L.J., Sept. 25, 1990, at 3 (noting that judges have a "blatant and continuing bias in favor of the prosecution" citation omitted)).

hope to mount a meaningful defense on their behalf."[70] Because appointed defense attorneys may not have adequate time to devote to representing their clients and the defendants do not want to risk a heftier sentence after trial, the defendants often choose to plead guilty. Prosecutors, however, should not unfairly benefit from this situation because they have a responsibility that is "moral if not legal [to use a] prudent and restrained exercise" of power.[71] When prosecutors violate ethical or internal guidelines, however, they are rarely disciplined.[72] Therefore, the justice system relies on prosecutors' integrity and honesty to aptly represent the public interest.[73]

The United States Attorneys' Manual guides federal prosecutors in their special role in plea bargaining.[74] Prosecutors are responsible for delivering "fair, evenhanded administration" of the law so that the public and defendants have confidence that prosecutors base their decisions on the "merits of each case."[75] Plea agreements are expected to "reflect the totality and seriousness of the defendant's conduct" and "charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government's ability readily to prove a charge for legal or evidentiary reasons."[76] Prosecutors are expected to weigh several factors when plea bargaining:

1. The defendant's willingness to cooperate in the investigation or prosecution of others;

2. The defendant's history with respect to criminal activity;

3. The nature and seriousness of the offense or offenses charged;

4. The defendant's remorse or contrition and his/her willingness to assume responsibility for his/her conduct;

5. The desirability of prompt and certain disposition of the case

6. The likelihood of obtaining a conviction at trial;

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70. *Id.* (citation omitted). Judge Rakoff also was an assistant United States attorney in the Southern District of New York from 1973-1980. 1 Almanac of the Federal Judiciary, 2d Cir. 66 (2004).

71. United States v. Van Engel, 15 F.3d 623, 629 (7th Cir. 1993); Model Code of Prof'l Responsibility EC 7-13(1); Green, *supra* note 52, at 629 (quoting *Van Engel*, 15 F.3d at 629).

72. Andrea Elliott, *Prosecutors Not Penalized, Lawyer Says*, N.Y. Times, Dec. 17, 2003, at B1 (discussing how "often egregious" prosecutorial misconduct in seventy-two cases over twenty-one years contributed to sixty-two reversals, yet only one of those prosecutors was disciplined).

73. Dep't of Justice Manual, *supra* note 60, at tit. 9, § 9-27.001.

74. *See id.* § 9-27.000.

75. *Id.* § 9-27.001.

76. *Id.* § 9-27.400(B).

7. The probable effect on witnesses;

8. The probable sentence or other consequences if the defendant is convicted;

9. The public interest in having the case tried rather than disposed of by a guilty plea;

10. The expense of trial and appeal;

11. The need to avoid delay in the disposition of other pending cases; and

12. The effect upon the victim's right to restitution.[77]

While plea bargaining is a useful prosecutorial tool, it cannot be used to the detriment of prosecutorial duties, such as the prosecutor's special duty to "seek justice"[78] and to protect defendants' rights. Moreover, if a prosecutor does not have "sufficient admissible evidence to support a conviction,"[79] he has an ethical duty "to drop the charges without exacting any price for doing so."[80] In provable cases, however, charitable contributions can evidence a defendant's "remorse or contrition"[81] to aid the prosecutor in quickly and effectively resolving the case. The next sections analyze the ethical rules that limit prosecutors who seek to include charitable contributions in plea agreements and judges who approve of them in sentencing.

B. *Prosecutorial Ethics in Plea Bargaining*

Prosecutors are bound by various court-adopted and ethical rules, yet no rule directly addresses whether prosecutors ethically can enter into plea agreements permitting defendants to give a charitable contribution. Even though a prosecutor does not violate a specific ethical rule by engaging in such plea agreements, general ethical rules indicate that abuse could evolve in this system. Rule 3.8 of the Model Rules of Professional Conduct ("Model Rules"), which is devoted to prosecutorial ethics, notes the need for prosecutorial fairness in only charging crimes that are supported by probable cause and in

77. *Id.* § 9-27.420(A)(1-12).

78. Model Code of Prof'l Responsibility EC 7-13 (2004); Standards Relating to the Admin. of Criminal Justice Standard 3-1.2(c) (3d ed. 1992); *see also* Green, *supra* note 52, at 607; Zacharias, *supra* note 67, at 107; Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 Geo. L.J. 207, 227 (2000) (explaining how federal prosecutors differ from other attorneys in examining whether federal prosecutors should be treated differently for ethics purposes).

79. Standards Relating to the Admin. of Criminal Justice Standard 3-3.9(a) ("A prosecutor should not . . . permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.").

80. Cowles v. Brownell, 538 N.E.2d 325, 327 (N.Y. 1989).

81. Dep't of Justice Manual, *supra* note 60, at tit. 9, § 9-27.420(A)(4).

disclosing evidence to the defense,[82] which may aid a defendant in deciding whether to accept a plea. Another Model Rule, Rule 8.4, prevents all attorneys, including prosecutors, from "engag[ing] in conduct that is prejudicial to the administration of justice."[83] The justice system has been established for several reasons: to have an orderly society; to promote punitive retribution; to specifically and generally deter crime; to rehabilitate or reform criminals; to keep criminals off of the streets; to vindicate victims; and to avoid vigilantism by assuring society that the government is punishing the criminal for the harm done.[84] Although general in language, Model Rule 8.4 is integral in reminding prosecutors that they must uphold the goals of criminal justice because of their special role in the courts.[85]

Prosecutors ethically cannot participate in a case with which they have conflicting interests. The Model Code of Professional Responsibility ("Model Code") restricts an attorney from representing a party when the lawyer's "personal interests" may conflict with his professional judgment.[86] The Standards Relating to

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82. Model Rules of Prof'l Conduct R. 3.8 (2003); *see also* N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.34 (2004); Model Code of Prof'l Responsibility EC 7-13.

83. Model Rules of Prof'l Conduct R. 8.4(d); *see also* N.Y. Comp. Codes R. & Regs. tit 22, § 1200.3(5); Model Code of Prof'l Responsibility DR 1-102(A)(5).

84. *See* Dressler, *supra* note 18, § 2.03, at 15-18; Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 Am. Crim. L. Rev. 1313 (2000); John Hasnas, *Once More unto the Breach: The Inherent Liberalism of the Criminal Law and Liability for Attempting the Impossible*, 54 Hastings L.J. 1, 45-47 (2002); Ashley Paige Dugger, Note, *Victim Impact Evidence in Capital Sentencing: A History of Incompatibility*, 23 Am. J. Crim. L. 375, 398-403 (1996).

85. Model Rules of Prof'l Conduct R. 8.4(d). See *supra* notes 67 and 83 and accompanying text for more discussion of Rule 8.4(d) of the Model Rules. *See also* N.Y. Comp. Codes R. & Regs tit. 22, § 1200.3(5); Model Code of Prof'l Responsibility DR 1-102(A)(5).

86. Model Code of Prof'l Responsibility DR 5-101(A). Disciplinary Rule 5-101(A) provides, "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests." *Id.*; *see also* N.Y. Comp. Codes R. & Regs tit. 22, § 1200.20(a) (mirroring the Model Code, except that the conflict is permitted if a "disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents . . . ."); Model Rules of Prof'l Conduct R. 1.7. Rule 1.7 provides in relevant part:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent

the Administration of Criminal Justice ("Standards") specifically caution prosecutors in this respect.[87] Consequently, any connection between the prosecutor and a charitable organization that a defendant contributes to as part of a plea agreement could cause a prohibited conflict of interest.

Finally, prosecutors must disclose the terms of plea agreements to the court in circumstances where the law requires it. The Model Code cautions that a lawyer cannot "[c]onceal or knowingly fail to disclose that which he is required by law to reveal."[88] Although not an ethical mandate, the Standards further recommend that prosecutors specifically "should assist the court in basing its sentence on complete and accurate information,"[89] which would include disclosing information about charitable contributions that are part of plea agreements to the sentencing judge. Additionally, the Model Code prohibits lawyers from engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation,"[90] which a prosecutor violates if he does not disclose terms of a plea agreement that the law requires him to disclose.[91] Thus, prosecutors ethically must disclose charitable contributions if the law in their jurisdictions requires such disclosure; otherwise, the Standards recommend that prosecutors disclose the information to enable the judge to accurately understand the full agreement.[92]

Another factor in assessing prosecutorial ethics is that the Model Rules recognize the prosecutor's role as part advocate and part judge.[93] In administering justice, a prosecutor's "interest . . . in a criminal prosecution is not that [he or she] shall win a case, but that

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representation to each affected client . . . [and] (4) each affected client gives informed consent, confirmed in writing.

Id.

87. Standards Relating to the Admin. of Criminal Justice Standard 3-1.3(a) (3d ed. 1992). Standard 3-1.3(a) states, "A prosecutor should avoid a conflict of interest with respect to his or her official duties." *Id.*; *see also id.* at Standard 3-1.3(f). Standard 3-1.3(f) provides that "[a] prosecutor should not permit his or her professional judgment . . . to be affected by his or her own political, financial, business, property, or *personal* interests." *Id.* (emphasis added).

88. Model Code of Prof'l Responsibility DR 7-102(A)(3); *see also* N.Y. Comp. Codes R. & Regs tit. 22, § 1200.33(a)(3) (codifying the Model Code); Model Rules of Prof'l Conduct R. 3.3(a)(2). Rule 3.3(a)(2) provides that "[a] lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." *Id.*

89. Standards Relating to the Admin. of Criminal Justice Standard 3-6.2(a).

90. Model Code of Prof'l Responsibility DR 1-102(A)(4); *see also* N.Y. Comp. Codes R. & Regs tit. 22, § 1200.3(a)(4) (codifying the Model Code); Model Rules of Prof'l Conduct R. 3.3(a)(1). Rule 3.3(a)(1) provides in relevant part that "a lawyer shall not knowingly make a false statement of fact or law to a tribunal . . . ." *Id.*

91. *See infra* notes 199-200 and accompanying text.

92. *See supra* notes 88-90 and accompanying text.

93. *See* Model Rules of Prof'l Conduct R. 3.8 cmt. 1; *see also* Model Code of Prof'l Responsibility EC 7-13, 7-13(2).

justice shall be done."[94] Rather than simply seeking convictions, prosecutors are expected to prosecute only the guilty and to recommend suitable sentences.[95] Scholars label the prosecutor's role as balancing between a "quasi-judicial" function and government representative, and, therefore, many hold a prosecutor to a higher standard than they hold other attorneys.[96] Even if their quasi-judicial role suggests that it may be appropriate to treat them similarly, prosecutors are not subject to the same ethical rules as judges. For example, judges are charged with avoiding any appearance of impropriety,[97] but no rule similarly requires prosecutors to do so. Although the unique nature of prosecutors' duties to the public to seek justice suggests that prosecutors also should be bound by the judicial ethical rules,[98] prosecutors are not held to the same standard as judges.[99]

C. *Judicial Ethics in Sentencing*

While prosecutors have much discretion in entering plea agreements and recommending sentences, the trial judge must ultimately determine whether to accept the plea agreement to which a prosecutor and a defendant agreed.[100] In determining the sentence, judges are expected to follow ethical rules set out by the Model Code of Judicial Conduct ("Model Judicial Code").[101] Judges' ethical rules are stricter than those of prosecutors in that judges must be careful to

94. *See* Green, *supra* note 52, at 614 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

95. *See supra* notes 64-66 and accompanying text.

96. *See* Douglass, *supra* note 36, at 1, 5, 24-25; Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest*, 16 Am. J. Crim. L. 323, 324 (1989); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. Rev. 669, 697 (1992); Uviller, *supra* note 64, at 1697; Zacharias & Green, *supra* note 78, at 227; Michael Q. English, Note, *A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?*, 68 Fordham L. Rev. 525, 528-29 (1999).

97. Model Code of Judicial Conduct Canon 2 (2003). See *infra* note 102 and accompanying text for a discussion of this judicial ethical rule.

98. Because of the impact that ethical rules have on the effective assistance of counsel and law enforcement, policy concerns should be strongly considered when interpreting disciplinary rules. *See* Grievance Comm. v. Simels, 48 F.3d 640, 645 (2d Cir. 1995); *see also In re* Norton, 608 A.2d 328 (N.J. Sup. Ct. 1992) (suspending attorneys for misleading the court by dismissing a case after discovering that the defendant had contributed to a police support organization).

99. *See infra* notes 104-06 and accompanying text.

100. People v. Farrar, 419 N.E.2d 864, 865 (N.Y. 1981) (noting that "the court must perform the delicate balancing necessary to accommodate the public and private interests represented in the criminal process").

101. The Federal Judicial Conference, the District of Columbia, and all states except for Montana have adopted some version of the Model Code of Judicial Conduct. Jeffrey M. Shaman et al., Judicial Conduct and Ethics 3-5 (3d ed. 2000).

avoid even the "appearance" of impropriety,[102] whereas no prosecutorial ethics rule maintains such a strict requirement. Judges must meet these higher standards for the public to have confidence that the judicial system is impartial and equitable.[103]

In addition, courts have struck down cases with even a potential conflict of interest for judges, or that could have given the appearance that judges were otherwise biased because of the necessity for judges to be impartial. In a landmark case in 1927, the Supreme Court reversed a judgment allowing a judge's salary to depend partially on whether he found a defendant guilty and assessed a fine.[104] Since then, the Court has reversed convictions where judges had even less direct pecuniary interest in the outcome because due process requires judges to be "neutral and detached."[105] These reversals exemplify the high standard for ensuring that judges appear impartial.[106]

Finally, judges are cautioned not to use the "prestige" of their office to advance "private interests," which include the interests of "others."[107] "Others" may include charitable organizations, as another ethical canon of the Model Judicial Code does not permit judges to solicit funds for charitable organizations.[108] Judges who solicit funds for charitable organizations demonstrate bias that could affect their ability to act impartially.[109] Hence, judges who permit plea

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102. Model Code of Judicial Conduct Canon 2. Canon 2 is entitled, "A Judge Shall Avoid Impropriety and the *Appearance* of Impropriety in All of the Judge's Activities." *Id.* (emphasis added).

103. *Id.* at Canon 2(A) ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." (footnote omitted)).

104. *See* Tumey v. Ohio, 273 U.S. 510, 531, 535 (1927) (reversing a defendant's conviction because the judge had a pecuniary interest in the outcome of the case and, thus, was not impartial).

105. *See, e.g.*, Ward v. Vill. of Monroeville, 409 U.S. 57, 61-62 (1972) (reversing a defendant's conviction because the judge was also the mayor and the funds levied from the conviction helped comprise the mayor's budget).

106. *Compare Tumey*, 273 U.S. at 532, 535 (noting that due process requires a defendant to have an impartial judge, even though "[t]here are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it"), *with* Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980) (noting that agencies could retain funds that prosecutors earned through penalties levied because prosecutors are expected to be zealous enforcers and do not have to be neutral in the same way that judges do).

107. Model Code of Judicial Conduct Canon 2(B). Canon 2(B) provides that the judge cannot use "the prestige of judicial office to advance the private interests of the judge or *others*; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge." *Id.* (emphasis added).

108. Model Code of Judicial Conduct Canon 4(C)(3)(b). Canon 4(C)(3)(b) provides that "[a] judge as an officer, director, trustee or non-legal advisor, or as a member *or otherwise*: (i) . . . shall not personally participate in the solicitation of funds or other fund-raising activities . . . (iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation." *Id.* (emphasis added).

109. *Id.* at Canon 4(A), cmt 2.

agreements that include charitable contributions as part of the sentence may violate the Model Judicial Code if their acquiescence appears to promote a charitable organization.[110]

After outlining the procedural and ethical limits on prosecutors and judges in Part I, Part II analyzes how courts and bar committees have treated plea bargains and sentences that include charitable contributions. Part II.A examines how courts and bar committees have reacted to judges who approve of charitable contributions in sentences. Several opinions show that the appearance of impropriety makes this an unethical practice for judges.[111] Part II.B explains courts and bar committees' reactions to prosecutors who include charitable contributions in plea agreements. Many opinions suggest that the benefits of these arrangements, such as creating unique methods to punish corporate defendants,[112] make this practice ethical for prosecutors. Further, Parts II.A.2 and II.B.2 demonstrate that courts and bar committees find that prosecutors and judges ethically may include charitable contributions in certain plea agreements.

II. COURTS' AND BAR COMMITTEES' RESPONSES TO USING CHARITABLE CONTRIBUTIONS IN PLEA AGREEMENTS

Nothing legally prohibits prosecutors or judges from considering a defendant's charitable contributions in charging or sentencing. There are three ways charitable contributions may affect plea agreements and sentences. First, prosecutors can weigh contributions that a defendant gave on his own before the offense as a socially beneficial act that demonstrates a potential for rehabilitation. Second, a prosecutor can enter into a plea agreement that includes a condition that the defendant must give a charitable contribution. Third, judges can include charitable contributions as a term of the defendant's sentence.

Charitable contributions can be a useful part of plea agreements, similar to fines and community service.[113] Courts have used charitable contributions in several types of cases,[114] including those that involved violent crimes.[115] Courts have found that contributions may assist in

110. *See infra* notes 136-64 and accompanying text (discussing cases where judges were disciplined or reversed for including charitable contributions as part of sentences).

111. *See infra* notes 136-64 and accompanying text.

112. *See infra* notes 172-81, 221 and accompanying text.

113. *See infra* Part III.C.

114. *See infra* notes 167-86, 201-26 and accompanying text.

115. *See, e.g.*, Hafner v. Leapley, 520 N.W.2d 252, 252-53 (S.D. 1994) (affirming the sentencing judge's suspension of eight years of a thirteen-year sentence for second-degree rape on the condition that the defendant have no contact with the victim, that the defendant reimburse the victim for counseling services resulting from the offense, and that the defendant pay a $5000 charitable contribution to the county's victim and witness assistance program). To the author's knowledge, no murder cases have

reforming criminal behavior and in rehabilitating defendants.[116] Also, the additional publicity that accompanies nontraditional sentences can aid in general deterrence.[117] Finally, this alternative sentencing option provides prosecutors with a method to suitably sentence corporate defendants who may not be well suited to traditional punishments.[118]

Using these contributions as part of sentences, however, raises ethical concerns. If contributions are not related to the crime, defendants and the public may not view charitable contributions as punishment.[119] Consequently, the defendant may not adequately compensate society for his crime and the deterrent effect of the punishment may be lost. The defendant also may not adequately compensate society for his crime if the prosecutor gives more weight than is appropriate for a contribution, such as when a defendant contributes a large sum.[120] Moreover, allowing charitable contributions could create—or give the impression of—unequal justice that wealthy people use as a "payoff."[121] The option to contribute may be available only for wealthy people accused of crimes[122] or for defendant corporations who may not otherwise be punished effectively.[123] Wealthy defendants, however, might not be deterred from committing crimes, knowing that they can evade traditional punishment by paying a contribution. Finally, this system may create an unethical conflict of interest for the prosecutor or judge if he has a connection to a charitable organization to which he proposes that the defendant pay.[124] As this Note argues in Part III, in certain situations it is appropriate for prosecutors to enter into these types of plea agreements and for judges to approve them. Yet, the aforementioned ethical issues illuminate several potential problems

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permitted charitable contributions.

116. *See infra* notes 167-79 and accompanying text.

117. *See infra* notes 177-78 and accompanying text.

118. *See infra* notes 172-81, 221 and accompanying text.

119. *See* Colquitt, *supra* note 41, at 717.

120. *See, e.g.*, Daniel Wise, *Setting Up of Trusts Behind Negotiations in Capital Case Plea*, N.Y. L.J., Feb. 10, 2004, at 1 (quoting the head of the Capital Defender Office as calling financial conditions in capital cases "deeply troubling," referring to a case where a prosecutor attempted to establish a life-without-parole deal for a criminal defendant who had murdered his wife by requiring the defendant to create a $100,000 trust fund).

121. *See* Colquitt, *supra* note 41, at 768; *see also* Wise, *supra* note 120, at 1.

122. *See, e.g.*, Leslie Eaton, *A Son of the Ultrawealthy, Caught Up in the Pursuit of Profit*, N.Y. Times, Sept. 7, 2003, § 1, at 37 (discussing an affluent man who was able to settle allegations of illegal trading with the New York Attorney General by agreeing to pay $10 million in fines and to provide $30 million in restitution to investors).

123. United States v. Danilow Pastry Co., 563 F. Supp. 1159, 1166 (S.D.N.Y. 1983) (upholding charitable contributions as a "creative" solution to deter criminal conduct while not harming the community and employees who would become unemployed if the corporation went bankrupt (quoting United States v. Mitsubishi Int'l Corp., 677 F.2d 785, 788 (9th Cir. 1982))).

124. Model Rules of Prof'l Conduct R. 1.7 (2003); *see supra* note 86.

that prosecutors and judges should consider when using charitable contributions as part of sentences.

There are no overarching guidelines for handling charitable contributions in plea bargains.[125] The courts and bar committees that have addressed the ethical questions raised by these plea agreements are not consistent among the circuits, from one state to the next, and sometimes even within the same state. For example, a Kansas ethics committee determined that prosecutors could permit charitable contributions in certain situations,[126] yet another committee in the same state implied that it would not be ethical for judges to permit the contributions in any situation.[127] This divergence of opinions confuses whether the practice is permissible because the judge must impose the final sentence.[128]

Ethics committees and courts have distinguished between prosecutors' and judges' ethical obligations governing charitable contributions in plea agreements.[129] Courts that have upheld contributions often noted that the contribution would aid in the defendant's rehabilitation or would assist in structuring a creative option to deter and punish corporate defendants.[130] Other courts have not upheld contributions, noting that the potential benefits are outweighed by the harm of the terms appearing as bribery or a "payoff," diverting fine fees away from the government, or not reasonably relating to the defendant's rehabilitation.[131]

A. *Response to Judges Who Use Charitable Contributions in Sentences*

Courts and bar committees disagree on whether it is ethical for judges to impose sentences or to acquiesce to plea agreements that include charitable contributions.[132] Part II.A.1 will discuss authorities that do not favor the charitable contributions. These opponents argue that judges who impose or approve of sentences that include charitable contributions violate the ethical canons that prohibit judges from using the prestige of the judicial office to advance private interests, soliciting funds for charitable organizations, and appearing improper.[133] Additionally, the opponents opine that these plea agreements do not reasonably relate to rehabilitating the defendant, or that the contributions to charitable organizations divert funds away

125. *See supra* Parts I.B-C.
126. *See infra* note 218 and accompanying text.
127. *See infra* notes 137-38 and accompanying text.
128. *See infra* note 200.
129. *See infra* notes 136-226 and accompanying text.
130. *See infra* notes 167-81, 211-26 and accompanying text.
131. *See infra* notes 136-64, 189-200 and accompanying text.
132. *See infra* Parts II.A.1-2.
133. *See infra* notes 136-57 and accompanying text.

from the city treasury.[134] Part II.A.2 will address those that permit the charitable contributions. The proponents consider the interest of justice served by such a punishment because the charitable contributions can better rehabilitate a defendant and provide creative sentencing in unique situations.[135]

1. Courts Finding Charitable Contributions in Plea Agreements Unethical

Courts and bar committees generally advise against judges permitting charitable contributions to be part of plea agreements, citing ethical prohibitions of judges using the "prestige" of their office to advance "private interests" and of judges soliciting funds for charities.[136] The Kansas judicial ethics committee, for example, determined that a judge would violate ethical canons by allowing an attorney to permit misdemeanor defendants to contribute $200 to a charitable organization in lieu of a $300 fine.[137] The committee found that the judge would improperly advance the private interest of the charity merely by imposing a sentence of a contribution to a charity that the defendant selected.[138] An Arizona committee stated that even an agreement for a defendant to participate on a "victim impact panel" was problematic and would violate the judicial canon against fundraising.[139] Hence, a judge who approves of plea agreements that include charitable contributions may violate the ethical rules against advancing private interests and fundraising if someone perceives that judge as connected to the charitable organization.[140]

Courts cite the judicial ethics canon of avoiding even the appearance of impropriety[141] as a reason to prohibit judges from

134. *See infra* notes 158-64 and accompanying text.

135. *See infra* notes 167-86 and accompanying text.

136. Kan. Judicial Ethics Advisory Comm., Op. JE 108, at 1 (2001), *available at* http://www.kscourts.org/je108-110.pdf. This opinion quotes Canon 2B, 2000 Kan. Ct. R. Annot. 472, which states that "A judge shall not lend the prestige of judicial office to advance the private interests of .... others ...." It also quotes Canon 4C(4)(b), 2000 Kan. Ct. R. Annot. 482, which provides that "A judge should not solicit funds for any .... charitable .... organization, or use ... the prestige of office for that purpose." The Kansas rules are similar to Model Code of Judicial Conduct Canons 2(B) and 4(C)(b) (2003). *See also In re* Davis, 946 P.2d 1033, 1037, 1045 (Nev. 1997); *In re* Richter, 409 N.Y.S.2d 1013, 1022-23 (N.Y. Ct. Jud. 1977) (censuring a judge for several improprieties, including conditionally discharging or dismissing charges after ordering defendants to give charitable contributions, which violated the ethical canon against soliciting funds for a charity).

137. Kan. Judicial Ethics Advisory Comm., Op. JE 108, at 1.

138. *Id.*

139. Ariz. Judicial Ethics Advisory Comm., Op. 92-2, at 1 (1992) (disapproving of the practice because Mothers Against Drunk Drivers, the organization that ran the panel, charged $10 to participate, which the bar committee considered to be similar to a charitable contribution).

140. Model Code of Judicial Conduct Canons 2(B) and 4(C)(b).

141. Model Code of Judicial Conduct Canon 2.

including charitable contributions as part of sentences. Using power in a way that "convey[s] the impression" that a judge is promoting a specific charity may create ambiguity regarding the judge's neutrality.[142] In *In re Storie*, the Supreme Court of Missouri suspended a judge because the judge "gave the appearance that justice was for sale in his court."[143] Further, even though the judge may not have intended to give such an appearance, the public could have perceived that his actions were not neutral by his approval of this system.[144] In responding to how he thought the defendants would perceive the contribution, the judge said, "I think they thought they bought their way out of it."[145] Even if a judge has not violated any specific ethical rule, therefore, he can still violate his ethical duties because someone could perceive his actions as wrong.

Bar committees also cite the canon to avoid the appearance of impropriety[146] when prohibiting judges from including charitable contributions in sentences. A Hawaii ethics committee admonished a judge who required that attorneys or parties pay sanctions[147] to charitable organizations.[148] The committee said that the sanctions were improper because they "creat[ed] the appearance that the judge [wa]s abusing [his or her] discretion to help charities or to increase his or her popularity by helping charities."[149] Moreover, the committee said that even if the judge's *intention* were proper, the potential that it could appear as if he were using his power to raise charitable funds caused the action to be inappropriate.[150] A Florida ethics committee used similar reasons to disapprove of a defendant's probation that required charitable contributions.[151] The committee members opined, however, that the arrangement could be acceptable if both of the parties stated that the contribution was not from "any suggestion or promises by the court and [was] entirely the result of negotiations between the state and/or victims of the defendant."[152] Hence, ethics

142. Fla. Comm. on Standards of Conduct Governing Judges, Op. 84-11, at 1, 2 (1984) (disapproving of judges' practice of requiring criminal defendants to make contributions to charities of the judges' choosing as part of the sentences).

143. *In re* Storie, 574 S.W.2d 369, 375 (Mo. 1978) (suspending the judge for approving a prosecutor's system of permitting criminal defendants to pay into the "library fund" to buy books for the dilapidated courthouse in exchange for dismissing or reducing charges).

144. *Id.* at 374.

145. *Id.*

146. Model Code of Judicial Conduct Canon 2.

147. Sanctions are penalties for "failure to comply with a law, rule, or order." Black's Law Dictionary 1341 (7th ed. 1999).

148. Haw. Comm'n on Judicial Conduct, Formal Op. 01-01, at 1, 2 (2001) (stating that the judge distorted the purpose of sanctions, which is to "compel compliance with court rules" and not to "raise funds for charities").

149. *Id.*

150. *Id.* (quoting *In re* Merritt, 432 N.W.2d 170 (Mich. 1988)).

151. Fla. Comm. on Standards of Conduct Governing Judges, Op. 87-6, at 1 (1987).

152. *Id.* at 2.

committees may approve of judges administering sentences with charitable contributions if the prosecutor recommended the contribution and not the judge.

Additionally, the fear that people could perceive a charitable contribution as a bribe leads courts and bar committees to disallow the practice for judges.[153] The Indiana Commission on Judicial Qualifications would not permit contributions because they deemed the sentence a "pay-off."[154] The Nevada state court in *In re Davis* attributed the problem to a concern that defendants could be "intimidated into making contributions when solicited by a judge . . . or that they may expect future favors in return for their largesse."[155] Furthermore, a commission in Missouri found that the option of paying a charitable contribution created a problem of unequal justice if only wealthier offenders "who have the means to buy out of community service work"[156] can enter into these types of plea agreements. These agreements gave the appearance that judges determined sentences based on the financial contribution,[157] which compromised their necessary neutrality.

Diverting funds to charity that would otherwise go to the government treasury as a fine also offends federal appellate courts. The U.S. Court of Appeals for the Fifth Circuit stated in *United States v. Haile* that if the city was intended to receive the funds according to statute, a charity could not receive the funds instead, even if the charitable contribution would better serve the community.[158] The court added, however, that a judge can consider a defendant's charitable contributions when sentencing; he simply cannot compel a defendant to give the contributions.[159] A Florida committee went as far as comparing the situation to giving judges the "authority to tax."[160] As a result, the judges' selection of who received funds intended for the city made these sentences improper.

Finally, one court reversed a charitable contribution as part of a sentence because the contribution did not relate to the defendant's

153. *See infra* notes 154-57 and accompanying text.

154. *See* Ratliff v. State, 596 N.E.2d 241, 242 (Ind. Ct. App. 1992).

155. *In re* Davis, 946 P.2d 1033, 1045 (Nev. 1997) (removing a judge for various unethical acts, including allowing criminal defendants to contribute to charities chosen from a list that the judge had created in lieu of paying fines to the city) (quoting Jeffrey M. Shaman et al., Judicial Conduct and Ethics § 9.06, at 289 (2d ed. 1995)).

156. Mo. Comm'n on Ret., Removal and Discipline, Op. 173, Mar. 2, 1999, LEXIS, Ethics Library, Mojeth File.

157. *Id.*

158. United States v. Haile, 795 F.2d 489, 492 (5th Cir. 1986) (reversing a sentencing judge who reduced part of the defendant's fine for committing an antitrust violation as long as the defendant gave some money to a charitable organization).

159. *Id.*

160. Fla. Comm. on Standards of Conduct Governing Judges, Op. 84-11, at 1, 2 (1984).

rehabilitation.[161] In *State v. Dominguez*, the Court of Appeals of New Mexico remanded a sentence that permitted a defendant to give a $500 contribution to the sheriff's office because the contribution was not "reasonably related to [the defendant's] rehabilitation since the Sheriff's Office was unaggrieved by [his] actions."[162] The court used a definition of "fine" to evidence that it is a court-ordered payment for punishment, while a "donation" is defined as "a voluntary payment."[163] Consequently, the court determined that a fine would have been appropriate in this situation, whereas the contribution was not.[164]

2. Courts Finding Charitable Contributions in Plea Agreements Permissible

In reasoning analogous to the New Mexico court in *Dominguez*,[165] some courts have affirmed sentences with charitable contributions when the contributions could assist in rehabilitating a defendant in a way that traditional punishments could not.[166] In *State v. Pieger*, the Supreme Court of Connecticut affirmed a sentence of a jail term and a $2500 contribution to the defendant's hit-and-run victim's treating hospital.[167] The court reasoned that the contribution was "an appropriate vehicle by which to help the defendant accept responsibility for the consequences of his conduct," and the contribution could ensure that the defendant's probation period would serve as a time of "'genuine rehabilitation.'"[168] Further, the court stated that the contribution would better rehabilitate the defendant than a traditional fine because the contribution "'force[d] the defendant to confront, in concrete terms, the harm his actions have caused'" while a fine that is paid to the state would be "'an abstract and impersonal entity.'"[169] Thus, the court reasoned that not

161. State v. Dominguez, 853 P.2d 147, 159 (N.M. Ct. App. 1993).

162. *Id.*

163. *Id.* (noting that the court did not give the defendant a true choice by offering for him to choose between paying the $500 contribution or a $5000 fine for his aggravated battery conviction, as the fine was so much greater than the donation).

164. *Id.*

165. *See supra* notes 161-64 and accompanying text.

166. *See infra* notes 167-74 and accompanying text.

167. State v. Pieger, 680 A.2d 1001, 1006 (Conn. App. Ct. 1996), *aff'd*, 692 A.2d 1273, 1280 (Conn. 1997) (noting that the contribution as "one part of a plan of action by the court to rehabilitate the defendant," helped to cause the defendant to be "aware of the damage he has wrought as a result of his offense").

168. *Pieger*, 692 A.2d at 1276, 1278 (quoting State v. Graham, 33 Conn. App. 432, 448 (1994)).

169. *Id.* at 1278 (quoting People v. Carbajal, 899 P.2d 67 (Cal. 1995)) (holding that restitution helped to reform and deter the defendant who had committed a similar crime as the defendant in *Pieger*). The court in *Pieger* analogized the argument that permitted restitution in *Carbajal* with the determination to permit charitable contributions: "'[T]he direct relation between the harm and the punishment gives [the charitable contribution] a more precise deterrent effect than a traditional fine.'"

only was the sentence reasonably related to the crime, but also the charitable contribution was beneficial in that it could improve the defendant's rehabilitation.[170]

Courts have upheld sentences that include charitable contributions for corporate defendants because such contributions aid in rehabilitating and deterring entities in a way that traditional punishments cannot.[171] The U.S. Court of Appeals for the Ninth Circuit found that "unique and creative" sentences often were necessary to punish corporate defendants that cannot be punished with incarceration.[172] The U.S. Court of Appeals for the Eighth Circuit, in *United States v. William Anderson Co.*, upheld the trial court's order of a combination of community service and contributions to a community project over the government's objection.[173] Here, the court stated that this sentence was preferable to incarceration because the creative arrangement was "constructive" and productive while it still "disrupted [the defendants] in their usual routines and styles of life."[174] In *United States v. Danilow Pastry Co.*, a New York district court approved a sentence requiring a defendant corporation to give baked goods to needy organizations on a regular basis.[175] The court approved of the charitable contribution because it would assist in deterring future misconduct and because a reasonable relationship existed between the sentence and the illegal conduct.[176] Further, the publicity that results from such sentences aids in deterring others from crime, and the staying power of the sentence acts as a specific deterrent and continual reminder to company employees of their violation.[177] In *Danilow Pastry*, the court intentionally chose beneficiaries that would create more public awareness.[178] Additionally, the sentence avoided creating unemployment and harming the community, for significant fines

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Id. (quoting *Carbajal*, 899 P.2d at 73).

170. *Id.* at 1276.

171. *See infra* notes 172-81 and accompanying text.

172. United States v. Mitsubishi Int'l Corp., 677 F.2d 785, 788 (9th Cir. 1982) (affirming an option that allowed the corporate defendants to pay a fine or work with and contribute to a community program).

173. United States v. William Anderson Co., 698 F.2d 911, 912 (8th Cir. 1982) (stating that the agreement "will not have decreased the amount of punishment, but will have increased the usefulness and decreased the expensiveness of it"); *cf.* Fox Butterfield, *With Cash Tight, States Reassess Long Jail Terms*, N.Y. Times, Nov. 10, 2003, at A1 (discussing new laws that emphasize treatment over incarceration as a way to save money while treating the drug problem in Washington).

174. *William Anderson Co.*, 698 F.2d at 912.

175. United States v. Danilow Pastry Co., 563 F. Supp. 1159, 1164-66 (S.D.N.Y. 1983) (joining the contributions with the corporation's probation for violating the Sherman Antitrust Act).

176. *Id.* at 1166.

177. *Id.* at 1167.

178. *Id.*

would have left the defendants in bankruptcy.[179] The government objected to the sentence because "reparations" only may be given to a victim, and here there was no nominal victim.[180] The court approved the creative sentence, however, because it served the "interests of justice" in this situation that did not have a specific victim.[181] The opportunity to give charitable contributions as retribution for the corporate defendants' crimes gave judges opportunities to deter and rehabilitate corporate misconduct when incarceration was not an option or where enormous fines would harm employees who had done nothing wrong.

Courts have stated that approval of this type of sentencing is not absolute, but instead that it is appropriate only in certain circumstances. The Appellate Court of Connecticut asserted, as had the Florida ethics committee that did not approve of a contribution in a sentence, that to permit a charitable contribution in a sentence, all parties must agree to the terms of the sentencing.[182] Another circumstance that generally leads the courts to approve these sentences is when the defendant has chosen the charity to which he is contributing.[183] Further, courts have approved of judges creating restrictions on the charitable contributions. For example, in *Campbell v. State*, the Indiana Court of Appeals affirmed the defendant's choice to forgo a $50,000 fine in lieu of paying a $40,000 non-tax deductible contribution to a charity that was housed by his employer.[184] The dissent argued that the contribution was like a fine that simply diverted funds from the federal treasury.[185] The majority stated,

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179. *Id.* at 1166-67.

180. *Id.* at 1170-71 (internal quotations omitted).

181. *Id.* at 1167, 1171 (explaining that the public was the victim and serving needy people was "symbolic restitution," which can be "an important element of general criminal deterrence").

182. *See* State v. Stellato, 523 A.2d 1345, 1349 (Conn. App. Ct. 1987) (affirming a court-approved agreement that the defendant would pay a $10,000 charitable contribution as part of his sentence for conspiracy to steal oil because the defendant agreed to the terms at the pre-sentencing hearing, the defendant did not object at sentencing, and the defendant chose the charity); *see also supra* notes 151-52 and accompanying text.

183. *See, e.g.*, Ratliff v. State, 596 N.E.2d 241, 243 (Ind. Ct. App. 1992) (affirming a court-approved plea agreement where two defendants pleaded guilty to driving under the influence in exchange for sentences that included the defendants paying $50 and $75 to charities that they chose); *cf. supra* notes 137-38, 155 (citing instances where a bar committee and court did not approve of contributions as part of sentences when the judges chose the charities to which the defendants contributed).

184. Campbell v. State, 551 N.E.2d 1164, 1169 (Ind. Ct. App. 1990) (noting that the court could impose conditions on the donation that were reasonable under the circumstances, as here where the employee had stolen more than $250,000 from his employer). The defendant also had to pay restitution on top of the contribution. *Id.*

185. *Id.* at 1171 (Sullivan, J., dissenting) (quoting United States v. Mo. Valley Constr. Co., 741 F.2d 1542, 1549-50 (8th Cir. 1984)). Judge Sullivan noted that courts could be blamed for randomly selecting a beneficiary when others may have a valid claim to the funds. *Id.* (citation omitted).

however, that "[t]he trial court did not abuse its discretion" in allowing the defendant to choose this option and in imposing restrictions on the contribution in this circumstance.[186] Hence, while some courts bar judges from allowing charitable contributions in sentences per se, others have considered the fairness of sentences that include charitable contributions on a case-by-case analysis.

B. *Response to Prosecutors Who Use Charitable Contributions in Plea Agreements*

Bar committees and courts are divided on whether prosecutors ethically can participate in plea agreements that include charitable contributions. A few courts and bar committees do not permit prosecutors to enter into these types of plea agreements because they inhibit the administration of justice, create a conflict of interest, and foster dishonesty with the court.[187] Other courts and bar committees permit prosecutors to do so, explaining that prosecutors do not violate ethical rules by participating in these plea agreements, the prosecutors are entrusted with much discretion that includes giving these types of recommendations, and the contributions assist in the defendant's rehabilitation and deterrence.[188]

1. Courts Finding Charitable Contributions in Plea Agreements Unethical

One bar committee compared prosecutors' ethical duty to not prejudice the administration of justice when they enter into plea agreements that include charitable contributions with the ethical duties that judges face when they approve these plea agreements because prosecutors and judges share certain responsibilities.[189] The Ethics Committee of the North Carolina State Bar determined that it was unethical for prosecutors to ask a defendant to give a charitable contribution in lieu of a fine because of the implication that "justice can be purchased."[190] Including charitable contributions in sentences was considered unethical for judges because of the appearance of impropriety.[191] Similarly, the committee stated that the ethics violation occurred for prosecutors because of the prejudice to the

186. *Campbell*, 551 N.E.2d at 1169 (imposing restrictions that the contribution could not be tax deductible and could not be acknowledged in any form by the charitable organization).

187. *See infra* notes 189-200 and accompanying text.

188. *See infra* notes 201-26 and accompanying text.

189. *See* Nat'l Reporter on Legal Ethics & Prof'l Responsibility, N.C. Op. RPC 204, at 43 (1995) (revised); *see also supra* notes 93-98 and accompanying text.

190. Nat'l Reporter on Legal Ethics & Prof'l Responsibility, N.C. Op. RPC 204 (revised), at 43.

191. *See supra* notes 141-57.

"administration of justice."[192] The bar committee cited prosecutors' special role of seeking justice as a reason prosecutors must be fair to the defendant when offering plea agreements.[193]

In another state, a bar committee would not permit prosecutors to allow contributions when the practice creates a conflict of interest. The New York State Bar Association's Committee on Professional Ethics opined that any significant interest that a prosecutor had in a charitable organization could create an impermissible conflict—even if that conflict only created "an appearance of impropriety."[194] The committee offered several examples of conflicting interests, including a district attorney earning a salary as the coordinator of a program that collects fines from drunk driving violations; a prosecutor devoting significant time or money to an organization that he then includes in the plea arrangement; and a prosecutor's close relative who is on the board of such an organization.[195] Prosecutors are not permitted to have a special interest that could taint their duty to seek justice.[196]

Finally, courts and bar committees have not supported concealing terms of plea agreements, including charitable contributions, from the sentencing judge or the victim. The Supreme Court of Virginia disciplined a prosecutor for acting unethically in entering a plea agreement that included a charitable contribution because the prosecutor had concealed information about a contribution from both the court and the victim.[197] First, the prosecutor in *Morrissey v. Virginia State Bar* misled the victim about the plea agreement by not informing her that the criminal defendant was financially capable of doubling her restitution had the defendant not distributed half of his funds to charitable organizations.[198] Second, the prosecutor hid the contributions from the court.[199] A New York bar committee also determined that concealing this type of plea bargaining information is

192. Nat'l Reporter on Legal Ethics & Prof'l Responsibility, N.C. Op. RPC 204, at 43.

193. *Id.* (quoting N.C. Rules of Prof'l Conduct R. 7.3 cmt. (1995)) (stating that a prosecutor's role is "to seek justice, not merely to convict").

194. N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 770, at 69, 77 (2003).

195. *Id.* at 72, 75.

196. *See, e.g.*, People v. Eubanks, 927 P.2d 310, 315 (Cal. 1996, *modified*, 1997) (dismissing the prosecution of an alleged theft of trade secrets because the prosecutors had a conflict of interest by pursuing the crime when a competitor company paid for part of the investigation).

197. Morrissey v. Va. State Bar, 448 S.E.2d 615, 618-19 (Va. 1994) (affirming a prosecutor's suspension for arranging a plea agreement where the defendant paid $25,000 to his rape victim and $25,000 to charities that the prosecutor chose in exchange for a guilty plea to lesser charges and suspended jail time).

198. *Id.*; Model Code of Prof'l Responsibility DR 1-102(A)(4) (2004) (*see supra* note 90 and accompanying text (citing text of DR 1-102(A)(4))).

199. *Morrissey*, 448 S.E.2d at 619 (noting that the prosecutor also asked the defendant to hide the full terms of the agreement from the court); Model Code of Prof'l Responsibility DR 7-102(A)(3); Standards Relating to the Admin. of Criminal Justice Standard 3-6.2(a) (3d ed. 1992).

unethical because it perpetrates a fraud on the court.[200] As a result, charitable contributions that might otherwise be proper in plea agreements can be improper if the terms of the agreement are hidden from the court.

2. Courts Finding Charitable Contributions in Plea Agreements Permissible

Bar committees that have supported prosecutors who include charitable contributions as part of plea agreements have noted that these arrangements do not violate any ethical rules as long as the prosecutor is not connected to the charitable organization.[201] The New York State Bar Association's Committee on Professional Ethics determined that this type of legally permissible sentence does not violate any ethical issues.[202] Without any connection to the organization, prosecutors who enter into plea agreements that include charitable contributions do not violate an ethical rule.[203]

Courts and bar committees have upheld situations where prosecutors have an indirect interest in the prosecution, however, because prosecutors, as advocates, are expected to use their discretion neutrally and separate personal feelings from their decisions.[204] Asset forfeiture is a method that the government uses to freeze and seize criminal defendants' profits after the government has proven that there was probable cause that the property has been used for or gained by criminal activity.[205] The government has discretion as to how to use the seized funds.[206] Although different that charitable contributions, the interest that prosecutors have in asset forfeiture is analogous to, or greater than, their interest would be in a charity.

Sometimes losing the property that the defendant illicitly gained distresses the defendant more than serving time would. When

200. N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 770, at 69, 79 (2003) (citing Model Code of Prof'l Responsibility DR 1-102(A)(4), DR 7-102(A)(3), which mirror N.Y. Comp. Code R. & Regs. tit. 22, §§ 1200.3(a)(4), 1200.33(a)(3), respectively, and People v. Farrar, 419 N.E.2d 864 (N.Y. 1981) (holding that the sentencing judge has the ultimate responsibility of determining appropriate sentences, regardless of plea terms to which prosecutors and defendants have agreed)).

201. *Id.* at 72, 74-75; *cf. supra* notes 194-95 and accompanying text.

202. N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 770, at 72, 74-75.

203. *Id.*

204. *See supra* note 106.

205. Jason B. Binimow, Annotation, *What Constitutes Establishment of Prima Facie Case for Forfeiture of Personal Property Used in Illegal Manufacture, Processing, or Sale of Controlled Substances Under § 511 of Comprehensive Drug Abuse Prevention and Control Act (21 U.S.C.A. § 881)*, 167 A.L.R. Fed. 365, § 2a, at 392-93 (2001) (identifying the purpose of asset forfeiture as "a system for the control of drug traffic and to prevent the abuse of drugs" (citing United States v. Greenberg, 334 F. Supp. 364 (W.D. Pa. 1971))).

206. *See* Linda J. Candler, *Tracing and Recovering Proceeds of Crime in Fraud Cases: A Comparison of U.S. and U.K. Legislation*, 31 Int'l Law. 3, 39 (1997).

prosecutors choose to prosecute asset forfeiture cases, the seizures serve as a way to limit the profit of the crime, assisting to deter criminal behavior. In Montana, the State Bar of Montana's Ethics Committee advised that a prosecutor did not have an unethical conflict of interest by prosecuting asset forfeiture cases, even though he knew that half of his salary came from the funds seized.[207] The committee reasoned that a prosecutor—unlike a judge—is an advocate who is not expected to be "impartial or unbiased," but the prosecutor still must be fair in using discretion and in not allowing any personal interest in a case to "interfere with his/her professional judgment."[208] The committee did not consider using the assets seized to hire a prosecutor to be an impermissible interest, thus permitting asset forfeiture prosecutions as long as the prosecutor's reasons for seeking them were "objective."[209]

Asset forfeiture can be analogized to charitable contributions because the prosecutor may have an indirect interest in seeing the funds go toward an organization that he is interested in, even if he is not personally receiving the funds. The New York Bar Committee approved of plea agreements that included charitable contributions to an organization that partly funded the District Attorney's office.[210] Consequently, a prosecutor's indirect financial interest in a prosecution has not caused courts and bar committees to deem the relationship unethical.

As when the courts determined judges to have acted ethically when sentences with charitable contributions advanced a defendant's rehabilitation,[211] courts similarly have permitted prosecutors to include charitable contributions as a part of defendants' probation when the contributions can aid in the defendant's rehabilitation.[212] A Colorado appellate court upheld a $5000 contribution to a drug-treatment program for a defendant who had pleaded guilty to unlawfully dispensing a controlled substance in the course of his practice as a doctor.[213] The court permitted the contribution to be part of the plea agreement because the contribution reasonably

207. Nat'l Reporter on Legal Ethics & Prof'l Responsibility, Mont. Ethics Op. 960827, at 14 (1996) (noting that funds earned through seizing drug profits contributed to about $27,000 of the prosecutor's approximate $55,000 annual salary). The Montana ethics opinion describes the Montana Asset Forfeiture Statute as permitting seized property to be sold, with the proceeds going into an account to aid local drug law enforcement. *Id.*

208. *Compare id.* at 15, *with supra* notes 104-06 and accompanying text.

209. Nat'l Reporter on Legal Ethics & Prof'l Responsibility, Mont. Ethics Op. 960827, at 14-15.

210. N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 770, at 69, 72-73 (2003).

211. *See supra* notes 167-74.

212. *See infra* notes 213-14.

213. State v. Burleigh, 727 P.2d 873, 874 (Colo. Ct. App. 1986) (permitting the contribution to be part of the probation after the defendant's ninety-day incarceration).

related to the defendant's rehabilitation and helped to deter the defendant and others from committing similar crimes.[214] Hence, charitable contributions can be used to aid the defendant to understand the seriousness of his crime.[215]

As courts have imposed restrictions on judges who include contributions in sentences to permit the practice to be ethical,[216] prosecutors have been likewise limited.[217] When asked if prosecutors ethically may reduce traffic tickets to non-moving violations if the defendants pay charitable contributions in addition to fines, a Kansas ethics committee suggested that prosecutors abide by an established list of requirements that the Attorney General's office follows in allowing civil parties to make charitable contributions as part of settlements.[218] The requirements that made this procedure ethical include prohibiting the funds from being diverted away from the local government, allowing the defendant to choose the charitable organization, ensuring that the defendant has the option of rejecting the plea agreement entirely, and requiring the prosecutor not to ask the defendant to contribute to a religious organization.[219] These requirements illustrate that this ethics committee—as did the Appellate Court of Connecticut[220]—considers charitable contributions with plea agreements to be ethical, in part, as long as the defendant maintains control over part of the process.

Furthermore, prosecutors have generally unreviewable discretion as to whether to bring charges initially. Sentencing judges are less likely to require white-collar business defendants to serve jail time than other criminal defendants for several reasons: prosecutors have difficulty proving the elements of the offense to a jury; white-collar defendants generally are not recidivists nor suited to incarceration; and white-collar defendants often have given charitable contributions.[221] Michael R. Milken, the junk bond financier who pleaded guilty to six felony charges of securities fraud and conspiracy in 1990, was a rare corporate defendant who served jail time in addition to the large fines and penalties that he agreed to pay.[222] One

214. *Id.* at 875.

215. *Id.* (noting that it would be in the "best interests of the public").

216. *See supra* notes 182-83 and accompanying text.

217. *See infra* notes 218-19 and accompanying text.

218. Nat'l Reporter on Legal Ethics & Prof'l Responsibility, Kan. Op. 93-02, at 35-37 (1993).

219. *Id.*

220. *See supra* notes 182-83 and accompanying text.

221. Kurt Eichenwald, *White-Collar Defense Stance: The Criminal-less Crime*, N.Y. Times, Mar. 3, 2002, § 4 (Week in Review), at 3 (asking "[h]ow is it that someone is more likely to go to jail for robbing a liquor store than for defrauding the equivalent of the population of a mid-sized city?" and noting that the money for the charitable contributions was likely "obtained illicitly").

222. *See* Kurt Eichenwald, *Milken Defends "Junk Bonds" as He Enters his Guilty Plea*, N.Y. Times, Apr. 25, 1990, at A1 (describing an agreement to pay $600 million

prosecutor dropped potential criminal contempt charges for a defendant corporation that "possibly" destroyed evidence of alleged chemical dumping that damaged crops when the defendant corporation agreed to give $11 million to fund legal ethics' chairs at Georgia's four law schools and an annual symposium.[223] Prosecutors sometimes do not criminally charge corporations when the officers have given large contributions, particularly in civil environmental cases; this practice has not been deemed unethical.[224] The New York Bar Committee also supported this practice for the same reasons that it permitted lesser charges as part of plea bargains that included charitable contributions.[225] The committee stated that a guilty plea is not ethically required to resolve potentially criminal behavior when a prosecutor has required the potential defendant to give a charitable contribution.[226]

The next part argues that including charitable contributions in plea agreements and sentences can be done without violating an ethical duty. Part III.A proposes a system for guiding prosecutors and judges who choose to use charitable contributions as part of plea agreements or sentences. Parts III.B through III.D apply the proposed system to hypothetical situations implicating prosecutorial discretion, judicial sentencing, and conflicts of interest to determine whether these situations, drawn from the issues discussed in Part II, should be considered ethical. Finally, Part III.E evaluates issues of unequal justice that may arise in other hypothetical plea agreements involving charitable contributions under the proposed system.

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and serve ten years in jail); Eichenwald, *supra* note 221. The sentence was later reduced to twenty-two months. Russ Mitchell, *White-Collar Criminal? Pack Lightly for Prison*, N.Y. Times, Aug. 11, 2002, § 3 (Money & Business), at 4.

223. *See* Colquitt, *supra* note 41, at 720 (citing Roy M. Sobelson, *Legal Ethics*, 51 Mercer L. Rev. 353, 370 (1999) (citing *In re* EI DuPont de Nemours & Co., 918 F. Supp. 1524 (M.D. Ga. 1995), *rev'd*, 99 F.3d 363 (11th Cir. 1996))).

224. *See, e.g.*, Brief for Appellants at 33-36, *In re* Tutu Water Wells Contamination Litigation, 120 F.3d 368 (3d Cir. 1997) (No. 96-7385) (arguing that the court assessed "arbitrary" fines to the defendant corporation to build prison facilities that the city needed even though there was no "nexus" between the charged environmental violations and the charitable recipient, noting that the amount could have varied depending on the charity the court chose).

225. N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 770, at 69, 78 (2003) (citing Standards Relating to the Admin. of Criminal Justice Standard 3-3.8(a) (3d ed. 1992)). Standard 3-3.8(a) states, "The prosecutor should consider in appropriate cases the availability of noncriminal disposition, formal or informal, in deciding whether to press criminal charges which would otherwise be supported by probable cause; especially in the case of a first offender, the nature of the offense may warrant noncriminal disposition." Standards Relating to the Admin. of Criminal Justice Standard 3-3.8(a).

226. N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 770, at 78.

III. RESOLVING CONFLICTS OF PLEA BARGAINS THAT INCLUDE CHARITABLE CONTRIBUTIONS

A system that allows defendants to include charitable contributions as part of their sentences can benefit prosecutors, defendants, and society by providing ways for prosecutors to more aptly punish defendants, allowing defendants alternate ways to pay for their crimes, and giving more opportunities to rehabilitate and deter criminals. Such a plea bargaining program, however, unintentionally may encourage prosecutors to violate ethical duties unless rules governing these plea agreements are established. Accordingly, this part recommends a structure for creating a system that ethically could permit charitable contributions as part of plea bargains in certain criminal cases while adhering to the lawyers' ethical obligations. Finally, this part addresses whether certain hypothetical situations would be ethical under the proposed system.

A. *Proposal for a Workable System that Allows Charitable Contributions*

Charitable contributions ethically can be used as part of plea agreements, provided that there is a system in place with adequate limitations. Factors that should be considered in evaluating whether it is ethical for prosecutors to enter into the plea agreements and for judges to approve of them include: (1) the situation surrounding the offense; (2) the financial situation of the defendant; (3) the degree to which the contribution can affect the sentence; and (4) the appropriateness of the charities.

1. The Situation Surrounding the Offense

For the prosecutor to avoid violating the Model Rule against prejudicing the administration of justice,[227] the circumstances surrounding the offense should determine whether the case meets the threshold for allowing a charitable contribution as part of the sentence. If the crime that the defendant is charged with is generally punishable by jail time, a charitable contribution is not a sufficient sentence in itself because it cannot alone fulfill the needs of "justice."[228] A contribution should not serve in lieu of the total jail time because punishing a defendant by controlling his liberty serves a different purpose than directing him to pay a fine or charitable contribution. For example, a judge may sentence a defendant to a jail term because the violent nature of the crime may necessitate incarceration to protect the public. If, however, the crime is

227. See *supra* notes 67 and 83 and accompanying text for more discussion of Rule 8.4(d) of the Model Rules.

228. *See supra* note 84 and accompanying text.

punishable by either a fine *or* incarceration or if the judge has suspended the jail time, a charitable contribution could be a proper part of the punishment because the legislature or court already has determined that a non-incarceration penalty may be appropriate. Therefore, a charitable contribution is suitable as a substitute for a fine or an addition to probation.

Furthermore, a charitable contribution might be appropriate when a fine does not serve the purposes of justice sufficiently. For example, with corporate defendants, the publicity may be more useful in rehabilitation and deterrence than a fine large enough to bankrupt a company.[229] In another situation, charitable contributions may provide an opportunity for the defendant to pay for his crime in a case that otherwise may be nullified by a jury, lacks coherent witnesses, or has a non-cooperative victim, as in the Fagan case described in the Introduction.[230] Further, charitable contributions may be more beneficial for deterrence and retribution purposes than a fine is for "victimless" crimes, where the charitable organization becomes a representative victim to the public.[231] Finally, as with fines and asset forfeiture,[232] a charitable contribution may be an apt sentence in a financial crime. By looking at the offense and the circumstances surrounding it, the prosecutor meets his ethical duty to serve the administration of justice by seeking appropriate methods of punishment.

2. The Financial Situation of the Defendant

Prosecutors and judges also should consider the defendant's financial situation to ensure that the prosecutor is using "sound" discretion[233] and not hindering the administration of justice.[234] When possible, the prosecutor should use his discretion to join charitable contributions with mandatory community service. By combining these two forms of punishment, the prosecutor enables the defendant to observe the benefits of his punishment. The concern that a contribution looks like a "payoff" subsides when the contribution is an option, not a requirement.[235] Additionally, a contribution may serve as a "creative" method for punishing corporate defendants that are otherwise difficult to educate as to the damage done by their criminal act.[236] The likelihood of inequality among defendants based on their wealth could be resolved if the payment amount varied

229. *See supra* notes 175-79 and accompanying text.
230. *See supra* note 43 and accompanying text.
231. *See supra* note 181 and accompanying text.
232. *See supra* notes 205-06 and accompanying text.
233. *See supra* note 60 and accompanying text.
234. *See supra* notes 67, 83 and accompanying text.
235. *See supra* notes 67, 83, 93-96 and accompanying text.
236. *See supra* notes 172-81 and accompanying text.

according to the financial situation of the defendant. A prosecutor can administer justice by using his discretion to allow defendants to pay on a sliding scale, based on a percentage of their salaries. Moreover, the inequality could be lessened in cases where it is possible to use the contributions in conjunction with community service to reinforce to the defendants the harm caused by the crimes. For example, if a defendant were pleading guilty to driving while intoxicated, he could contribute to and participate in community service with Mothers Against Drunk Driving.[237]

Despite the potential difficulty of assessing a defendant's financial situation, a prosecutor who is amenable to alternatives for the indigent defendant who may not have the option of giving a charitable contribution will administer justice ethically. For example, the prosecutor could allow the indigent defendant to spend a larger amount of time toward the community service component of the sentence, or even eliminate the contribution entirely, permitting community service to replace the financial element of the sentence. Thus, by combining community service and charitable contributions based on a defendant's income, the prosecutor helps to administer justice by permitting indigent defendants to have an alternative to a punishment that they cannot afford.

3. The Degree to Which the Contribution Can Affect the Sentence

Prosecutors should pre-determine the maximum portion of the overall sentence that a charitable contribution can account for in an effort to guide their discretion[238] and to avoid conduct that is prejudicial to the administration of justice.[239] It is appropriate for prosecutors to consider charitable contributions because they enable defendants to compensate society for their wrongdoing, to demonstrate remorse, and to benefit society. Setting a ceiling on contributions is necessary, however, to ensure that punishments do not vary dramatically from one defendant to the next, that corporate defendants are not exploited to contribute inordinately more than individual defendants,[240] and that indigent defendants have a similar opportunity to substitute an alternate punishment that is not financially related. Moreover, the prosecutor must disclose all aspects of the plea agreement, including any charitable contribution, to the

237. *See, e.g.*, *supra* text accompanying notes 202-03. *But see supra* note 139 and accompanying text.

238. *See supra* note 60 and accompanying text.

239. *See supra* notes 67, 83, 93-96 and accompanying text.

240. Although corporate defendants should contribute an amount proportionate to their relative worth to allow for deterrence, prosecutors should not extort corporate defendants into contributing a disproportionately high amount solely because the corporate defendants have the financial ability to do so.

sentencing judge to ensure that the judge is aware of all relevant factors before determining the final sentence.[241]

In considering a defendant's financial situation to determine the correct amount for a charitable contribution, prosecutors allow a defendant to exhibit contrition by paying an amount that is substantial for him, even if the amount would be negligible to a wealthy person or corporation. At the other extreme, if a prosecutor allows a very large contribution by a wealthy defendant to comprise too great a portion of the punishment, then the contribution could appear to be an improper "payoff" to the court. In addition, the amount that a defendant pays should be the pre-tax amount to avoid the problem of limiting a citizen's right to receive a tax deduction on the charitable contribution[242] while simultaneously using the contributed amount to demonstrate remorse. Further, because the charitable contribution is a separate factor from any fine, there will not be a problem of diverting funds from the city treasury to a charitable organization.[243] Finally, as with a fine, the contribution should not affect victim restitution.[244] As long as prosecutors keep their discretion in check by allowing the contribution only to account for part of the punishment, then this factor will assist prosecutors in not engaging in conduct that is prejudicial to the administration of justice.

4. The Appropriateness of the Charities

Finally, a neutral committee should determine which charities are suitable for charitable contributions to ensure the prosecutor and judge avoid conflicts of interest.[245] Neither the judge nor the prosecutor should choose the charity to avoid potential conflicts of interest or appearances of impropriety between the judge or the prosecutor and the chosen charitable organization.[246]

In determining the suitability of a charity, selected organizations should assist crime victims or the community generally. In cases that are deemed fitting for charitable contributions as part of sentences, the victim should be permitted to select the charity from a list of approved charities. In "victimless" crimes, such as antitrust violations, the judge should select the charity from a list of approved charities and provide equal opportunities for charities to be selected. This procedure assists prosecutors and judges in avoiding conflicts of interest or the appearance of impropriety by removing them from the process of selecting the charity to which the defendant may contribute.

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241. *See supra* notes 89, 199 and accompanying text..
242. *See supra* notes 184, 186 and accompanying text.
243. *See supra* notes 158-60, 184-86 and accompanying text.
244. *See supra* text accompanying notes 77, 180.
245. *See supra* notes 86-87 and accompanying text.
246. *See supra* notes 64, 67, 83, 93-98, 141, 154-56 and accompanying text.

This proposed system to allow charitable contributions aids the prosecutor and judge because it allows more options and creativity in plea bargaining and sentencing while providing guidelines to use contributions ethically as a punishment. Moreover, the contribution satisfies many of the goals of the criminal justice system. As with a fine, there is punitive retribution because the defendant pays for his wrongdoing, even if a criminal is not incarcerated. Unlike a fine, charitable contributions expand the population that receives funding. Further, the defendant may reform in a way that is not possible through paying a fine into a faceless "city treasury." By paying a debt to society in a way that improves the lives of victims or community members, a defendant can see the effect of his crime and punishment.[247] Additionally, society benefits from the deterrent aspects of the penalty because the defendant will not want to compensate society repeatedly for his wrongdoings.[248] Joining the contribution with community service may more successfully deter the defendant because he has an opportunity to "do good" by giving a charitable contribution and putting his money toward a tangible and positive organization. Although there is less of a stigma associated with a contribution than with a fine, the public is more likely to hear of a big contribution because it will attract more publicity than a fine.[249] Therefore, others may be generally deterred, serving the goals of the criminal justice system.

In the Fagan case,[250] the prosecutor may not have met her ethical duties, according to this proposal. Three of the factors appear to be appropriate for this plea agreement. First, the situation was suitable because the witnesses were not willing to testify against the defendant and the abduction was nonviolent, thus the trial may not have ended in a conviction.[251] Second, the defendant's financial situation permitted him to give a charitable contribution.[252] Third, the victim chose the charitable organization, which demonstrates an effort to ensure that there was no connection between the prosecutor or judge and the charitable organization. However, the degree that the contribution affected the sentence may have contributed to the criticism surrounding the plea agreement.[253] Here, the prosecutor and judge may have permitted the contribution to account for too large a part of the overall sentence by suspending Fagan's sentences before he served any jail time, while he faced up to twenty years of

247. *See supra* notes 167-79 and accompanying text.

248. The defendant may not be deterred, however, if giving the contribution is not a hardship or if the person does not mind giving a charitable contribution, which could be the same problem with a fine.

249. *See supra* notes 177-78 and accompanying text.

250. *See supra* notes 1-18 and accompanying text.

251. *See supra* notes 2-3, 17 and accompanying text.

252. *See supra* note 5 and accompanying text.

253. *See supra* notes 14-15 and accompanying text.

incarceration for the two abductions.[254] Parts III.B through III.E apply this proposed system to hypothetical situations that involve prosecutorial discretion, judicial sentencing, conflicts of interest, and unequal justice.

B. *Prosecutorial Discretion*

1. No Connection to the Charitable Organization

It could be ethical for a prosecutor to enter into a plea agreement that includes a charitable contribution if the prosecutor is not connected to the charitable organization. Consider the following:

> Prosecutor Pete charges Defendant Dave with committing a misdemeanor. Pete offers a plea agreement that includes a condition for Dave to give a $500 charitable contribution to an organization with which Pete has no connection.

First, the crime that Dave committed did not rise to a level that required significant jail time, if any, making alternative sentencing a possibility. If Dave's crime had been a nonviolent felony, it also may have met the threshold of the proposed system's first factor because there may not be, for example, a strong need to protect society from him by keeping him in jail for his entire sentence. As long as the charges are readily provable and the recommended sentence is sufficient, then it is possible for Pete to use "sound" prosecutorial discretion and provide adequate "justice"[255] in this plea agreement.

Second, if Pete knows that Dave's salary permits him to contribute $500 or if Pete is willing to otherwise replace the condition with an alternative condition, such as community service, then Pete has met the second factor in making this agreement ethical.

Third, the large discretionary power afforded to Pete allows him to determine whether a charitable contribution is in the interest of justice and whether the justice system can best be served by including the charitable contribution as part of the plea agreement. As an advocate and a government employee,[256] a prosecutor is expected to consider the overall benefit for all citizens,[257] but he also must consider the narrow purpose of redressing the wrong created by a criminal act. Proponents of this condition say that a defendant could be better rehabilitated by contributing to a charity than by traditional sentences[258] or that the contribution could better serve the community than a fine.[259] In addition, as in the Fagan case,[260] defendants who

254. *See supra* notes 8, 12 and accompanying text.
255. *See supra* note 60, 78 and accompanying text.
256. *See supra* notes 64, 93-96 and accompanying text.
257. Uviller, *supra* note 64, at 1697.
258. *See supra* notes 167-79 and accompanying text.
259. *See supra* note 158 (discussing United States v. Haile, 795 F.2d 489 (5th Cir.

have admitted their guilt likely may not be convicted through a trial because a witness or victim does not wish to testify against them.[261] Opponents suggest that the punishment may not be effective if the goals of the criminal justice system are not met in the same way as a fine.[262] This may happen if the defendant or others in the community do not perceive the contribution to be a punishment.[263]

Fourth, the appropriateness of the charity depends on how it was chosen. When a prosecutor enters into a plea agreement that includes a charitable contribution for a charity to which he has no connection, he does not violate any explicit ethical rule.[264] As long as a neutral party selected the charitable organization, this final factor also is met. Because this practice does not violate an ethical rule and this unique type of plea agreement may sometimes be the best way to ensure that justice is served and the defendant pays for his crime, it is ethical for the prosecutor to enter into plea agreements that include charitable contributions.

2. Dismissing Charges

It may be appropriate in certain situations for a prosecutor to dismiss criminal charges when a defendant gives a contribution. Consider the following:

> Prosecutor Pete charges Defendant Dave with committing a misdemeanor, which is Dave's first offense. Pete offers to dismiss the criminal charges altogether if Dave gives a $500 contribution to an organization with which Pete has no connection.

Three of the proposed system's factors—the situation surrounding the offense, the defendant's financial situation, and the appropriateness of the charity—are considered in the first hypothetical.[265] In this hypothetical, however, the concern is the degree to which the contribution can affect the sentence. Pete is permitted to use his discretion to determine whether to abandon a prosecution. Prosecutors may dispose of cases when they believe

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1986)). Although the Fifth Circuit reversed the charitable contributions portion of the sentence in *Haile*, the court noted:

> It might be true that the rehabilitation of a person such as [the defendant] will be fostered by charitable gifts or by the response from the community that they provoke. It might also be true that judicially approved charitable organizations can spend money, and thereby benefit the community, more intelligently than can the U.S. government.

795 F.2d at 492.

260. *See supra* notes 1-18 and accompanying text.

261. *See supra* note 17 and accompanying text.

262. *See supra* notes 161-64 and accompanying text.

263. *See supra* note 10 and accompanying text. Fagan's response evidences that his punishment would not deter him.

264. *See supra* text accompanying notes 201-02.

265. *See supra* Part III.B.1.

incarceration or fines would not properly punish defendants when, for example, the defendant is a first-time offender or the offense is nonviolent.[266] With criminal behavior that is difficult to prove at trial, and with a defendant who is not willing to admit guilt as part of a plea bargain,[267] a prosecutor may be encouraged to abandon the prosecution if the defendant is willing to give a charitable contribution. If there were an interest in keeping the defendant off of the streets,[268] however, the prosecutor does not seek justice appropriately by disposing of the case without pursuing jail time.[269] Moreover, if a prosecutor requests a charitable contribution as part of his determination to abandon a prosecution, the charitable contribution could appear to be the reason for the decision, which could be viewed as a payoff that does not serve the interests of justice.[270]

Further, transparency is a concern. Where prosecutors use their discretion to not charge the defendant with any crime when there is evidence that a criminal act may have occurred, the public may not know of the wrongdoing. Then, the defendant—or others—may commit similar crimes because the prosecutor has not attempted to deter the criminal behavior by bringing charges for the initial criminal act. On the other hand, publicity generated from a large charitable contribution associated with wrongdoing that may not have reached the level of criminal behavior could have an even greater deterrent effect than other punishments. Although decisions not to prosecute may be appropriate in certain situations, in this hypothetical, Pete's decision not to prosecute based on Dave's charitable contributions would be unethical if the contribution were the sole factor leading to that determination. If Pete has allowed the contribution to account for the entire sentence, the third factor of the proposed system is not satisfied.

C. *Judicial Sentencing*

Contributions ethically may replace part of a fine or jail term for a sentence. Consider the following:

> Prosecutor Pete charges Defendant Dave with committing a misdemeanor. Judge James sentences Dave to give a $500

266. *See supra* note 225 and accompanying text.

267. *See supra* note 221 and accompanying text.

268. Some courts have permitted charitable contributions to be used in some cases of violent crimes. *See supra* note 115. Others have not upheld charitable contributions in these types of cases, although the reasoning was not specifically because the crime was violent. *See supra* notes 197-99.

269. *See supra* notes 60, 78 and accompanying text.

270. *See supra* notes 67, 83, 93-96 and accompanying text; *see also* Colquitt, *supra* note 41, at 716-17.

> charitable contribution to an organization with which James has no connection, as part of probation that decreases the fine or jail term.

Three of the proposed system's factors—the situation surrounding the offense, the defendant's financial situation, and the appropriateness of the charity—are similar to those of the first hypothetical.[271] As in the second hypothetical, this situation contemplates the degree to which the contribution can affect the sentence. Judges ultimately determine whether alternative sentencing would better suit a particular defendant or crime. Courts traditionally condone punishments that are similar to charitable contributions when they sentence defendants to perform community service. Although community service involves giving time instead of money, both punishments have similar goals of rehabilitation, deterrence, and benefiting the public overall. Many people contribute to charitable organizations because they want to, not as a punishment. If a defendant does not perceive a charitable contribution as a punishment, then justice has not been served because the defendant has not been punished for the crime. Community service also can be viewed as a way for a prosecutor or judge to assist a charitable organization that he is interested in, even though there is less of a concern of a payoff because money is not involved. Still, the judicial canon that prohibits conflicts is not solely concerned with monetary "interest."[272] Because community service is not viewed as a conflicting interest, charitable contributions similarly should not be.

Charitable contributions are comparable to fines and asset forfeiture as well.[273] With fines and asset forfeiture, the funds go to the city instead of a charity, but the government deters the defendant through any of these channels by forcing the defendant to pay for the crime committed. Defendants who are compelled to give money through all three methods may feel more deprived than if they were incarcerated,[274] particularly if part of the motive for committing the crime is financial. All three methods also provide a way for courts to deter criminal conduct by forcing a defendant to pay for his misdeeds. With fines and asset forfeiture, the funds often are used to investigate and prosecute crime. Charitable contributions, however, can be used to reduce crime by ameliorating underlying social problems that lead to crime. Thus, using charitable contributions in lieu of part of a jail term or fine is ethical.

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271. *See supra* Part III.B.1.
272. *See supra* note 107 and accompanying text.
273. *See supra* notes 205-10 and accompanying text.
274. *See* Dressler, *supra* note 18, § 1.01, at 2.

D. *Conflicts of Interest*

1. Connection to the Charitable Organization

If the prosecutor or judge were connected to the charitable organization to which a defendant gave a contribution, the contribution would be an unethical part of the sentence. Consider the following:

> Prosecutor Pete charges Defendant Dave with committing a misdemeanor. Pete offers a plea agreement that includes a condition for Dave to give a $500 charitable contribution to a specific organization. Pete's wife is on the organization's board. Alternatively, Pete's wife is not on the board, but Judge James, the sentencing judge, is a member of the board.

Three of the proposed system's factors—the situation surrounding the offense, the defendant's financial situation, and the degree to which the contribution can affect the sentence—are similar to those of the first two hypotheticals.[275] This hypothetical concerns the appropriateness of the charities. While there are benefits to including charitable contributions as part of plea agreements, both the prosecutor and the judge can violate the ethical duty to avoid conflicts of interest if either has a connection to the charity.[276] If the prosecutor sits on the board of a charitable organization or is related to a person who works with the organization, his personal interest in the charitable contribution may limit his ability to handle the defendant in an "even-handed" way.[277] A prosecutor is given great discretion and power in his public position.[278] He cannot use his power to promote private interests,[279] however, which may be of particular concern if the prosecutor chooses which charities receive the defendant's contributions. As for the alternative situation with Judge James, any connections that are unethical for prosecutors to have with the charitable organizations are similarly unethical for judges because judges are held to even higher standards than prosecutors.[280]

The Model Rules and Model Code allow conflicts of interest under certain conditions for prosecutors;[281] thus, it similarly may be possible to allow the prosecutor to have a conflict with a "personal interest" in

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275. *See supra* Part III.B.

276. See *supra* note 87 and accompanying text.

277. *See supra* note 196 and accompanying text (discussing the need for prosecutors to avoid special interests in *People v. Eubanks*, 927 P.2d 310, 314-15 (Cal. 1996) (internal quotations omitted)) The *Eubanks* court noted that prosecutorial discretion must be exercised "with the highest degree of integrity and impartiality, and with the appearance thereof." 927 P.2d at 314-15 (citation omitted).

278. *See supra* note 60 and accompanying text.

279. *See supra* note 87 and accompanying text.

280. *See supra* notes 104-06 and accompanying text.

281. *See supra* note 86 and accompanying text.

a charity.[282] Other problems arise in this context, however, in which prudence would prohibit these arrangements altogether. A criminal prosecutor is in a different position than an attorney who wants to represent two clients with similar interests because a criminal defendant may not feel comfortable rejecting a plea offer, knowing that the prosecutor controls his liberty. Hence, the full disclosure of a prosecutor's tie to a charity[283] unintentionally may encourage the defendant who knows of the prosecutor's connection to "payoff" the prosecutor by contributing to an organization with which the prosecutor is affiliated.

When a prosecutor seeks to seize funds through asset forfeiture and fines, however, he also has an interest in attaining a conviction or guilty plea. Although one bar committee noted that this does not create an unfair incentive for prosecutors to enforce these laws,[284] the discretion to seek these funds can give prosecutors more of an interest than if the money were to go to a charity to which he had no connection. Consequently, asset forfeiture and fines may encourage prosecutors to zealously enforce certain laws in a way that is unfair to defendants who commit crimes that are profitable for the city. Yet, the judicial system gives prosecutors considerable discretion because they are expected to maintain a high standard of ethical responsibility in seeking justice.[285] Nevertheless, the personal aspect of Pete's potential interest in a charitable organization to which he has a connection, and to which Dave would contribute through a plea agreement, would create an unethical conflict of interest.[286]

2. Charitable Contributions Prior to Arrest

If a defendant gave a donation prior to his arrest, it would be unethical for a prosecutor to consider the contribution as part of the defendant's sentence. Consider the following:

> Defendant Dave gave a $500 donation to the police. Two months later, Prosecutor Pete charges Dave with committing a misdemeanor, which is Dave's first offense. Pete offers to dismiss the criminal charge altogether because of Dave's past generosity.

Three of the proposed system's factors—the situation surrounding the offense, the defendant's financial situation, and the appropriateness of the charity—are considered in the first hypothetical.[287] In this hypothetical, the concern is the degree to

282. For example, a conflict may be permitted if it is fully disclosed to the defendant and the defendant agrees in writing to permit the conflict.

283. In addition to disclosing the relationship with the charity to the defendant, a prosecutor also must apprise the court of the connection. *See supra* notes 88-89.

284. *See supra* notes 207-08.

285. *See supra* notes 59-68 and accompanying text.

286. *See supra* note 86 and accompanying text.

287. *See supra* Part III.B.1.

which a donation can affect a sentence. Because a prosecutor cannot hide the reasons for dismissing charges,[288] this connection creates the appearance that a person can buy his way out of criminal charges. A defendant who regularly donates to a charitable organization may equate this act to a contribution that is given as part of a plea agreement or sentence because the "punishment" has been the same. Yet, a person cannot serve a punishment before a criminal act has occurred. In addition, donations given beforehand may not demonstrate a defendant's contrition or remorse because the contribution may have been given for a different purpose, such as to receive a tax deduction, and it may not have deterred the person from criminal behavior. If the defendant donated to an investigating agency, like an organization that supports the police,[289] the donation may appear to be a "payoff." Thus, a prosecutor who dismisses charges because a defendant regularly donates to a charitable organization would appear to allow the donation to affect the entirety of the sentence, giving the appearance of accepting a bribe.

There is an institutional interest in wanting the public to have confidence that courts are neutral and fair. Even the appearance that the prosecutor has used his position to influence the defendant into giving a contribution could be an inappropriate use of discretion because of the long-term damage that may result from the public's perception that justice can be bought.[290] This problem is magnified for defendants who cannot afford to donate continually, creating an inequality between wealthy and indigent citizens.[291] Additionally, wealthier citizens may not be deterred from criminal activity when they observe prosecutors not punishing defendants as a result of donations that they had given. Therefore, Pete should not consider the donation that Dave gave prior to his arrest.

3. Defendant Offers to Give Contribution

There is no difference if the defendant or the prosecutor initiated the discussion of including a charitable contribution in the plea agreement. Consider the following:

> Prosecutor Pete charges Defendant Dave with committing a misdemeanor. Dave offers a plea agreement that includes a condition for him to give a $500 charitable contribution to an organization with which Pete has no connection.

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288. *See supra* note 89 and accompanying text.

289. *See supra* note 98.

290. *See supra* notes 93-98, 141-57 and accompanying text; *see also* Cowles v. Brownell, 538 N.E.2d 325, 327 (N.Y. 1989) (noting that behavior that creates these types of concealed arrangements "does not foster public confidence that the justice system operates evenhandedly").

291. *See, e.g.*, Eaton, *supra* note 122, at 37.

Three of the proposed system's factors—the situation surrounding the offense, the defendant's financial situation, and the appropriateness of the charity—are considered in the first hypothetical.[292] In this hypothetical, the concern, again, is the degree to which the contribution can affect the sentence. When a prosecutor offers the agreement, there is no ethical dilemma.[293] A problem may arise when the defendant offers the agreement, however, because it may appear as if the defendant were seeking to buy his way out of punishment for the crime. Nonetheless, a defendant who initiates an offer to include a charitable contribution in a plea agreement is still admitting his guilt, which aids in deterrence and rehabilitation. Although a wealthy defendant would be in a better position than an indigent defendant to propose a charitable contribution, the same inequality exists when a prosecutor offers to include any financial condition in a plea agreement. The Supreme Court has permitted this inequality because poverty is not considered a "suspect" class[294] and the right to a plea agreement is not a fundamental right;[295] therefore, this inequality need only have a rational relationship to avoid violating the Equal Protection Clause.[296] Here, the rational relationship is that the agreements may better reform and deter criminals. Therefore, there is no difference in the ethical consequences if the defendant or the prosecutor initially offered to include a charitable contribution as part of the plea bargain.

E. *Unequal Justice*

1. Defendant Cannot Afford Contribution

If a defendant cannot afford to give the contribution, he would not have the option of giving a charitable contribution as part of his sentence. Consider the following:

> Prosecutor Pete charges Defendant Dave with committing a misdemeanor. Pete offers a plea agreement that includes a condition for Dave to give a $500 charitable contribution to an organization with which Pete has no connection. Dave is indigent and cannot afford the $500 contribution.

Three of the proposed system's factors—the situation surrounding the offense, the degree to which the contribution can affect the sentence, and the appropriateness of the charity—are considered in

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292. *See supra* Part III.B.1.
293. *See supra* Part III.B.1.
294. Shapiro v. Thompson, 394 U.S. 618 (1969); see *infra* Part III.E for the disparity between the wealthy and indigent.
295. *See* Colquitt, *supra* note 41, at 700.
296. *Shapiro*, 394 U.S. at 638.

the first six hypotheticals.[297] In this hypothetical, the concern is the defendant's financial situation. While a defendant may benefit by, and agree to, this type of arrangement if he can afford to pay the contribution,[298] these types of plea agreements can create the appearance of unequal justice if one defendant can afford to contribute but another cannot. The prosecutor has a responsibility as a minister of justice to treat defendants equally.[299] Yet prosecutors are not held to the same "disinterested" standard as judges.[300] For example, prosecutors are permitted to have a financial incentive from fines collected through a prosecution that judges are prohibited from having.[301] Moreover, convictions generally are not set aside with "even a clear appearance of impropriety in the participation of the prosecutor."[302] Further, in seeking justice, the adversarial system requires a prosecutor to be a zealous advocate, unlike a judge.[303] As a result, prosecutors' discretion and advocacy roles allow them to enforce justice with a degree of inequality if they perceive it to be necessary. Judges, on the other hand, must be impartial and neutral.[304] Therefore, it could be unethical for them to acquiesce to plea agreements that are not options for all defendants.

Justice also may be unequal if the only way to specifically deter the wealthy person is to compel him to pay an extraordinary amount in contributions; thus, he potentially pays more than an indigent defendant for committing a similar crime. Consequently, the wealthier defendant is paying more in the form of a contribution than a fine, simply to avoid the stigma of a criminal fine. The wealthy defendant at least has the option of incarceration or paying a fine in lieu of giving the charitable contribution.

A defendant who is state dependent, however, should not use the funds he receives from the state to contribute to a charity because he needs those resources to survive. In addition, this use of state funds may have the unintended effect of encouraging that defendant to commit another crime to gain resources to survive. Thus, the defendant who cannot afford to contribute may not have this option, and his financial situation may necessitate that he be punished

297. *See supra* Parts III.B-D.

298. *See* Eaton, *supra* note 122, at 37; *see also supra* notes 221-22.

299. *See supra* notes 63-66 and accompanying text.

300. *See supra* notes 93-99, 102-06 and accompanying text; *see also* Young v. United States, 481 U.S. 787, 807 (1987).

301. *See supra* notes 208-09 and accompanying text.

302. Dick v. Scroggy, 882 F.2d 192, 196 (6th Cir. 1989). *But see id.* at 199 (Celebrezze, J., concurring) (noting that an appearance of impropriety could infect a proceeding if a prosecutor has a financial interest at stake).

303. *Dick*, 882 F.2d at 197 (citing Marshall v. Jerrico, Inc., 446 U.S. 238, 248); *see also* People v. Eubanks, 927 P.2d 310, 316 (Cal. 1996) ("True disinterest on the issue of such a defendant's guilt is the domain of the judge and the jury—not the prosecutor.").

304. *See supra* notes 105-06 and accompanying text.

differently than a defendant who can afford to contribute.[305] The outcome may be unequal, but the law already embodies such inequalities.[306] Indigent defendants cannot serve jail terms longer than a statutory maximum if they cannot pay a fine, yet they may face longer terms than a defendant who can pay a fine.[307] Although certain defendants may not want to serve jail time in lieu of paying a contribution, other defendants may prefer not having the financial commitment.[308] Still, the judicial system allows indigent defendants other options to ensure that they are not denied constitutional rights.[309] Hence, an indigent defendant would not have an option of giving a charitable contribution as part of a plea agreement, adding another layer of inequality that already exists in the law.

2. Contribution to the Victim

The prosecutor could allow the victim to receive restitution from the defendant, but he should not require another contribution to the victim to be part of the plea agreement. Consider the following:

> Prosecutor Pete charges Defendant Dave with harassing Victim Vincent. Pete offers a plea agreement that includes a condition for Dave to give a $500 charitable contribution to Vincent.

Three of the proposed system's factors—the situation surrounding the offense, the defendant's financial situation, and the degree to which the contribution can affect the sentence—are similar to those in the first two hypotheticals.[310] This hypothetical concerns the appropriateness of the charities. Contributions to organizations that aid victims of crimes can serve the goals of the criminal justice system by ensuring that defendants "pay" for their crimes and are deterred. The additional publicity associated with a contribution rather than a fine may further increase the likelihood of deterring misconduct.[311] While charitable contributions are not intended to be punitive, the charitable organization benefits regardless of the motivation behind the contribution. Yet, if the defendant or the public does not view the

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305. There is no justice when it "can be bought by the highest bidder." Fla. Bar v. Machin, 635 So. 2d 938, 940 (Fla. 1994) (affirming a 90-day suspension of the defendant-attorney's law practice because an attorney should not try to buy a victim's silence at sentencing because that is prejudicial to the administration of justice and it would be unfair if a wealthy defendant could opt for a lesser sentence than a defendant who could not pay for silence).

306. *See supra* notes 294-96 and accompanying text.

307. Williams v. Illinois, 399 U.S. 235, 243, 244 (1970).

308. *See supra* note 274 and accompanying text.

309. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956) (overturning a statute that did not permit indigent defendants a free transcript of their trial for appellate review because the statute violated the Equal Protection Clause by discriminating as to who could appeal convictions based on an ability to pay).

310. *See supra* Part III.B.

311. *See supra* note 178 and accompanying text.

contribution as a punishment, the charitable contributions will not deter criminal activity.

It would not serve the administration of justice to allow the victim to benefit from the defendant's crime in lieu of a sentence that the defendant must pay to society. Victim restitution is different than charitable contributions,[312] but charities can substitute for the unknown victim or when the crime is "victimless."[313] If the public at large is harmed, then a charity can stand in the place as a victim and benefit from the contribution in a way that serves similar purposes as victim restitution would. The designated charity could have a direct connection to the crime, such as a contribution to Mothers Against Drunk Driving by defendants charged with driving while intoxicated, permitting the symbolic representation of the victim to be an appropriate beneficiary. Vincent, as the victim, however, could not serve that purpose; a charitable contribution to him would be unethical.

CONCLUSION

With the need to develop creative solutions to sentencing problems and the trend toward the neediest individuals continually losing the fight for government funding, allowing defendants to give charitable contributions in lieu of a fine can benefit society and rehabilitate defendants in a way that incarceration or a fine cannot. By combining charitable contributions with community service, the prosecutor encourages an overall goal of promoting social welfare and assisting to rehabilitate the defendant who is able to see the effect of his contribution and service. When a person gives to a charity—even by contract—he is doing a good deed, which may improve his character. The defendant should not receive a "deal" or "bargain" by agreeing to contribute to a charity, but he benefits by choosing to whom he pays his "debt" for his criminal activity. To ensure that prosecutors follow the rules of ethics and that the judicial system maintains its integrity when applying these sentences, prosecutors should follow the guidelines set forth in this Note's proposal[314] when incorporating charitable contributions into plea agreements and sentences: (1) the situation surrounding the offense, (2) the financial situation of the defendant, (3) the degree to which the contribution can affect the sentence, and (4) the appropriateness of the charities. Prosecutors and judges can expand their methods of reforming criminal defendants and meeting the goals of criminal justice by including

312. In cases with a clear victim, the charitable contribution would be added on top of victim restitution. *See, e.g.*, Campbell v. State, 551 N.E.2d 1164, 1169 (Ind. Ct. App. 1990).

313. *See supra* note 181 and accompanying text.

314. *See supra* Part III.A.

charitable contributions in appropriate plea agreements and sentences.