

## **Sentence Reduction as a Remedy for Prosecutorial Misconduct**

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## SENTENCE REDUCTION AS A REMEDY FOR PROSECUTORIAL MISCONDUCT

### Abstract

*Current remedies for prosecutorial misconduct, such as reversal of conviction or dismissal of charges, are rarely granted by courts and thus do not deter prosecutors effectively. Further, such all-or-nothing remedial schemes are often problematic from corrective and expressive perspectives, especially when misconduct has not affected the trial verdict. When granted, such remedies produce windfalls to guilty defendants and provoke public resentment, undermining their expressive value in condemning misconduct. To avoid such windfalls, courts must refuse to grant any remedy at all, either refusing to recognize violations or deeming them harmless. This often leaves significant non-conviction-related harms unremedied and egregious prosecutorial misconduct uncondemned.*

*This Article accordingly proposes adding sentence reduction to current all-or-nothing remedial schemes, arguing that this would provide courts with an intermediate remedy that they would be more willing to grant. It argues that several prosecutorial incentives combine to make sentence reduction an effective deterrent. Moreover, because sentence reduction could be tailored to the magnitude of the violation, it could resolve the windfall dilemma and serve as an effective corrective and expressive remedy.*

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## INTRODUCTION

Remedies for violations of criminal defendants' procedural rights are often all or nothing. Convictions are either reversed or affirmed; charges are either thrown out or let stand; evidence is either excluded or admitted. These remedies pose serious dilemmas for courts. When granted, strong remedies often result in windfalls for guilty defendants—and courts, as Judge Guido Calabresi has observed, “are not in the business of letting people out on technicalities.”<sup>1</sup> But if courts don't want to grant such windfalls, they cannot grant any remedy at all: they must either avoid recognizing a violation in the first place or deem violations harmless. The latter problem has been especially acute with respect to prosecutorial misconduct. As many scholars have observed, such misconduct is widespread, and the existing remedies are ineffective, largely because they are rarely invoked.<sup>2</sup>

This Article accordingly proposes adding to the menu of available remedial options an intermediate remedy for prosecutorial misconduct: reduction of the defendant's sentence. Sentence reduction is an accepted remedy in a number of other jurisdictions for a variety of kinds of violations of criminal defendants' rights. It has been approved, for instance, by the European Court of Human Rights,<sup>3</sup> some European domestic courts,<sup>4</sup> several Canadian provincial supreme courts,<sup>5</sup> and the Appeals Chamber for the International Criminal Tribunal for Rwanda.<sup>6</sup> But it is essentially unknown in U.S. courts. The one time the Supreme Court considered the possibility of using sentence reduction

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<sup>1</sup> Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 112 (2003).

<sup>2</sup> See *infra* Part I.

<sup>3</sup> E.g., *Chraidi v. Germany*, 47 E.H.R.R. 2, paras. 24-25 (Eur. Ct. H.R. 2006) (holding that sentence reduction is a permissible remedy for excessive pretrial detention); *Scordino v. Italy*, 45 E.H.R.R. 7, paras. 185-186 (holding that sentence reduction can adequately remedy speedy trial violations); *Mathew v. Netherlands*, 43 E.H.R.R. 23, paras. 148-49 (2005) (holding that sentence reduction can compensate for unlawful conditions of detention).

<sup>4</sup> E.g., *Salah v. Netherlands*, 44 E.H.R.R. 55 (Eur. Ct. H.R. 2006) (discussing cases in which Dutch courts reduced sentences to remedy unlawful wiretaps and prisoner mistreatment); *Yetsinercki v. United Kingdom*, 43 E.H.R.R. 4, para. 8 (2005) (quoting a U.K. court that reduced sentence to remedy “anxiety” caused by trial delay).

<sup>5</sup> E.g., *R. v. MacPherson*, 100 C.C.C. (3d) 216 (N.B. 1995) (reducing sentence to remedy delay before arraignment); *R. v. Chabot*, 77 C.C.C. (3d) 371 (Queb. 1992) (reducing sentence to remedy improper detention); *R. v. Stannard*, 52 C.C.C. (3d) 544 (Sask. 1989) (reducing sentence to remedy unlawful search). The remedy remains infrequent in Canada, in part because of controversy as to when Canadian sentencing law permits it. Oren Bick, *Remedial Sentence Reduction*, 51 CRIM. L.Q. 199 (2006).

<sup>6</sup> E.g., *Kajelijeli v. Prosecutor*, Case No. ICTR 98-44A-A, Judgment, P 255 (May 23, 2005) (ordering sentence reduction to remedy unlawful initial detention); *Semanza v. Prosecutor*, Case No. ICTR 97-20-A, Judgment, P 325 (May 20, 2005) (same); *Barayagwiza v. Prosecutor*, Case No. ICTR 97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration) (Mar. 31, 2000) (ordering sentence reduction to remedy unlawful delay in indictment and appointment of counsel); see Sonja Starr, *Rethinking “Effective Remedies”:* *Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 717-18 (2008).

to remedy a non-sentencing-related error (a Speedy Trial Clause violation), it rejected it, reiterating its cursory conclusion in an earlier speedy trial case that dismissal with prejudice was the “only possible” remedy.<sup>7</sup>

U.S. scholarship has likewise almost entirely ignored this possible remedy. However, two pieces have proposed sentence reduction as an alternative to the Fourth Amendment exclusionary rule—a short essay by Judge Calabresi<sup>8</sup> and an article by Harry Caldwell and Carol Chase.<sup>9</sup> Both would combine sentence reduction with direct sanctions against the police, such as fines. Their theory is that the direct sanctions would deter misconduct while sentence reduction would give defendants an incentive to raise misconduct claims.<sup>10</sup> In a response to Calabresi’s piece, Yale Kamisar argues that this combined scheme would not accomplish the deterrent purpose of the exclusionary rule.<sup>11</sup> First, he observes that, as Calabresi concedes,<sup>12</sup> sentence reduction itself will not deter police misconduct because the police don’t care “one whit” about sentencing.<sup>13</sup> Second, direct sanctions would not work—the police are politically powerful, and judges have historically been loath to supervise police department policies or to grant remedies against individual officers.<sup>14</sup>

Kamisar may well be right that sentence reduction would not work as an alternative to the exclusionary rule. His two key empirical assumptions are both plausible: that the police don’t care about sentencing<sup>15</sup> and that courts will

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<sup>7</sup> *Strunk v. United States*, 412 U.S. 434, 439-40 (1973) (citing *Barker v. Wingo*, 407 U.S. 514, 532 (1972)); see *infra* Part V.A.

<sup>8</sup> Calabresi, *supra*.

<sup>9</sup> Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule*, 78 MARQ. L. REV. 45 (1994).

<sup>10</sup> Calabresi, *supra*, at 116-17; Caldwell & Chase, *supra*, at 68-71 (also including an educational component).

<sup>11</sup> Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 119, 136 (2003).

<sup>12</sup> Calabresi, *supra*, at 116.

<sup>13</sup> Kamisar, *supra*, at 136.

<sup>14</sup> *Id.* at 127-29, 138-39.

<sup>15</sup> Kamisar cites no studies of police attitudes concerning sentencing, and I have found none. However, Josh Bowers notes that low sentences sometimes *help* police effectiveness by reducing community resentment. *The Relationship Between Plea Bargaining and Criminal Code Structure*, 91 MARQ. L. REV. 85, 94-96, 102-04 (2007). One study finds that increased prosecutorial screening of cases did not affect police practices—police were “willing to suffer a refusal to prosecute.” Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 TEX. L. REV. 2055, 2059 (2006). If police are indifferent to whether their cases are prosecuted at all, they probably do not care about sentences either—but this also suggests that the exclusionary rule itself may have limited deterrent effect. *But see* Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor*, 63 U. COLO. L. REV. 75, 83 (1992) (finding that judges, prosecutors, and public defenders believe “the exclusionary rule has dramatically improved police behavior”). In theory, even if police do not care about sentences, prosecutors who do care might be able to influence police behavior. *See* Daniel Richman, *Prosecutors and their Agents, Agents and their Prosecutors*, 103 COLUM. L. REV. 749, 779 (2003) (noting prosecutorial influence over investigations); *but*

be reluctant to directly sanction the police.<sup>16</sup> But even if he is right on both counts—a question beyond the scope of this paper—it would not mean sentence reduction has no viable role as a criminal procedure remedy. Even if it does not deter police misconduct, it might well deter *prosecutorial* misconduct. The first of Kamisar’s assumptions is probably not applicable to prosecutors, who *can* be expected to care about sentence reductions.<sup>17</sup>

Although prosecutors’ motivations vary, political pressures, ideology, office policies and subcultures, career interests, and the adversarial process all generally tend to push them toward preferences for longer sentences.<sup>18</sup> And even a prosecutor who does not usually care much about sentences would face professional embarrassment if a court were to reduce a sentence on the express basis of her wrongdoing. To be sure, prosecutors would presumably rather have a sentence lowered than a conviction thrown out. But a less serious but much more likely penalty might be a bigger deterrent.

Sentence reduction is also an attractive alternative to the extent that criminal procedure remedies are premised on corrective justice or expressive rationales. Certainly, sentence reduction would be insufficient to remedy prosecutorial misconduct that rendered the conviction unreliable—unless a defendant has been fairly convicted, she should not be sentenced at all. But not all misconduct falls into this category. Some harms the defendant but does not undermine the reliability of the conviction. For instance, undue delays in trial may cause extended emotional stress, even if they do not ultimately preclude a fair trial. When a prosecutor makes abusive or racist comments about a defendant at trial, the defendant may suffer emotional or dignitary harm. When she makes inflammatory comments about the defendant’s character, the defendant may additionally suffer reputational harm. Prosecutors are immune from damage suits for these harms, and while remedies like reversal or dismissal are available in theory, courts in practice rarely grant them.

In such cases, sentence reduction could vindicate the defendant’s rights in a nontrivial way, providing a remedy that matters to the defendant and has

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*see id.* at 755, 758, 767-68 (observing that prosecutors’ relationship with police involves mutual dependence, not hierarchical control).

<sup>16</sup> Kamisar cites the experience of a direct sanction system for INS officers who conduct unlawful searches; these sanctions were almost never invoked. Kamisar, *supra*, at 138-39; *see INS v. Lopez-Mendoza*, 468 U.S. 1032, 1054 (1984) (White, J., dissenting). He also cites evidence of the political power of police departments, including the fact that “many other ‘direct sanctions’ proposals . . . have failed over the years,” *id.* at 129, and scholarship arguing that judges frequently tolerate police perjury, *id.* at 130. As I show in Part I, courts virtually never issue direct sanctions against prosecutors. It seems plausible that they would similarly abstain from sanctioning police, especially given the Supreme Court’s recent suggestion that police departments can be trusted to handle discipline for Fourth Amendment violations internally. *See Hudson v. Michigan*, 547 U.S. 586, 598-99 (2006).

<sup>17</sup> *Cf.* Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 631 (1972) (giving reasons prosecutors care more than police do about appellate reversal).

<sup>18</sup> *See infra* Part III.

symbolic significance to the community. But because the magnitude of the reduction could be tailored to the violation, it would not create a massive windfall that risks offending the community’s sense of justice and undermining the remedy’s expressive and corrective purposes. And because it is not such a windfall, courts may be more willing to invoke it—serving those purposes better than the all-or-nothing choices that most often result in nothing.

Part I of this Article argues that courts’ reluctance to invoke current remedies leaves a great deal of prosecutorial misconduct unredressed. Part II outlines my sentence reduction proposal and argues that courts would be relatively willing to grant such reductions. Part III examines the incentives of prosecutors and explain why sentence reduction could effectively deter misconduct. Part IV argues that sentence reduction is an effective corrective and expressive remedy. Part V explores three contexts in which sentence reduction could apply: speedy trial violations, race discrimination in jury selection, and “harmless but serious” examples of trial misconduct or disclosure violations. In the first two contexts, sentence reduction would amount to a less extreme alternative to the current remedies; in the third, it would be a new remedy where none is currently provided. Finally, Part VI addresses implementation details and practical objections.

## **I. The Failure of Current Remedies for Prosecutorial Misconduct**

Prosecutorial misconduct has been a widespread and widely criticized problem in the U.S. criminal justice system for decades.<sup>19</sup> “Misconduct” is a term with no fixed meaning, and some courts and scholars reserve it for certain small subcategories of very extreme wrongdoing. I use it more broadly, however, as shorthand for any prosecutorial actions that violate the U.S. constitution or other substantial rights of defendants under federal or state law. Examples include failure to disclose exculpatory evidence, race and sex discrimination in jury selection, inflammatory opening and closing statements, deliberate attempts to make sure information that is supposed to be excluded gets before the jury, and foot-dragging that deprives the defendant of a speedy trial.<sup>20</sup> Each

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<sup>19</sup> See *United States v. Modica*, 663 F.2d 1173, 1182-83 (2d Cir. 1981); Michael D. Cicchini, *Prosecutorial Misconduct at Trial*, 37 SETON HALL L. REV. 335, 369 (2007); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WISC. L. REV. 399, 399-400; Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor*, 61 N.Y.U. ANN. SURV. AM. L. 45, 46 (2005); Charles L. Cantrell, *Prosecutorial Misconduct: Recognizing Errors in Closing Argument*, 26 AM. J. TRIAL ADVOC. 535, 562 (2003); Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy*, 71 TEMP. L. REV. 887, 956-57 (1998); Joseph R. Weeks, *No Wrong Without a Remedy*, 22 OKLA. CITY U. L. REV. 833, 869 (1997); Tracey L. Meares, *Rewards for Good Behavior*, 64 FORDHAM L. REV. 851, 890 (1995); Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965, 966 (1984); *id.* at 975; Alschuler, *supra*, at 631.

<sup>20</sup> See *Berger v. United States*, 295 U.S. 78, 84-85 (1935) (defining prosecutorial misconduct as conduct “overstep[ing] the bounds of . . . propriety and fairness” and giving examples); Joy, *supra*, at 402-03; Rosenthal, *supra*, at 947-51.

of these actions can in principle trigger strong judicial remedies for the defendant—reversal of conviction or dismissal of indictments—and direct sanctions against the prosecutor.

Yet the existing remedies and sanctions for prosecutorial misconduct share a common defect: they are very rarely invoked.<sup>21</sup> First, consider the principal appellate remedy for procedural violations related to the trial process: reversal of conviction, usually followed by retrial. This remedy is so rarely granted in noncapital cases that some commentators have referred to it as a “dysfunctional” remedy for misconduct.<sup>22</sup> The principal doctrinal basis for denying reversal is the harmless error doctrine, which requires affirmance if the violation did not affect the trial verdict.<sup>23</sup> Prosecutorial misconduct is almost always deemed harmless, even quite serious misconduct such as deliberate withholding of exculpatory evidence.<sup>24</sup> As Judge Posner wrote for the Seventh Circuit in *United States v. Pallais*, the doctrine renders procedural protections “like the grapes of Tantalus”—forever just out of reach of criminal defendants—and seriously undermines courts’ ability to deter misconduct.<sup>25</sup> And appeals courts’ toleration of misconduct may make trial courts less willing to enforce the underlying rights themselves.<sup>26</sup>

But the harmless error doctrine is not the only obstacle to appellate remedies for prosecutorial misconduct. In some contexts, the option of declaring misconduct harmless has been taken away from courts—and courts appear to have responded by avoiding recognizing misconduct in the first place, effectively defining down the underlying rights. For instance, the Supreme Court in *Batson v. Kentucky* reversed a conviction, without harmless error analysis, on the basis of prosecutorial race discrimination in jury venire selection; this case and its progeny have generally been understood to require automatic reversal.<sup>27</sup> Scholars have demonstrated, however, that since the establishment of this remedy, lower appellate courts have narrowed the circumstances under which they will find that race discrimination existed, “combining a deferential stan-

<sup>21</sup> *E.g.*, Meares, *supra*, at 890, 893-898; Cicchini, *supra*, at 336; Joy, *supra*, at 425-26.

<sup>22</sup> Steele, *supra*, at 976-77; Alschuler, *supra*, at 645, 647; *see* *United States v. Modica*, 663 F.2d 1173, 1184 (“Despite numerous threats to reverse convictions for prosecutorial misconduct, federal courts have seldom invoked that sanction.”).

<sup>23</sup> *See* *Chapman v. California*, 386 U.S. 18, 21-22, 24 (1967) (applying this doctrine to constitutional violations); Fed. R. Crim. P. 52; *see infra* Part V.C.

<sup>24</sup> *E.g.*, Meares, *supra*, at 900-01; Francis Allen, *A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review*, 70 IOWA L. REV. 311, 333 (1985); Alschuler, *supra*, at 659; *cf.* William M. Landes & Richard A. Posner, *Harmless Error*, 30 J. LEGAL STUD. 161, 182-92 (2001) (reviewing 1222 criminal procedure cases—not limited to prosecutorial misconduct—and finding that courts refused to reverse convictions on the basis of the harmless error doctrine in 87% of them, with 45% finding harmless error and 42% finding that any error, if it existed, was harmless).

<sup>25</sup> 921 F.2d 684, 691-92 (1990).

<sup>26</sup> *See* Kate Stith, *The Risk of Legal Error in Criminal Cases*, 57 U. CHI. L. REV. 1, 48 (1990) (arguing that harmless error affects trial courts’ decisions by reducing fear of reversal).

<sup>27</sup> *Batson v. Kentucky*, 476 U.S. 79, 100 (1986).



dard of appellate review with a sweeping scope of permissible neutral explanations for prosecutorial strikes.”<sup>28</sup> That is, as Pam Karlan puts it, “lower courts . . . have responded to the fact that many *Batson* violations might be found harmless if harmless error analysis were performed by declining to find a violation in the first place.”<sup>29</sup> Again, these loosened appellate standards may have spillover effects on trial courts’ own handling of alleged *Batson* violations—trial courts have been directed to accept a broader range of prosecutorial explanations for strikes, and they furthermore may be less willing to take on the costs of reconvening juries absent a serious fear of appellate reversal.<sup>30</sup>

A similar defining-down appears to have taken place in the context of violations of the Speedy Trial Clause of the Sixth Amendment, for which the Supreme Court has held that dismissal of the indictment with prejudice is the “only possible remedy.”<sup>31</sup> Scholars and courts have recognized that this extremely costly remedy dissuades trial and appellate judges from finding violations, even in the face of “shockingly long delays.”<sup>32</sup> As Susan Herman concludes on the basis of her comprehensive review of speedy trial jurisprudence, the “severity of the remedy . . . has had a profound effect on the development of speedy trial jurisprudence.”<sup>33</sup> The result is that “the remedy of dismissal is granted in a tiny fraction of the thousands of constitutional speedy trial claims brought every year.”<sup>34</sup>

These examples illustrate a broader phenomenon documented by a wealth of scholarship in criminal procedure and other fields of law: if the remedy for a rights violation is undesirable, courts will find ways to avoid granting it, like narrowing the underlying right.<sup>35</sup> Daryl Levinson, who has re-

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<sup>28</sup>Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2005, 2015, 2021(1998); accord Robin Charlow, *Tolerating Deception and Discrimination After Batson*, 50 STAN. L. REV. 9, 16 (1997). See *infra* Part V.B.

<sup>29</sup>Karlan, *supra*, at 2021; see *id.* at 2014-23.

<sup>30</sup>The available trial-level remedies for *Batson* violations present their own costs—trial judges may accept dubious explanations for strikes in order to avoid reconvening a new jury pool. Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099 (1994). When trial-level remedies for rights violations are costly, effective appellate remedies are especially important, because the risk of the appellate remedy “may be the major incentive the trial court has” to take on the costs of enforcing rights. Stith, *supra*, at 48.

<sup>31</sup>*Barker v. Wingo*, 407 U.S. at 522; see *infra* Part V.A.

<sup>32</sup>Amsterdam, *supra*, at 539; see *United States v. Strunk*, 467 F.2d 969, 972 (7<sup>th</sup> Cir. 1972); Susan N. Herman, *The Right to a Speedy and Public Trial* 230 (2006) (“The reluctance of courts to invoke the ‘severe remedy’ of dismissal unquestionably has an impact on the willingness of courts to find a constitutional violation. . . .”); Amar, *supra*, at 646.

<sup>33</sup>Herman, *supra*, at 212.

<sup>34</sup>*Id.* at 231.

<sup>35</sup>*E.g.*, Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1370 (2001); Barry Friedman, *When Rights Encounter Reality*, 65 S. CAL. L. REV. 735, 738 (1992). I have elsewhere described a number of examples of remedial deterrence in international courts. Starr, *supra*, at 710-736.

viewed this phenomenon in depth, calls it “remedial deterrence,” a phrase this Article borrows: the high cost of remedies deters courts from vindicating rights.<sup>36</sup> For instance, numerous scholars have argued that after *Mapp v. Ohio* established the Fourth Amendment exclusionary rule, lower courts chipped away at the scope of the Fourth Amendment.<sup>37</sup> Similarly, Stephen Clymer argues that in order to avoid dismissing indictments, courts have made it almost impossible to prove discriminatory selective prosecution.<sup>38</sup>

But why are reversal or dismissal seen as high-cost remedies? Reversal imposes the cost of retrial on the public, the parties and witnesses, and the court system, a concern frequently cited by courts<sup>39</sup> and by commentators.<sup>40</sup> Judges may also see dismissals, or reversals that are not followed by reconviction,<sup>41</sup> as creating undue windfalls.<sup>42</sup> In addition, almost all state judges are elected and must pay attention to public opinion.<sup>43</sup> The public may resent the costs of retrials or perceive them as unacceptable delays in justice,<sup>44</sup> or may not focus on the possibility of retrial and simply perceive reversal (like dismissal) as letting a criminal off the hook.<sup>45</sup>

<sup>36</sup> Levinson, *supra*, at 884-85.

<sup>37</sup> *E.g.*, William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991); Kamisar, *supra*, at 133-34; Calabresi, *supra*, at 112; Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363.

<sup>38</sup> Stephen D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 683, 736 (1997) (“If a less draconian remedy was available, courts might be more willing to review charging decisions.”).

<sup>39</sup> *E.g.*, *United States v. Mechanik*, 475 U.S. 66, 73 (1986); *United States v. Turner*, 474 F.3d 1265, 1275 (11<sup>th</sup> Cir. 2007); *Modica*, 663 F.2d at 1184; *Stringer v. Mississippi*, 627 So.2d 326 (Miss.1993).

<sup>40</sup> Posner, *supra*, at 644; Dunahoe, *supra*, at 95; Alschuler, *supra*, at 663.

<sup>41</sup> Retrial is precluded by the Double Jeopardy Clause when the prosecutor’s misconduct was intended to trigger a mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982). In other cases, retrial might be precluded in practice by loss of evidence, or it might result in an acquittal (even if the defendant is in fact guilty), *see* Posner, *supra*, at 644.

<sup>42</sup> *See, e.g.*, *Luce v. United States*, 469 U.S. 38, 42 (1984) (describing the “windfall of automatic reversal”); *North Dakota v. Tweeten*, 679 N.W.2d 287, 291-92 (N.D. 2004) (holding that dismissal with prejudice “may serve to punish the public and provide a windfall for the defendant”); *Kansas v. Bolen*, 13 P.3d 1270, 1272 (Kan. 2000) (same).

<sup>43</sup> David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 265 (2008).

<sup>44</sup> *See* *Evitts v. Lucey*, 469 U.S. 387, 405-06 (1985) (Burger, J., dissenting) (“Few things have . . . contributed more to lowered public confidence in the courts, than the interminable appeals, the retrials, and the lack of finality.”).

<sup>45</sup> *See, e.g.*, R.G. Ratcliffe, *Opinions Divided On Judge in Dispute Over Condemned Man*, HOUSTON CHRON., Oct. 10, 2007, p. B1 (explaining that a judge had been elected in “an atmosphere of public anger over criminals getting cases reversed on what appeared to be technicalities”); Patricia L. Garcia, *Austin College Welcomes Texas Supreme Court*, 70 TEX. BAR J. 446, 446 (2007) (observing that a Tennessee state supreme court chief justice was unseated because “the public perceived [a controversial] ruling to be a reversal [even though] the court actually sent the case back to the trial court for review”); Dennis B. Roddy, *Judges Can’t Dismiss Popular Opinion*, PITT. POST-GAZETTE, July 14, 1991, p. B1 (describing “public anger” at judicial reversals of jury convictions and stating that “consen-

To judges, then, it may seem like a better option to let the misconduct slide. As Stanley Fisher put it: “Because courts are understandably reluctant to reverse convictions, even if the prosecutor’s conduct has been egregiously unethical, . . . [they] may strain to excuse or overlook the prosecutor’s questionable conduct [or deem it] “harmless.”<sup>46</sup> In short, when faced with all-or-nothing remedial choices, appellate courts tend to choose nothing.

Nor is there much hope for solving the problem via alternative sanctions that would directly punish the prosecutor—contempt sanctions, fines, and referral for bar discipline—as some commentators have proposed.<sup>47</sup> Courts already have these options, but if anything appear *more* reluctant to impose them than to grant reversal.<sup>48</sup> Judges, it appears, simply do not have any appetite for directly imposing personal or professional penalties on the prosecutors with whom they regularly interact. Indeed, they rarely so much as identify misbehaving prosecutors by name in published opinions, even when they have reversed a defendant’s conviction.<sup>49</sup> Courts may also wish to avoid risking over-detering prosecutors from pursuing cases with appropriate zeal—the concern that underlies prosecutorial immunity to civil suits.<sup>50</sup>

Other scholars have suggested that bar associations should themselves initiate disciplinary proceedings each time an appeals decision identifies misconduct.<sup>51</sup> Again, however, these proposals have gone nowhere. Bar associations are notoriously lax in policing the ethics of *any* of their members, particularly prosecutors, who are virtually never held accountable for misconduct even when it has been recognized by a court.<sup>52</sup>

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sus in the legal community appears to be that judges are far more sensitive to popular opinion than they would like to say”); Michael Hall, *And Justice For Some*, TEX. MONTHLY, Nov. 1, 2004, p. 154 (describing “outraged” public and media reaction to a 1993 reversal on procedural grounds).

<sup>46</sup> Stanley Z. Fisher, *In Search of the Virtuous Prosecutor*, 15 AM. J. CRIM. L. 197, 212-13 (1988).

<sup>47</sup> E.g., Henning, *supra*, at 828-31; Kelly Gier, *Prosecuting Injustice: Consequences of Misconduct*, 33 AM. J. CRIM. L. 191, 205-06 (2006).

<sup>48</sup> See Steele, *supra*, at 978, 981; Alschuler, *supra*, at 633, 673-74 (stating that survey of 25 years of reported decisions found no examples of courts imposing sanctions on prosecutors); Dunahoe, *supra*, at n.146 (noting that the use of contempt sanctions has remained extremely infrequent in the decades since Alschuler’s article); *id.* at 83-84 (noting that other criminal sanctions are available but essentially never used); Meares, *supra*, at 893-97.

<sup>49</sup> *Modica*, 663 F.2d at 1185-86 & n.7; Dunahoe, *supra*, at 72; Henning, *supra*, at 830-31.

<sup>50</sup> See *Imbler v. Pachtman*, 424 U.S. 409, 427-28 (1976); Dunahoe, *supra*, at 75.

<sup>51</sup> E.g., Joy, *supra*, at 427; Gier, *supra*, at 205; see also Steele, *supra*, at 982-88 (arguing for the creation of a special Prosecutors’ Grievance Council); Gershman, *supra*, at 454 (making a similar proposal).

<sup>52</sup> Gier, *supra*, at 201; Steele, *supra*, at 966, 981-82; Gershman, *supra*, at 445 (noting that “despite the recognized frequency of misconduct by prosecutors in argument to the jury, this writer has found only one decision involving a disciplinary proceeding against a prosecutor for such conduct”); Dunahoe, *supra*, at 76-77; Meares, *supra*, at 899.

Some scholars have proposed that defendants who suffer constitutional wrongs be empowered to sue prosecutors in civil court.<sup>53</sup> But even if the current rule of absolute prosecutorial immunity were changed,<sup>54</sup> damages probably would not be an effective deterrent. Criminal defendants are not usually appealing civil plaintiffs,<sup>55</sup> and may also have a difficult time quantifying damages.<sup>56</sup> In light of the dubious prospects of recovery, most may not bother to sue, especially given high litigation costs, the poverty of most criminal defendants, and the lack of appointed counsel for civil suits.<sup>57</sup> Even if defendants did sue and win, individual prosecutors would be indemnified by the government under most states' laws—if they were not, overdeterrence might be a serious concern.<sup>58</sup> And while the government would take a financial hit, it is uncertain what the effect might be. Government agencies do not predictably respond to financial incentives the way private actors do; their budgets are under political control and can be increased to offset losses, and they may be more directly motivated by votes than by dollars.<sup>59</sup>

Several scholars have proposed eliminating appellate courts' discretion in responding to misconduct, and making remedies or sanctions automatic.<sup>60</sup> Such approaches carry some intuitive appeal, as part of the problem appears to be a lack of judicial backbone. Even if courts are justified in their reluctance to grant remedies like reversal that carry hefty social costs, perhaps they should at least be willing to take other steps that seem less drastic, like publishing the misbehaving prosecutors' names.<sup>61</sup>

But even if courts *should* take these steps more often than they do, *requiring* them to do so would be risky. The lesson of the literature on remedial deterrence is that it is hard to force courts to issue remedies they don't want to give. When remedial discretion is taken away (as in *Batson*, for instance), courts tend to respond by redefining the underlying rights. If a court is forced to sanction a prosecutor harshly in the event of misconduct, it may avoid re-

<sup>53</sup> See Alschuler, *supra*, at 669.

<sup>54</sup> See *Imbler*, 424 U.S. 409.

<sup>55</sup> See, e.g., Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials*, 88 COLUM. L. REV. 247, 284 (1988); Alschuler, *supra*, at 670.

<sup>56</sup> Meltzer, *supra*, at 284.

<sup>57</sup> Meares, *supra*, at 892-93.

<sup>58</sup> See Richard A. Posner, *Excessive Sanctions for Government Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 637 (1982) (discussing overdeterrence generally). For some forms of prosecutorial misconduct, there may be little cost to overdeterrence, however. See Dunahoe, *supra*, at 88 (discussing disclosure violations).

<sup>59</sup> Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 361-62, 420 (2000); see also Dunahoe, *supra*, at 49 (arguing that prosecutors respond to career incentives, not dollars).

<sup>60</sup> See Cicchini, *supra*, at 336 (proposing requiring mistrial in all misconduct cases and dismissal with prejudice for intentional misconduct); Joy, *supra*, at 427 (proposing that prosecutors' offices "be required to implement a system of graduated discipline each time" a court finds misconduct); Kenneth Williams, 51 CATH. U. L. REV. 1177, 1200 (2002) (recommending requiring courts to refer prosecutors for bar discipline).

<sup>61</sup> See Gier, *supra*, at 205-06 (proposing requiring judges to publish names).

cognizing misconduct at all—and may thus appear to tolerate or even endorse specious prosecutorial practices.

## II. Sentence Reduction as an Alternative Remedy

In light of the remedial deterrence problem, the best solution to prosecutorial misconduct may not be “stronger” remedies at all. Rather, it may be better to give appellate courts the option of a *lesser* remedy—one which, if it is more likely to be invoked, may actually have a greater prospect of deterring prosecutorial misconduct and meaningfully vindicating defendants’ rights. Here, I propose sentence reduction as such an alternative. Section A gives an overview of the proposal, and Section B argues that it will help solve the remedial deterrence problem.

### A. The Proposal

Appeals courts, upon identifying prosecutorial conduct resulting in a serious violation of a defendant’s rights but not affecting the trial verdict, should be empowered to reduce the defendant’s sentence as a remedy. Although this Article mostly focuses on appellate remedies, trial courts could likewise be empowered to reduce sentences (in addition to issuing curative instructions or other interlocutory remedies) for prosecutorial misconduct. Sentence reduction might also be permitted as a form of habeas corpus relief. At any of these stages, the reduction could be a fixed amount, percentage of the sentence, or number of levels in a sentencing guidelines scheme; or the court could be permitted to tailor it to the violation.<sup>62</sup>

If tailored, the reduction should be at least sufficient to compensate the defendant for any non-conviction-related harm she suffered, and bigger if necessary to deter or condemn misconduct effectively—i.e., in cases where the misconduct was significant but the harm to the defendant was relatively minor. For instance, deterrent and expressive rationales might require a greater reduction for deliberate, strategic misconduct than for conduct that had the same concrete effect on the proceedings but resulted from mere negligence. Likewise, a bigger reduction might be required to deter or condemn repeat prosecutorial offenders, even though the particular defendant receiving the reduction has suffered no additional harm due to the prosecutor’s prior misconduct.

I do not suggest that sentence reduction would be appropriate in all cases of prosecutorial misconduct. Often, reversal and other remedies are principally intended to prevent the imposition of criminal punishment without the defendant’s guilt being reliably proven by the state—to avoid the risk of wrongful conviction. Sentence reduction would be plainly inadequate to serve this purpose, and I do not advocate using it, at least not as the sole remedy,<sup>63</sup>

<sup>62</sup> See *infra* Part VI (discussing these options).

<sup>63</sup> In theory, sentence reduction could supplement reversal—the defendant could be entitled to a reduction if reconvicted on retrial, to compensate for the stress and inconvenience of having to be tried twice. This paper does not focus on that potential use of sentence reduction, but instead on its potential role as an *alternative* to remedies that courts are rarely

when prosecutorial misconduct undermines the court's confidence in the factual validity of the conviction.

But not every criminal procedure remedy serves that innocence protection rationale. Sometimes, remedies are justified by the need to deter unconstitutional conduct that, although it did not cause a miscarriage of justice in the case at hand, risks harming defendants in other cases or other members of society. Sometimes, they are grounded in corrective justice concerns, seeking to compensate for whatever harm the defendant did suffer even if she was not wrongfully convicted. And remedies can also serve expressive purposes: they signify that society finds the misconduct morally blameworthy, and that it values the defendant's humanity.

Sentence reduction *could* plausibly serve these three functions, providing a way for courts to deter and condemn misconduct, and remedy any resulting injury, without providing an undue windfall to guilty defendants. And none of these remedial purposes are well served by the current all-or-nothing remedies that courts are almost always unwilling to grant. Instead, when a court identifies serious prosecutorial misconduct but concludes that the misconduct did not affect the trial verdict, it might be better to permit the court to opt for a remedy of sentence reduction.

Such an approach would amount to a "lesser" alternative to the current remedies for some kinds of misconduct and a "greater" alternative for most. It would be a lesser remedy for misconduct that currently triggers automatic reversal or dismissal—*e.g.*, speedy trial violations and *Batson* violations. It would be a greater remedy for those forms of misconduct currently subject to harmless error review, which currently trigger no remedy at all if the court concludes the verdict was unaffected. In Part V, I explore the application of my proposal to each of these categories of cases, and explain why sentence reduction can help to solve various problems scholars have identified with the *Batson* and speedy trial remedies and with the harmless error doctrine.

## B. Sentence Reduction and Remedial Deterrence

If courts avoid issuing the various currently available remedies for prosecutorial misconduct, why should we expect them to be willing to order sentence reductions? Sentence reduction avoids a number of the costs associated with current remedies. Perhaps most important, it does not require the time and expense of retrial.<sup>64</sup> Nor does sentence reduction create the impression that a criminal is "getting off scot-free," and thus it may not be as politically proble-

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willing to invoke; obviously, using sentence reduction as an *additional* remedy would not solve this remedial deterrence problem.

<sup>64</sup> This would be true even if a separate resentencing hearing were required. See *United States v. Williams*, 399 F.3d 450, 461 (2005) (noting that resentencing procedures are "brief" and cost "far less" than retrials); Charles A. Wright, *Federal Practice and Procedure* § 856, at 511-12 (2004).

matic.<sup>65</sup> Because the court can tailor the reduction’s magnitude to the seriousness of the misconduct, the remedy need not feel—to the court or the public—like a windfall.<sup>66</sup> And some courts may even consider the resulting sentence to be a fairer one for the underlying crime—studies show that judges widely believe that modern sentencing schemes are overly harsh.<sup>67</sup>

Because of the remedial deterrence problem, however, the sentence-reduction scheme I propose does *not* include a direct sanction component analogous to the one Calabresi as well as Caldwell and Chase propose for Fourth Amendment violations. Those scholars suggest that the issuance of a sentence reduction should automatically trigger a fine or other direct sanction against the police officer who conducted the unlawful search.<sup>68</sup> That proposal has some logical appeal if (as the authors concede) police officers do not care much about the sentence reduction itself, for otherwise the scheme would have little deterrent effect. But if Kamisar’s response is correct—that courts will be unwilling to sanction the police—then adding the automatic direct sanction component may be worse than unhelpful; it may be counterproductive. Courts then could only avoid the direct sanction by declining to find a Fourth Amendment violation in the first place.

In any event, regardless of whether they are willing to sanction police, it is very clear that courts are extremely reluctant to sanction *prosecutors* directly, even more reluctant than they are to reverse criminal convictions.<sup>69</sup> So in the context of prosecutorial misconduct, it does not make sense to require

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<sup>65</sup> See *supra* Part I. While the public generally favors strong sentences, see *infra* Part III.B, sentence reduction may nonetheless be more palatable than reversal and certainly more so than dismissal. Cf. Starr, *supra*, at 717-18 (discussing the Rwanda Tribunal’s turn to sentence reduction as an alternate remedy when it was facing a catastrophic political backlash to its decision to release a genocide defendant on procedural grounds).

<sup>66</sup> See *infra* Part IV.C (discussing importance of proportionality and desert to public acceptance of remedies).

<sup>67</sup> See Calabresi, *supra*, at 116 (“Because the sentencing guidelines are so severe, judges are not unduly worried about whether a criminal goes to jail for thirty-five years as opposed to forty.”); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1214-15, 1222-23, 1236-37 (2004) (observing that while prosecutors “love” the federal sentencing guidelines, judges think they are too severe and sentence at the bottom of the range); Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, n.252 (2001).

<sup>68</sup> See *supra* note 10 and accompanying text.

<sup>69</sup> While studies have found virtually no instances of direct sanctions, see *supra* Part I, the Center for Public Integrity’s study of appellate opinions nationwide between 1970 and 2003 found 2012 cases in which courts granted the defendant a remedy for prosecutorial misconduct. See Steve Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct?*, The Center for Public Integrity, June 26, 2003, available at <http://www.publicintegrity.org/pm/default.aspx?sID=main> (noting, however, that this still means reversals are a “relative rarity,” that most decisions find harmless error, and that most instances of misconduct are probably never discussed in appellate opinions).

direct sanctions—the likely result would be remedial deterrence. Instead, an effective sentence reduction scheme must stand on its own merits, rather than merely being a trigger for the “real” sanction. Thus, for the scheme to work, the fear of sentence reduction itself must adequately deter prosecutorial misconduct. The next Part considers whether it can do so.

### III. Sentence Reduction as a Deterrent: Prosecutors’ Incentives

The effectiveness of a remedy in deterring prosecutorial misconduct turns on two factors: the probability that it will be invoked in the event of misconduct, and the cost it imposes on prosecutors if it is invoked.<sup>70</sup> The economic literature on deterrence in other contexts strongly suggests that the first factor is by far the most important.<sup>71</sup> This exacerbates the problem with the current remedial scheme—deterrent schemes that rely on large penalties to compensate for very low probability of punishment tend to fail.<sup>72</sup> If, as I argue above, courts are significantly more likely to grant sentence reduction than the present remedies, that factor may far outweigh the difference between the magnitudes of the cost experienced by prosecutors.

And indeed, many commentators have recognized that although appellate reversals are costly to prosecutors, their rarity greatly undermines their deterrent effect.<sup>73</sup> As the Second Circuit observed in *United States v. Modica*, “[g]iven this Court’s unwillingness to use reversals as a means of disciplining prosecutors, threats to do so seem unlikely to have much effect. As a practical matter, prosecutors know that courts are reluctant to overturn convictions because of improper remarks, when the defendant’s guilt is clear.”<sup>74</sup>

Still, even a high likelihood of sentence reduction will not deter misconduct unless it imposes some cost on prosecutors that outweighs the gains misconduct offers. Oren Bick, the author of the most comprehensive scholarly article on sentence reduction in Canada, has questioned its deterrent value, al-

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<sup>70</sup> See, e.g., Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 292 (1983) (discussing deterrence of crime).

<sup>71</sup> E.g., Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 380 & n.112 (1997) (citing studies showing disproportionate effect of probability and arguing that the best explanation is that low probability undermines the informal social stigma that accompanies formal penalties); Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169.176 n.12 (1968) (“Certainty of detection is far more important than severity of punishment.”).

<sup>72</sup> See Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 NW. UNIV. L. REV. 655, 660 (2006) (arguing that “[d]eterrence falls off rapidly (and nonlinearly) with lower probabilities of enforcement, and higher penalties are unable to counteract these losses” and citing explanations including social stigma and heuristic risk assessment).

<sup>73</sup> See Cicchini, *supra*, at 348; Meares, *supra*, at 900; Steele, *supra*, at 976-77; Alschuler, *supra*, at 647; see also *supra* Part V.C (collecting scholarship arguing that harmless error review undermines deterrence).

<sup>74</sup> 663 F.2d at 1183.



though he provides no empirical basis for his position and does not focus on prosecutors specifically.<sup>75</sup>

In this Part, I examine prosecutorial incentives and conclude that sentence reduction *would* likely be an effective deterrent. No empirical studies have given a comprehensive account of all of the various factors influencing prosecutorial behavior and their relative importance.<sup>76</sup> Still, these factors are illustrated, albeit in a piecemeal fashion, by a large body of empirical and theoretical scholarship on plea-bargaining, charging, and other prosecutorial behavior. This Part draws from that literature insights into how prosecutors might respond to the risk of remedial sentence reduction. Section A briefly addresses the gains prosecutors seek through misconduct; Section B considers the costs imposed by sentence reduction from the perspective of several different theoretical models of prosecutorial incentives; and Section C reviews the existing empirical evidence about prosecutors’ sentencing-related behavior.

#### A. The Gains Offered By Misconduct

Before considering the costs that sentence reduction imposes on prosecutors, a word is in order about the gains they seek from misconduct, as it is the comparison between expected costs and expected gains that determines the remedy’s deterrent effect.

Usually, deliberate misconduct is presumably committed to increase the chance of conviction.<sup>77</sup> This is true even in cases in which the misconduct can be identified as “harmless” *ex post*. Such misconduct must have been committed because of a perceived benefit, even it ultimately brought the prosecutor no gain—the *ex ante* decision to commit misconduct has to be based on a probabilistic risk assessment because the prosecutor has incomplete information about how the trial will go.<sup>78</sup> Some misconduct may also be motivated by non-conviction-related reasons—for instance, speedy trial violations may often be the product of negligence or laziness.

If misbehaving prosecutors are motivated by a desire for convictions, it might be objected, how can a remedy that fails to reverse convictions deter them? I concede that sentence reduction cannot accomplish perfect deterrence, nor can any other remedial scheme—in some cases the gains from misconduct

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<sup>75</sup> Bick, *supra*, at 221.

<sup>76</sup> See Dunahoe, *supra*, at 59; Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 942, 966-67 (1997); see also William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 46 n.158 (1997) (noting that most literature on prosecutors uses a fairly unsophisticated model of incentives).

<sup>77</sup> See Alicia M. Hilton, *Alternatives to the Exclusionary Rule After Hudson v. Michigan*, 53 VILL. L. REV. 47, 80 (2008) (discussing studies on why prosecutors lie or suborn perjury); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 430 (1992) (discussing why prosecutors make improper statements).

<sup>78</sup> See Gershman, *supra*, at 430 (“That prosecutors actually do assess the risks and benefits associated with misconduct is an intuitively, anecdotally, and empirically well-founded conclusion.”).

will be too tempting. For instance, suppose a prosecutor whose overriding priority was getting convictions were 100% certain that misconduct would make the difference between winning and losing a particular case. It would not be possible to deter her from committing the misconduct via a threat of sentence reduction as the only possible remedy, because even if that remedy were imposed, it would leave her gain partially intact.

But if sentence reduction imposes a significant cost on prosecutors and its imposition is relatively likely, it may deter a large number of instances of misconduct *even assuming that prosecutors generally care more about convictions than about sentences*. This is principally because the gains of misconduct are also subject to uncertainty. The situation facing prosecutors is rarely so black and white as the hypothetical above—especially in the kinds of cases that are the focus of this Article, namely those in which the misconduct is ultimately found *not* to have affected the verdict. If the same prosecutor believes that committing misconduct will increase the likelihood of conviction from, say, 75% to 85%, then it will be possible to deter her with a threat of sentence reduction, provided that the cost and likelihood of the reduction impose an expected penalty that exceeds the 10% chance of the greater gain.

In addition, the scheme I propose does *not* leave sentence reduction as the only possible remedy. Rather, it maintains reversal as a required remedy for cases in which misconduct *does* affect the verdict, and leaves it optional for other cases. Sentence reduction would apply only in cases in which the verdict was unaffected—in which the prosecutor, in theory, achieved no conviction-related gain due to the misconduct. So it imposes a cost that, if the harmlessness determination is accurate,<sup>79</sup> is unaccompanied by a prosecutorial gain.

In any event, the potential gains from misconduct will vary from case to case, and I do not give an extended account of those gains here, other than explaining why various prosecutorial motivations lead them to care about convictions as well as sentences. The gains offered by undetected misconduct will be the same regardless of the remedial scheme; what differs is the likelihood that the court will identify the misconduct and the cost of the penalty imposed in that event. Thus, the remainder of this Part focuses on comparing the cost and likelihood provided by sentence reduction with those provided by current all-or-nothing remedial schemes.

### **B. Models of Prosecutorial Incentives**

Although prosecutors' interests vary, there are many reasons to believe that most of them would consider a court-ordered sentence reduction to be a significant penalty for misconduct. Such reductions would impair a variety of different objectives that are each likely to be important to many prosecutors. Here, I assess the costs imposed by sentence reduction from the perspective of

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<sup>79</sup> Prosecutors might still gain if courts *wrongly* deem errors harmless. But the same weakness afflicts harmless error review under current all-or-nothing remedial schemes—at least with sentence reduction as an option, the prosecutor does not retain *all* the benefits of a conviction in such instances.

several different ideal-typical prosecutors, each representing one of those different objectives.

(1) *Detering crime.* First, consider a hypothetical prosecutor, McGruff, motivated solely by the desire to use the office’s resources efficiently to reduce crime as much as possible. Many scholars writing about prosecutorial decision-making from a law-and-economics perspective have assumed that this is what motivates prosecutors.<sup>80</sup> And indeed, it is probably safe to say that this is at least a significant part of many prosecutors’ motivations.<sup>81</sup> Prosecutors, after all, have chosen careers in law enforcement, usually over higher-paying private-sector jobs, perhaps for altruistic reasons.<sup>82</sup> Moreover, their superiors generally have a strong political interest in reducing crime,<sup>83</sup> and that interest may influence line prosecutors via office policies and norms.<sup>84</sup>

McGruff would generally prefer longer sentences for crimes to shorter ones. As Frank Easterbrook explained, he seeks to “obtain the maximum deterrence from his available resources.”<sup>85</sup> Because deterrence is a function of both the probability and the magnitude of the penalty, the prosecutor seeks “to maximize the expected number of convictions weighted by their respective [sentences],” insofar as his budget will allow.<sup>86</sup> McGruff, in short, seeks to maximize expected sentence-years. He is willing to accept shorter sentences

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<sup>80</sup> E.g., Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, n.123 (2005); Scott Baker et al., *Prosecutorial Resources, Plea Bargaining, and the Decision to Go to Trial*, 17 J.L. ECON. & ORG. 149, 154-55 (2001); Easterbrook, *supra*, at 295-96; William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 63 (1971); see also Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 261 (2000) (assuming that along with considering “career concerns,” prosecutors “seek to reduce crime”).

<sup>81</sup> See Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 330 (2002) (“Prosecutors, like virtually everyone else, view crime as a grave problem.”); Glaeser et al., *supra*, at 268 (finding empirical support, based on federal prosecutors’ charging decisions, for both the propositions that prosecutors maximize social welfare and that they maximize career advancement). Prosecutors no doubt also have competing personal interests that may diverge from the public interest in deterrence. Keith N. Hylton & Vikramaditya Khanna, *A Public Choice Theory of Criminal Procedure*, 15 SUP. CT. ECON. REV. 61, 73 (2007); accord William J. Stuntz, 86 VA. L. REV. 1871, 1893 (2000); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 50-51 (1988); Easterbrook, *supra*, at 300-01. However, as Schulhofer observes, in the comparatively few cases that go to trial (i.e., those most likely to give rise to the types of prosecutorial misconduct discussed in this Article), even prosecutors primarily interested in private career concerns have a strong reputational interest in pursuing the “public interest in deterrence,” because their “professional competence is openly on display.” Schulhofer, *supra*, at 63-64.

<sup>82</sup> See Richman, *Old Chief*, *supra*, at 966.

<sup>83</sup> See *infra* note 103 and accompanying text.

<sup>84</sup> See *infra* notes 119 and accompanying text.

<sup>85</sup> Easterbrook, *supra*, at 295-96.

<sup>86</sup> Landes, *supra*, at 63. See also Smith, *supra*, at n.123 (noting that “two key factors in deciding whether or not to prosecute will be the likelihood of conviction and the potential punishment”).

pursuant to plea-bargains in exchange for certainty of conviction (avoiding the risk that *no* sentence-years will result) and saved resources (allowing him to pursue more sentence-years in other cases). But once he has decided to pursue a case to trial, receiving a reduced sentence is plainly a setback.<sup>87</sup>

(2) *Efficient case processing*. Second, consider another hypothetical prosecutor, Sleepy, who is less public-minded—she is motivated entirely by the desire to maximize her own leisure time without losing her job, and thus seeks to dispose of her docket as quickly as she can get away with doing. While it would be unfair to suggest that many prosecutors are like Sleepy, it is reasonable to assume that most do consider efficient management of their dockets to be an important part of the job (as, in fact, does the more altruistic McGruff).<sup>88</sup> So Sleepy serves as a useful ideal type.

Sleepy seeks to induce as many defendants as possible to plead guilty on terms that are minimally sufficient to satisfy Sleepy's superiors. But defendants will not plead guilty unless they believe that, should they refuse, Sleepy will take them to trial and win an expected sentence longer than the one they will receive if they plead. Sleepy thus wants a high ratio between expected trial sentences and expected post-plea sentences—a high expected penalty for going to trial.<sup>89</sup> Thus, while Sleepy does not seek to increase the sentences of those defendants who plead guilty (indeed, she seeks to reduce them), she *does* want high sentences for those who go to trial. So a sentence reduction based on her trial misconduct, again, would count as a setback.

To be sure, some defendants no doubt enter plea agreements without much information about the specific prosecutor they face, which weakens Sleepy's incentive to pursue a reputation for winning high sentences at trial. But that point applies equally to the reversal remedy—if her reputation doesn't matter to her ability to get pleas, Sleepy shouldn't care about avoiding reversal. Indeed, Sleepy shouldn't have any incentive to commit deliberate misconduct during the trial process either, which would make her incentives largely irrelevant. If Sleepy *does* care about convictions enough to be willing to commit misconduct, it must be because she does think at least some future defendants

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<sup>87</sup> If McGruff's understanding of deterrence theory is particularly sophisticated, taking into account discounting, then it will take a larger sentence reduction to deter him from misconduct the longer the base sentence is. Economist-prosecutor McGruff would understand that each added year in a criminal sentence has a decreasing marginal deterrent effect on crime, because criminals (like other people) care less about potential harms that await them far into the future. See Easterbrook, *supra*, at 295.

<sup>88</sup> Commentators writing about prosecutorial incentives generally so assume. *E.g.*, Stuntz, *supra*, at n.159. In addition, one relatively recent survey of federal prosecutors found a “growing trend” so-called “deadwood” career prosecutors who “seek the easiest types of cases.” Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys' Offices*, 23 JUST. SYS. J. 285-87 (2002); *but see id.* at 287 (suggesting that such prosecutors still remain a relatively small minority).

<sup>89</sup> See Miller, *supra*, at 1258 (arguing that a “high plea/trial differential” encourages plea-bargaining and “reflects prosecutorial dominance”).

or their counsel will take her reputation for trial success into account when deciding whether to plead.

(3) *Career advancement.* Now consider Hotshot and Moneybags, young ADAs whose sole objective is to advance their own career ambitions. Again, these are merely ideal types—but many commentators have suggested that career interests are important motivators for prosecutors.<sup>90</sup> Hotshot hopes to climb the internal office ladder; Moneybags plans to cash in on his experience by moving to a private law firm in two or three years.<sup>91</sup> Their motivations differ in some ways—Moneybags may be especially concerned with gaining particularly relevant trial experience or with having positive interactions with the defense bar.<sup>92</sup> But like Hotshot, Moneybags cares about impressing his superiors by successfully implementing the office’s institutional agenda—Moneybags may not be seeking internal promotion, but he does need positive references and a general reputation as a successful prosecutor.<sup>93</sup>

Both Hotshot and Moneybags are likely to prefer longer sentences. Many offices actually require their line prosecutors to seek the highest available sentences.<sup>94</sup> Junior prosecutors’ job performance is often evaluated in part

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<sup>90</sup> *E.g.*, Dunahoe, *supra*, at 49, 60; Lochner, *supra*, at 277; JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES 174 (1978).

<sup>91</sup> Much of the literature on prosecutors has focused on federal prosecutors, and has assumed that most of them are transient like Moneybags. *See* Lochner, *supra*, at 272-74 (reviewing literature). Interestingly, this appears no longer to be accurate, as Todd Lochner’s more recent study finds that the composition of U.S. Attorneys’ Offices has shifted heavily toward careerists like Hotshot. *Id.* at 281-84. In any event, as discussed below, Hotshot and Moneybags are likely to have fairly similar reasons to avoid sentence reductions.

<sup>92</sup> *See* Richard T. Boylan et al., *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J. L. & ECON. 627, 627-28, 648 (2005) (finding that in districts with high private-sector salaries, federal prosecutors seek to impress private sector employers by bringing high-profile cases to trial).

<sup>93</sup> *See* RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 620 (“Future employers will evaluate a prosecutor by his success in litigation. . . .”); Fisher, *supra*, at 206 (noting that both transient and career prosecutors face “pressures to demonstrate professional competence”).

<sup>94</sup> Under both Bush Administrations, for instance, DOJ has held that prosecutors have a “General Duty to Charge and to Pursue the Most Serious, Readily Provable Offense in All Federal Prosecutions,” where seriousness is measured by length of sentence. Memorandum from John Ashcroft to All Federal Prosecutors [hereinafter Ashcroft Memo] (Sept. 22, 2003), *available at* <http://www.crimelynx.com/ashchargememo.html>; Memorandum from Richard Thornburgh to Federal Prosecutors, “Plea Policy for Federal Prosecutors” (1989), *reprinted in* 6 *Federal Sentencing Reporter* 347 (1994); *see* Miller, *supra*, at 1255 (observing that this “basic policy” in fact dates back to 1980); *but see id.* at 1257 (noting exceptions to these policies). “The use of statutory enhancements is strongly encouraged” and prosecutors are instructed to seek increased penalties “in all appropriate cases.” Ashcroft Memo, *supra*. Since 2005, federal prosecutors have additionally been required to oppose every sentence below the appropriate Guidelines range. Memorandum from James B. Comey to All Federal Prosecutors (Jan. 28, 2005), *available at* [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/files/dag\\_jan\\_28\\_comey\\_memo\\_on\\_booker.pdf](http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf).

on the basis of the sentences they obtain.<sup>95</sup> Conviction rate is also important, of course,<sup>96</sup> and appellate reversal would presumably be a bigger “loss” than a reduced sentence—so to be as effective in deterring Hotshot and Moneybags from misconduct, sentence reduction would have to be perceived as more likely. And efficient docket management is also generally an important measurement of performance—so Hotshot and Moneybags, like Sleepy, have an interest in maintaining a high trial penalty.

Even more than they fear the sentence reduction in and of itself, Hotshot and Moneybags are likely to fear the professional embarrassment of being found by an appellate court to have committed wrongdoing.<sup>97</sup> Perhaps they might not experience much professional harm as a result of a lenient trial judge simply going easy on a defendant—their superiors might not even notice and might not hold it against Hotshot or Moneybags if they did notice. But what if an appeals court ordered a reduction in the trial sentence on the express basis of a prosecutor’s violation of the defendant’s rights? Even assuming the court named no names, there is little doubt that their superiors would find out.<sup>98</sup>

So if having the option of a lesser remedy (sentence reduction rather than reversal) makes the court more willing to make an embarrassing finding of prosecutorial wrongdoing, that option might deter Hotshot and Moneybags even assuming they *didn’t* care very much about the length of the sentence itself. In theory, this reputational sanction might have some deterrent effect even absent *any* concrete remedy—i.e., where misconduct is identified but deemed harmless. But Hotshot and Moneybags may well assume that their colleagues won’t put much stock in such toothless reprimands—many scholars

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<sup>95</sup> NAT’L DISTRICT ATTORNEYS ASSOC., PERFORMANCE MEASURES FOR PROSECUTORS 14 (2007), available at [http://www.ndaa.org/pdf/performance\\_measures\\_findings\\_07.pdf](http://www.ndaa.org/pdf/performance_measures_findings_07.pdf). (listing “sentence length” as one of eight “core performance measures” for prosecutors); Fisher, *supra*, at 206 (observing that prosecutors’ “professional competence . . . tends to be measured in terms of ‘wins,’ i.e., ‘heavy’ convictions and sentences”); Meares, *supra*, at 885 (“One way that effectiveness can be measured is by a combination of the prosecutor’s conviction rate and the severity of sentences on those convictions.”).

<sup>96</sup> See, e.g., Richman, Old Chief, *supra*, at 968; Robert L. Rabin, *Agency Criminal Referrals in the Federal System*, 24 STAN. L. REV. 1036, 1045 (1972).

<sup>97</sup> See Meares, *supra*, at 918 & n.52 (observing that prosecutors care greatly about impressing colleagues and seek to “avoid embarrassing losses”); Jerome H. Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOL. 52, 57 (1967) (stating that prosecutors seek “a reputation for utter credibility”); Richman, Old Chief, *supra*, at 968-69 (citing Skolnick, *supra*); Fisher, *supra*, at 215-16 (noting that a reputation for overzealousness can harm prosecutors’ career prospects).

<sup>98</sup> Embarrassment would be an even bigger concern if courts *did* publish the names of misbehaving prosecutors—but even though courts almost never do so now, reversals still trigger professional consequences. See Alshuler, *supra*, at 647 (noting that an ADA’s superiors “read appellate opinions” and that when “the behavior of an assistant district attorney leads to a reversal, his superiors know about it”). Even the so-called “deadwood” AUSAs described by Lochner might likewise be motivated to avoid this embarrassment, since judicially punished misconduct might provide the rare “good cause” needed to fire underperforming civil servants. See Lochner, *supra*, at 283-84.

and courts have observed that prosecutors pay limited attention to judicial findings of rights violations until they are combined with some effect on the “bottom line.”<sup>99</sup>

(4) *Winning*. A fifth hypothetical prosecutor, Champ, is hyper-competitive—he thrives on the adversarial process, and his overriding incentive is simply to win. Although he represents an extreme, competitiveness is a trait he shares with many prosecutors.<sup>100</sup> Champ pays a lot of attention to his conviction rate. But he doesn’t just want to rack up easy convictions—he wants high-stakes wins, and thus aims for severe sentences.<sup>101</sup> He wants to win at the sentencing stage of the proceeding, not just at the trial stage—indeed, in a system dominated by plea-bargaining, sentence length is the main way he can quantify his success. Because he also wants to induce the most favorable pleas, he too needs to maintain a steep trial penalty, requiring high sentences after trial convictions. And he wants to win on appeal, too, which means preserving the trial result.<sup>102</sup> A sentence reduction based on his misconduct would thus amount to a loss.

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<sup>99</sup> Fisher, *supra*, at 213; *accord* United States v. Pallais, 921 F.2d at 691-92 (7<sup>th</sup> Cir.); Allen, *supra*, at 334. One former federal prosecutor told me that the actual inclusion of the word “misconduct” in an opinion might significantly embarrass prosecutors even absent a concrete remedy, because that word is understood as a signal, and that courts vary in their willingness to use this term. Email from Mary Fan, August 18, 2008. To avoid remedial deterrence, my proposal would not require courts to use that term; sentence reduction would be triggered by the finding of a rights violation caused by the prosecutor’s actions, not by any “magic word.” In addition, while most prosecutors might well be ashamed by a misconduct finding standing alone, the “bad actors” who commit most misconduct may be likelier to disregard such findings absent some remedy. Reviews of appellate opinions show that misconduct “is frequently committed by repeat prosecutorial offenders,” Dunahoe, *supra*, at 68, suggesting that some prosecutors are not significantly discouraged by a first finding of misconduct, much less removed from their jobs as a result.

<sup>100</sup> See Meares, *supra*, at 918 (describing the “desire to win” as “a primary characteristic of existing prosecutorial culture”); Richman, Old Chief, *supra*, at 967-68; Fisher, *supra*, at 198 (discussing “conviction psychology”).

<sup>101</sup> See Richard Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1505 (1999) (arguing that “the desire to win, weighted by the stakes in the case (roughly, the sentence if the defendant is convicted), is the most important argument in the prosecutorial utility function”); Fisher, *supra*, at 206, 208 (arguing that the adversary system drives prosecutors toward “maximizing convictions and punishments” and that “wins” are defined as “‘heavy’ convictions and sentences”).

<sup>102</sup> Even if Champ turned over the appeal to a different prosecutor, as is common, see James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2120 & n.224 (2000), loss on appeal would hurt his “bottom line.” See Meares, *supra*, at 900. Liebman notes that the length of capital appeals processes means that the trial prosecutor involved may have left the agency by the time the appeal is decided. Liebman, *supra*, at 2119-2120. This is less true in non-capital cases, in which appeals are more efficient, but in any event, such turnover would hamper the deterrent effect of any appellate remedy equally.

(5) *Political gain.* What about Chief, the elected district attorney?<sup>103</sup> Her motives, let's hypothesize, are purely political—she responds to votes.<sup>104</sup> Chief will want to reduce crime, because voters pay great attention to crime rates—so she will share McGruff's incentives.<sup>105</sup> Beyond the actual crime rates, Chief also wants to *appear* tough on crime and successful against criminals. That means pushing for tough sentences, which the public overwhelmingly supports.<sup>106</sup> And it means that (like Champ) she cares about the bottom line—she wants her office to win,<sup>107</sup> which includes winning tough sentences.<sup>108</sup> On the other hand, Chief also doesn't want to be perceived as abusing her power or letting her line prosecutors do so. So she is likely to be embarrassed by a judicial opinion reducing a sentence on the basis of her misconduct or that of her subordinates.<sup>109</sup> Even if the opinion does not name the individual prosecutor involved, it makes the office as a whole look bad. And if the public is distressed by the reduced sentence, it may hold her to blame.

6. *Justice.* Finally, let's imagine a different sort of prosecutor, Angel. Angel's sole motivation is the one set forth for all prosecutors by the Supreme Court, and one many prosecutors fortunately take seriously: to “do justice.”<sup>110</sup> As she sees it, her duty is to seek fair punishments for crime. Angel is of

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<sup>103</sup> See Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334, 335 (2002) (noting that over 95% of chief prosecutors at the state and local level are elected).

<sup>104</sup> E.g., James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1558 (1981); see also Levinson, *Making Government Pay*, *supra*, at 420 (discussing incentives of government actors generally).

<sup>105</sup> See Daniel C. Richman and William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 602-03 (arguing that DAs are “fixated” on crime rate reports); Thompson, *supra*, at 331.

<sup>106</sup> See, e.g., Talbot “Sandy” D'Alemberte, *A Critique of Roscoe Pound's Popular Dissatisfaction with the Administration of Justice*, 48 S. TEX. L. REV. 969, 971-72 (2007) (citing the “political reward for prosecutors who . . . obtain long sentences”); Gordon & Huber, *supra*, at 335 n.1 (finding that 77% of surveyed sample wanted harsher sentences). Even unelected prosecutors may be subject to political pressures to increase sentences. See SUZANNE WEAVER, DECISION TO PROSECUTE 144-45 (1977) (discussing congressional oversight of DOJ antitrust prosecution policy).

<sup>107</sup> See Gordon & Huber, *supra*, at 350 (arguing that “voters will always reward prosecutors for obtaining convictions”); Richman, *Old Chief*, *supra*, at 967; Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 442 n. 164 (1992); Fisher, *supra*, at 205.

<sup>108</sup> See Gordon & Huber, *supra*, at 337 (noting that district attorney candidates emphasize sentences in addition to conviction rates)

<sup>109</sup> *Id.* at 335 & n.2 (noting that misconduct sometimes produces “well-publicized scandals”); Fisher, *supra*, at 207 (“Unless it results in reversal of the conviction or public scandal, the prosecutor's choice to act ‘overzealously’ can be cost-free.”).

<sup>110</sup> See *Berger v. United States*, 295 U.S. 78, 88 (1938) (holding that the government's interest is “that justice shall be done”). See also Fisher, *supra*, at 216 (citing professional standards).



course unlikely to commit unconstitutional misconduct to begin with,<sup>111</sup> so her incentives are less important—but let’s assume that she can be tempted into a fall from grace, so to speak, if it serves what she sees as a just end.

Angel does not aim for severe punishments *per se*—she may think leniency is appropriate in some circumstances, and severity in others. But she nonetheless would want to avoid sentence reduction on the basis of misconduct. After all, she has extremely broad discretion over charging<sup>112</sup> and plea-bargaining,<sup>113</sup> and she can also make a sentence recommendation that judges are likely to take seriously (and rarely exceed).<sup>114</sup> So Angel has plenty of tools available to achieve a lower sentence for a particular defendant if that’s what justice requires. Once she has selected the charges, won at trial or accepted a plea, and recommended a sentence, the defendant will usually receive a sentence no higher than what she believed was just. A subsequent sentence reduction on the basis of misconduct will seem, to Angel, to subvert the ends of justice. Moreover, as an ethically conscious member of the profession, she may “find a judicial rebuke especially stinging.”<sup>115</sup>

None of these archetypes, of course, perfectly describes real-world prosecutors. Different prosecutors have varying incentives<sup>116</sup>—even within the same office<sup>117</sup>—and each may have multiple interests.<sup>118</sup> Most prosecutors probably do want to reduce crime and achieve just outcomes, but also cannot help but care about their careers and reputations, have no choice but to seek efficient docket management, and feel driven to win. In addition, their preferences are not fixed—they are shaped in part by their office culture,<sup>119</sup> and they may evolve over the course of their career.<sup>120</sup> Yet the hypotheticals above suggest that despite this complexity, virtually all prosecutors will be dismayed by a

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<sup>111</sup> If Angel follows the Supreme Court’s admonition to do justice, she will avoid using “improper methods” to achieve a conviction. *See Berger*, 295 U.S. at 88.

<sup>112</sup> Even if office policy requires her to charge the most serious possible offense, in practice she probably has some discretion. *See Miller, supra*, at 1257 (noting loopholes in Bush administration policies); Richman, *supra*, at 2068-69; Dunahoe, *supra*, at 63.

<sup>113</sup> *E.g.*, Bowman & Heise, *supra*, at 1122-24.

<sup>114</sup> Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1011 n.3 (2005); *see* Bowman & Heise, *supra*, at 1116-18 (noting that federal prosecutors can loosely define “substantial assistance” to justify a downward sentencing departure).

<sup>115</sup> Alschuler, *supra*, at 647.

<sup>116</sup> *See* Richman, *Prosecutors and their Agents, supra*, at 758; Bowman & Heise, *supra*, at 1048-49.

<sup>117</sup> *See* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion* (Feb. 24, 2008), *avail.* at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1099064#PaperDownload](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1099064#PaperDownload); Richman, *supra*, at 2056.

<sup>118</sup> *E.g.*, Glaeser et al., *supra*, at 260-61, 268.

<sup>119</sup> *See* Meares, *supra*, at 918; Fisher, *supra*, at 209-210; Leanord R. Mellon et al., *The Prosecutor Constrained by His Environment*, 72 J. CRIM. L. & CRIMINOLOGY 52, 79 (1981).

<sup>120</sup> *See, e.g.*, Fisher, *supra*, at 206-07; George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 117.

sentence reduction issued on the basis of their misconduct. As pertains to sentencing, their motivations are mutually reinforcing.

### C. Evidence About Real Prosecutors' Preferences

Most scholars have assumed that prosecutors generally prefer higher sentences,<sup>121</sup> and the existing empirical evidence supports that conclusion. First, prosecutors' offices tend to support tough sentencing laws.<sup>122</sup> Some scholars suggest that this is because such systems increase prosecutors' control over the plea-bargaining process, not because of a preference for harshness *per se*.<sup>123</sup> Even if so, however, that rationale supports the point that prosecutors require a significant trial penalty<sup>124</sup>—even if they do not mind leniency for defendants who plead, they want post-trial sentences to be harsh, and thus would want to avoid sentence reduction as a consequence of misconduct during the pretrial or trial process. In addition, prosecutors who can choose to charge particular conduct under one of several criminal provisions generally choose the one carrying the highest sentence.<sup>125</sup> As noted above, many offices *require* prosecutors to do so.<sup>126</sup> District attorney candidates sometimes campaign on a platform of increased sentence severity.<sup>127</sup> And the culture of prosecutors' offices may create “pressures . . . to renounce quasi-judicial values in favor of pursuing penal severity.”<sup>128</sup>

There may well be exceptions—not every prosecutor pushes for the strongest sentence in every circumstance, obviously, just as not every prosecu-

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<sup>121</sup> See, e.g., Smith, *supra*, at 896, 928 (noting that prosecutors “have strong institutional reasons to prefer severity” and that “increase in the potential punishment will tend to make a prosecution more attractive”); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1480 (1993) (stating that in plea-bargaining, prosecutors will “seek to maximize ‘profit’ [by extracting pleas near] the upper end of the range of sentencing outcomes”); Albert Alschuler, *Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52 (1968) (noting that prosecutors seek to “maximize both the number of convictions and the severity of the sentences”); see *supra* note 80.

<sup>122</sup> See, e.g., Troy Anderson, *D.A., Sheriff Say Inmates Will Soon Serve Longer Terms*, DAILY NEWS OF L.A., Nov. 9, 2006, at N6; Bob Bernick Jr., *No more 5-to-life sentences for killers in Utah?*, DESERET MORNING NEWS, Sept. 25, 2005; Matthew Franck, *Prosecutors criticize child-sex bill*, ST. LOUIS POST-DISPATCH, Apr. 27, 2006, at D4; Andy Furillo, *Revisions to three-strikes law sought*, CONTRA COSTA TIMES, Jan. 18, 2006, at F4; Jonathan Saltzman, *Push is on to Keep Sex Criminals Locked Up*, BOSTON GLOBE, Oct. 25, 2005, at A1; Range Stacey, *Embezzlers may face tougher penalties under Mich. Proposal*, LANSING ST. J., Sept. 25, 2006, at 1A.

<sup>123</sup> E.g., Miller, *supra*, at 1215.

<sup>124</sup> Indeed, as Miller puts it, prosecutors like the federal sentencing guidelines because they have created “vastly greater prosecutorial control not only after the actual sentences, but over the plea/trial differential.” *Id.* at 1253.

<sup>125</sup> Smith, *supra*, at 922-925.

<sup>126</sup> See *supra* note 94.

<sup>127</sup> Sanford & Huber, *supra*, at 337.

<sup>128</sup> Fisher, *supra*, at 254-55; see *supra* notes 100, 119.

tor seeks convictions at all costs.<sup>129</sup> For instance, in federal drug cases, given the particularly harsh applicable sentencing laws, prosecutorial leniency may be disproportionately common.<sup>130</sup> But as a general rule, most prosecutors, even the Angels, would prefer to avoid sentence reductions.

Moreover, the same subcategory of prosecutors who are the most likely to commit misconduct—the most overzealous ones, not the Angels—may experience the most harm from a sentence reduction. Many scholars have suggested that both a tendency to commit misconduct and an especially strong preference for “penal severity over other potential goals” are symptoms of the same underlying characteristic, namely “overzealousness.”<sup>131</sup>

Although prosecutors are likely to care less about sentences than about convictions,<sup>132</sup> sentence reduction might actually amount to a more serious penalty than appellate reversal, if sentence reductions were made final while reversed convictions can be reinstated after retrial.<sup>133</sup> In any case, convictions clearly aren’t everything to prosecutors—for instance, they often charge more serious offenses carrying higher sentences even when doing so significantly increases the chance of acquittal.<sup>134</sup>

The trick to improving deterrence vis-à-vis the all-or-nothing system—and it may be a challenging one—would be calibrating the sentence reduction to a magnitude that is significant enough for prosecutors to fear it, but not so significant that courts will treat it as the functional equivalent of a reversal or dismissal (and thus be unwilling to grant it). This task might require some trial and error.<sup>135</sup> Leaving the magnitude of the reduction up to the appeals court would presumably take care of the second concern, but it is not clear whether it would result in reductions so small that their deterrent effect would be less than the current system. That result would be less likely if prosecutors are substantially motivated by fear of professional embarrassment—*any* reduction would

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<sup>129</sup> Alissa Pollitz Worden, *Policymaking By Prosecutors*, 73 JUDICATURE 335, 335 (1990); Fisher, *supra*, at 245-46 & n.197.

<sup>130</sup> Bowman & Heise, *supra*, at 1049-50, 1131-33 (2001).

<sup>131</sup> Fisher, *supra*, at 198-200 (collecting cites); Dunahoe, *supra*, at 68.

<sup>132</sup> Conviction rates are probably the most basic measurement of prosecutorial performance. *E.g.*, Catherine M. Coles, *Community Prosecution, Problem Solving, and Public Accountability: The Evolving Strategy of the American Prosecutor*, at 10, available at [http://www.hks.harvard.edu/criminaljustice/publications/community\\_prosecution.pdf](http://www.hks.harvard.edu/criminaljustice/publications/community_prosecution.pdf); Hylton & Khanna *supra*, at 85; Thompson, *supra*, at 331.

<sup>133</sup> *See* Cicchini, *supra*, at 336 (arguing that retrials greatly reduce the deterrent effect of reversal). Where charge-bargaining is permitted, the parties may respond to reversal by bargaining for a plea to a charge carrying a lesser sentence. *See* Posner, *supra*, at 644. Sentence reduction could be worse than reversal for the prosecutor if its magnitude exceeds the reduction the prosecutor would have to offer to get the defendant to accept a plea.

<sup>134</sup> Richman & Stuntz, *supra*, at 608.

<sup>135</sup> Neither legislatures nor courts will likely be able to predict precisely what level of reduction will have the ideal deterrent effect. But that problem is not unique to sentence reduction; similar uncertainty plagues *all* deterrent remedies in constitutional law. Meltzer, *supra*, at 290-91; *see* Dan Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 427-28 (1999).

be enough to call attention to the underlying misconduct. In any event, if there is truth to the apparent scholarly consensus that the current remedies for prosecutorial misconduct are largely devoid of deterrent effect, it may be time to take a chance on an alternative.<sup>136</sup>

#### IV. Sentence Reduction as a Corrective and Expressive Remedy

Constitutional remedies are not solely designed to deter misconduct, of course. Many are designed to compensate victims of rights violations or to express condemnation of wrongdoing. This Part discusses those remedial purposes in Sections A and B, respectively, and then argues in Sections C and D that all-or-nothing remedies for prosecutorial misconduct do not serve those purposes well and that sentence reduction could serve them better.

Obviously, if sentence reduction is much likelier to be granted, it may serve *all* remedial purposes better than current remedies do. But even assuming the remedies were equally likely to be granted, sentence reduction may actually serve corrective and expressive objectives better than all-or-nothing remedies do. It can be tailored to the magnitude of the harm suffered, offering more precision in compensating the defendant and making it less likely that the expressive message will be clouded by the perception of a windfall.

##### A. Criminal Procedure Remedies as Corrective Justice

At least since *Marbury v. Madison*,<sup>137</sup> U.S. constitutional law has encompassed the oft-invoked maxim that “there is no right without a remedy.” Constitutional remedies have traditionally sought to repair the impact of the violation “to the greatest possible degree”—that is, to make the defendant whole.<sup>138</sup> This idea, which is a form of “corrective justice,” has also played a central role in private law—although modern scholarship emphasizes efficiency concerns,<sup>139</sup> courts have traditionally designed private law remedies to re-

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<sup>136</sup> Tracey Meares has offered an interesting proposal to make prosecutors’ bonuses contingent on not having had an appeals court identify misconduct. Meares, *supra*, at 902. The proposal has the advantage that—like mine—it would penalize prosecutors for serious misconduct even if “harmless.” See *id.* at 914. But it would work better combined with sentence reduction. In harmless error cases, sentence reduction would give defendants a more concrete incentive to raise claims; under Meares’ scheme alone, their only incentive would be a possible desire to hurt the prosecutor. In other cases, providing a lesser remedy would make courts more willing to identify prosecutorial misconduct; Meares’ scheme, while adding extra punishment for prosecutors when courts do find misconduct, does not solve the remedial deterrence problems that make such findings unlikely.

<sup>137</sup> 5 U.S. (1 Cranch) 137, 163 (1803).

<sup>138</sup> *Davis v. Board of School Comm’rs*, 402 U.S. 33, 37 (1979); see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-83 (1976); Kent Roach, *The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies*, 33 ARIZ. L. REV. 859, 868-69 (1991); Meltzer, *supra*, at 249.

<sup>139</sup> *E.g.*, Jules Coleman, *The Costs of the Costs of Accidents*, 64 MD. L. REV. 337, 348-54 (2005) (describing and critiquing this shift away from corrective justice).

store the plaintiff to her “rightful position.”<sup>140</sup> It is deeply rooted in the English common law<sup>141</sup> and in legal systems throughout the world.<sup>142</sup> This principle is not without exceptions,<sup>143</sup> and constitutional remedies, like private law remedies, serve other purposes as well.<sup>144</sup> Still, corrective justice remains important in shaping constitutional remedies and as a norm of our legal culture.<sup>145</sup>

In criminal cases involving defensive invocation of procedural rights, courts tend to be less explicit in invoking the “make-whole” principle than they are in civil lawsuits. And courts sometimes eschew corrective rationales for remedies. For instance, the Supreme Court has usually sought to justify the Fourth Amendment exclusionary rule in deterrence terms alone.<sup>146</sup>

Nonetheless, corrective justice is one of the primary purposes of many criminal procedure remedies. The logic of the harmless error rule is grounded in this principle: if there is no harm of wrongful conviction to be corrected, there is no justification for a remedy. Likewise, where the Supreme Court has declined to apply harmless error review, it has sometimes been on the ground that some non-conviction-related harm needed to be redressed. For instance, in Speedy Trial Clause cases, the Supreme Court has held (wrongly, in my view) that only dismissal with prejudice can effectively compensate the defendant for the emotional harm suffered due to the delay in trial.<sup>147</sup>

Moreover, criminal procedure scholars often invoke corrective justice principles when criticizing current doctrine. For instance, defenders of the exclusionary rule often criticize the Supreme Court’s reliance on deterrence to justify it, arguing that courts can too easily chip away at the rule by claiming

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<sup>140</sup> *E.g.*, DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 16 (3d ed. 2002).

<sup>141</sup> *See* WILLIAM BLACKSTONE, 3 *COMMENTARIES* \*23; ALBERT DICEY, *AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 199 (10<sup>th</sup> ed. 1959).

<sup>142</sup> *See* Starr, *supra*, at 698-710.

<sup>143</sup> Many scholars have observed that right-remedy gaps remain frequent in U.S. constitutional law. *See, e.g.*, Friedman, *supra*, at 737; Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 *GEO. L. J.* 2537, 2559, 2564 (1998); Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 *HARV. L. REV.* 1731, 1765, 1778, 1784 (1991); Owen Fiss, Foreword, *The Forms of Justice*, 93 *HARV. L. REV.* 1, 44-58 (1979); Paul Gewirtz, *Remedies and Resistance*, 92 *YALE L.J.* 585, 587 (1983).

<sup>144</sup> For instance, remedies in institutional reform litigation involve complicated, discretionary policy choices. Chayes, *supra*, at 1296-1302; Fiss, *supra*, at 47; Roach, *supra*, at 867. *See also* DAVID I. LEVINE, DAVID J. JUNG, DAVID SCHOENBROD, & ANGUS MACBETH, *REMEDIES: PUBLIC AND PRIVATE* 9-10, 12 (2006) (arguing that both private and public law remedies involve such discretionary choices); Theodore Eisenberg & Stephen Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 *HARV. L. REV.* 465, 481-86 (1980) (discussing complexities of private law remedies).

<sup>145</sup> *See* Fallon & Meltzer, *supra*, at 1786 (observing that notwithstanding right-remedy gaps, “[e]ffective remedies have always been available for most violations of rights”).

<sup>146</sup> *See* *United States v. Leon*, 468 U.S. 897, 906 (1984); *United States v. Calandra*, 414 U.S. 338, 347 (1984).

<sup>147</sup> *See infra* Part V.A.

that a particular application has little marginal deterrent value.<sup>148</sup> They contend that the rule should instead be justified on corrective grounds: the injury done by the unlawful search must be corrected by refusal to admit the resulting evidence.<sup>149</sup> As the case studies in Part V will illustrate, inconsistency with the corrective principle—lack of fit between wrong and remedy—likewise underlies many criticisms of current remedies for prosecutorial misconduct.<sup>150</sup>

## B. Expressive Theories of Remedies

Scholars arguing for strong remedies for prosecutorial misconduct often cite the need to “send the prosecutor a message.”<sup>151</sup> These arguments go beyond deterrence—the desired message is not just about the consequences that misconduct will trigger, but also about that conduct’s *wrongfulness*. These remedial arguments are expressive in nature.

Expressive theories of law recognize that what the law *means* is often as important to us as what it does. Advocates of expressive theories sometimes cite the “intrinsic” value of expressing morally sound judgments, “connected with the individual interest in integrity.”<sup>152</sup> More often, expressive theories are framed in consequentialist terms: when the law expresses morally sound judgments, it encourages people to act consistently with those judgments.<sup>153</sup> Such arguments share with deterrence arguments a primary concern with shaping behavior—but they suggest that law impacts behavior not just by making people fear specific penalties, but by shaping social norms.<sup>154</sup>

Expressive theories of law are concerned with using the law to counter “expressive harms.” They are premised on the idea that wrongful conduct can do harm because of what it *means*—often, because it conveys a lack of respect for another individual’s dignity or humanity.<sup>155</sup> As Elizabeth Anderson and Richard Pildes point out, for instance, the harm you experience when your

<sup>148</sup> Meltzer, *Deterring Constitutional Violations*, *supra*, at 268-69 (citing such critics but disagreeing with them).

<sup>149</sup> *Id.*

<sup>150</sup> See also Henning, *supra*, at 714-15 (arguing that remedies “should redress the harm suffered by the defendant”).

<sup>151</sup> E.g., Robert Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong*, 15 GEO. MASON L. REV. 257, 317-18 (2008); Covey, *supra*, at 318-19; Joy, *supra*, at 428-29; Wasby, *supra*, at 114-16; Williams, *supra*, at 1200.

<sup>152</sup> Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2026-27 (1996) (discussing arguments of Bernard Williams).

<sup>153</sup> E.g., Sunstein, *supra*, at 2025-27 (distinguishing these two approaches to expressive law); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 755 (1998); Richard McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 340 (2000); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. Rev. 453, 454-57 (1997).

<sup>154</sup> See McAdams, *supra*, at 371-73 (arguing that economists should make “the expressive consequences of law a standard component of their models”).

<sup>155</sup> E.g., Lawrence Friedman, *Reactive and Incompletely Theorized State Constitutional Decision-Making*, 77 MISS. L.J. 265, 284 (2007); Jean Hampton, *Correcting Harms Versus Righting Wrongs*, 39 UCLA L. REV. 1659, 1666 (1992).

neighbor knowingly dumps trash on your lawn is quite different from the harm you experience when the wind blows the same trash there.<sup>156</sup> The burden of picking it up is the same, and relatively minor, but in the former case it is greatly magnified by the feeling of having been treated with contempt. Government actions can likewise inflict expressive harms—indeed, “[o]ften it seems to matter more to individuals what the government says than what other private actors say.”<sup>157</sup> Such expressive harms go beyond the particular individuals directly affected, because of “the way in which they undermine collective understandings.”<sup>158</sup>

One objective of legal remedies is to combat these kinds of expressive harms, to respond to wrongful message with a better message.<sup>159</sup> As Anderson and Pildes put it, “‘expressive legal remedies’ matter because they express recognition of injury and reaffirmation of the underlying normative principles for how the relevant relationships are to be constituted.”<sup>160</sup>

Criminal procedure remedies can serve similar expressive purposes. When prosecutors or police disregard individual rights, they do expressive harm—they send “demeaning messages about human worth.”<sup>161</sup> They do so even if the misconduct is meant to be kept secret, for expressive harms are not confined to acts that are deliberately communicative—just as your hypothetical trash-throwing neighbor’s rudeness would unmistakably express contempt toward you even if she didn’t know you were watching her.<sup>162</sup> Such expressive harms can be met with expressive remedies. For instance, Lawrence Friedman argues that the Fourth Amendment exclusionary rule “serves to vindicate publicly the search victim’s privacy interest: it represents the means by which the community, speaking through the judiciary, answers the government’s incorrect valuation of privacy.”<sup>163</sup>

Corrective and expressive justifications for criminal procedure remedies are closely intertwined. An appropriate expressive remedy for prosecutorial misconduct would counteract the expressive harm done by the prosecutor’s failure to give appropriate value to the defendant—by her disregard of the defendant’s humanity, her willingness to strip away his dignity and the rights

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<sup>156</sup> Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law*, 148 U. PA. L. REV. 1503, 1528 (2000); *see also* Kahan, *supra*, at 420 (arguing that although “competition may impoverish a merchant every bit as much as theft,” only theft is “viewed as wrongful” because “against the background of social norms theft expresses disrespect for the injured party’s moral worth”).

<sup>157</sup> McAdams, *supra*, at 381; *see* Pildes, *supra*, at 726.

<sup>158</sup> Pildes, *supra*, at 755.

<sup>159</sup> *E.g.*, Brent T. White, *Say You’re Sorry*, 91 CORNELL L. REV. 1261, 1278 (2006).

<sup>160</sup> Anderson & Pildes, *supra*, at 1529; *see, e.g.*, Baher Azmy, *Unshackling the Thirteenth Amendment*, 71 Fordham L. Rev. 981, 1048 (2002).

<sup>161</sup> Andrew E. Taslitz, *The Expressive Fourth Amendment*, 76 MISS. L.J. 483, 564 (2006); *see* Cicchini, *supra*, at 343-44; Rosenthal, *supra*, at 958.

<sup>162</sup> *See* Anderson & Pildes, *supra*, at 1565-67 (discussing the error of “confusing expression with communication”).

<sup>163</sup> Friedman, *supra*, at 286.

that belong to him as a full member of the community. The remedy would seek to restore that full humanity—to “make the defendant whole.” In a culture that gives pride of place to the *Marbury* principle, the most effective expressive remedy will often be a corrective one, because culturally we understand such remedies to “restore” victims of wrongdoing to their “rightful positions.”<sup>164</sup> Likewise, arguments for corrective justice themselves sometimes sound in expressive terms—for instance, Margaret Jane Radin argues that “corrective justice restores moral balance between the parties” and “show[s] the victim that her rights are taken seriously.”<sup>165</sup>

Expressive remedies are thus usually ineffective if they are *merely* expressive, for instance declaratory relief or simple judicial recognition and condemnation of wrongdoing. Remedies that diverge from the corrective principle may sometimes still be expressively valuable—as Anderson and Pildes point out, for instance, landowners subject to state takings often prefer “token compensation” to no compensation, while victims of constitutional wrongs often take even nominal damages seriously.<sup>166</sup> But usually, at least some concrete relief is necessary for the expressive message to be taken seriously. As Friedman argues regarding the exclusionary rule,

proper vindication of an individual’s privacy interest . . . requires that the search victim be returned to the approximate position in relation to the government that she occupied before the illegal search or seizure. . . . Absent that realignment of interests, the judicial declaration of the expressive harm and reaffirmation of the proper relationship between individuals and the government would ring hollow.<sup>167</sup>

Similarly, Jean Hampton argues that actions that degrade another person take “more than a few remarks to deny. . . . [Instead,] we are morally required to respond by trying to remake the world in a way that denies what the wrongdoer’s events have attempted to establish, thereby lowering the wrongdoer, elevating the victim, and annulling the act of diminishment.”<sup>168</sup>

In addition to recognizing the dignity and humanity of the wronged party, legal remedies can thus also serve a second expressive purpose: *condemning* wrongdoing. Expressive theories of law have often focused on the power of

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<sup>164</sup> See Friedman, *supra*, at 286 (arguing that “return to the status quo ante . . . recognizes the expressive injury and reaffirms” the proper “relationship between government and citizen”); Alon Harel, *Whose Home Is It? Reflections on the Palestinians’ Interest in Return*, THEOR. INQ. IN LAW, July 2004, 342-43.

<sup>165</sup> *Compensation and Commensurability*, 43 DUKE L.J. 56, 60-61 (1993) (noting, however, that there is “no canonical conception of corrective justice”).

<sup>166</sup> Anderson & Pildes, *supra*, at 1529; see *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (holding that through nominal damages awards, “the law recognizes the importance” of those rights to society). *But see* White, *supra*, at 1278-79 (arguing that limiting relief to nominal damages suggests “that the municipality’s actions weren’t all that serious”).

<sup>167</sup> Friedman, *supra*, at 289; see Harel, *supra*, at 342.

<sup>168</sup> Hampton, *supra*, at 1686-87.



the law to shape social norms by marshaling social opprobrium. In an influential essay, for instance, Joel Feinberg argued that criminal punishment should express “attitudes of resentment and indignation.”<sup>169</sup> Likewise, Paul Robinson and John Darley have argued that “social science research consistently finds that fear of social disapproval and moral commitment to the law both inhibit the commission of illegal activity. . . . The prosecution of a deviant brands the deviant as a criminal and casts a bright light on the exact location of a boundary that previously might have been obscure to the community.”<sup>170</sup> Expressions of condemnation thus speak to a broader audience than the parties to the case. But they also can induce shame in the wrongdoer herself, and indeed, this shame can be a crucial aspect of the punishment.<sup>171</sup>

Scholars advancing condemnation-centered expressive theories have mainly focused on criminal punishment. But legal remedies for other kinds of wrongs can also be understood to serve the purpose of condemnation. Indeed, remedies awarded to criminal defendants are often described as “sanctions” for prosecutorial misconduct.<sup>172</sup> To be sure, they do not “punish” the individual prosecutor in the traditional legal sense of the word—the defendant, not the prosecutor, is the direct object of the remedy, one might say. But they often share something important in common with punishment: the intent to condemn or blame.<sup>173</sup> And the judicial condemnation accompanying such remedies may publicly embarrass the prosecutor in a way that affects her more than the remedies alone would.<sup>174</sup>

The two expressive purposes I have discussed here are distinct, although intertwined. The defendant-centered expressive purpose is essentially corrective—it focuses on making the defendant whole for the expressive harms he has suffered. The prosecutor-centered purpose is essentially retributive.<sup>175</sup> The remedial implications will sometimes differ, particularly when the prosecutor’s wrongdoing was egregious but the expressive harm experienced by the defendant was minor. This point is further discussed in the next two sections.

### C. The Windfall Problem

Both the corrective and the expressive purposes of criminal procedure remedies risk being undermined by excessive remedies—windfalls—just as they are undermined by absent ones. Strong remedies like reversal or dismissal

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<sup>169</sup> Joel Feinberg, *The Expressive Function of Punishment*, in 4 *PHILOSOPHY OF LAW: CRIMES AND PUNISHMENTS* 90 (Jules Coleman ed.).

<sup>170</sup> Robinson & Darley, *supra*, at 470; see Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Divide*, 85 *GEO. L.J.* 775, 800-806 (1997).

<sup>171</sup> See Steiker, *supra*, at 807 (discussing the capacity of criminal punishment to “reach inside the self”).

<sup>172</sup> *E.g.*, *United States v. Mendoza*, 522 F.3d 482, 495 (5<sup>th</sup> Cir. 2008); *United States v. Helmandollar*, 852 F.2d 498, 502 n.3 (9<sup>th</sup> Cir. 1988); *Modica*, 663 F.2d at 1184.

<sup>173</sup> Steiker, *supra*, at 803-04 (describing “blaming” as the central function of punishment).

<sup>174</sup> See *supra* Part III.B.

<sup>175</sup> See Hampton, *supra*, at 1663 (explaining that corrective justice is concerned with harms while retributive justice is concerned with “wrongful actions”).

are probably essential in some cases to respond to misconduct. But in other cases, they may be counterproductive.

The harm of windfalls is easy to understand in corrective terms: they overcorrect, and thus restore the defendant not to his rightful position, but to a superior position. Because the corrective justice principle treats restoration of the *status quo ante* as the moral ideal, overcorrection is as problematic as undercorrection.<sup>176</sup> But the harm of windfalls in expressive terms is less obvious: if we want to condemn conduct, why is a more vociferous condemnation not always better?

The answer lies in the centrality of *desert* to expressive theories of law, and is closely related to the widespread cultural acceptance of the corrective justice principle. As scholars have recognized, the expressive value of law turns on its perceived moral legitimacy.<sup>177</sup> If the law is not culturally understood as legitimate, then it lacks value as an expressive medium and cannot effectively shape social norms. One important factor in determining legitimacy is that the law does not diverge too greatly from cultural intuitions concerning fairness. These intuitions include the notion that remedies and punishments should be apportioned, at least roughly, only as deserved.

Windfall remedies threaten this desert principle in two ways. First, because they go beyond the requirements of corrective justice, they may be perceived<sup>178</sup> as giving the defendant more than he deserves. Rather than sending a positive message restoring respect for the defendant's dignity and humanity, the remedy may just provoke resentment.<sup>179</sup>

Second, proportionality and desert also matter to the effectiveness of *condemnation* as well. If remedies are perceived as disproportionate to the wrongdoing that they are intended to condemn, they may be seen as retributively unjustified. This is especially true when similar prosecutorial misconduct usually meets with no remedy at all. If the unlucky few prosecutors are not perceived as "deserving" the loss inflicted by those remedies, the desired stigma may be lost. As Stephen Schulhofer argues with respect to disparately distributed criminal punishment:

[D]esert is a vital component of an *efficient* sanctioning system because desert is essential to the stigmatizing effects of punishment. . . . [R]andomly punishing only one in ten robbers would seriously undermine that requirement. . . . [T]he sanctioning effect of stigma tends to vanish, to the extent that a severe

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<sup>176</sup> E.g., Tracy A. Thomas, *Proportionality and the Supreme Court's Jurisprudence of Remedies*, 59 HASTINGS L.J. 73, 83 (2007); Michael Tilbury, *Reconstructing Damages*, 27 MELB. U. L. REV. 697, 713 (2003).

<sup>177</sup> E.g., Robinson & Darley, *supra*, at 457.

<sup>178</sup> Normative assessment of *actual* desert is beyond the scope of this Article. I merely argue that windfall remedies are widely *perceived* as undeserved, and that this clouds their effectiveness as expressive remedies.

<sup>179</sup> See *supra* Part III.B.5.

punishment brands the tenth robber not as an extraordinarily bad person but only as an extraordinarily unlucky one.<sup>180</sup>

Robinson and Darley have likewise argued that punishment cannot effectively shape social norms if it is seen as arbitrary or undeserved. Indeed, because “the criminal law’s most important real-world effect may be its ability” to shape social norms, excessive punishment may have a net negative effect on compliance with law—the marginal deterrent benefit “is outweighed by the additional cost” to the “law’s moral credibility.”<sup>181</sup>

Although these arguments focus on criminal punishment,<sup>182</sup> their logic may well apply to the use of windfall remedies to condemn prosecutors.<sup>183</sup> The effectiveness of those remedies’ message may be undermined by the perception that the condemnation goes beyond what is deserved.<sup>184</sup>

All-or-nothing remedies for misconduct thus often pose a choice between two unsatisfactory alternatives. Granting the defendant a remedy produces a windfall that is excessive from a corrective perspective and unsatisfactory from an expressive perspective. But denying a remedy fails to correct the harm that the defendant did suffer, and sends the equally unacceptable message that the court tolerates the misconduct.<sup>185</sup>

#### **D. Sentence Reduction as a Tailored Remedy**

To resolve the dilemmas posed by all-or-nothing remedial choices, it may be necessary to find an alternative that is less of a blunt instrument. Sentence reduction is one possibility. Because a sentence reduction could be of any magnitude—from a nominal reduction to the entire length of the base sentence—it can be tailored either to the wrongfulness of the prosecutor’s misconduct or to the harm inflicted on the defendant. It thus could potentially be more satisfying in terms of desert: a fair remedy for the defendant and a fair form of condemnation for the prosecution. And for this reason, it could be more effective in expressing a message condemning misconduct—serious enough to convey that message’s seriousness, but not so excessive as to merely engender resentment.

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<sup>180</sup> Schulhofer, *supra*, at 68.

<sup>181</sup> Robinson & Darley, *supra*, at 457-58; *see id.* at 478; *cf.* Furman v. Georgia, 408 U.S. 238, 308-09 (1972) (Stewart, J., concurring) (arguing that the death penalty’s retributive value was deeply undermined by its rarity and apparent capriciousness).

<sup>182</sup> *See* Robinson & Darley, *supra*, at 480 (noting that “[m]uch of civil law is governed by principles unrelated to desert”).

<sup>183</sup> *Cf.* White, *supra*, at 1279-80 (arguing that perceived excessive size of punitive damage verdicts undermines their expressive message).

<sup>184</sup> Although it has not framed its arguments in expressive terms, in the Fourth Amendment context the Supreme Court has demonstrated discomfort with remedies that over-punish—it has refused to exclude unconstitutionally obtained evidence if doing so would “put the police in a worse position than they would have been in absent any error or violation.” *Nix v. Williams*, 467 U.S. 431, 443 (1984) (adopting the “inevitable discovery” exception).

<sup>185</sup> *See* Henning, *supra*, at 717.

It is easier to see how this might work in some contexts than others. In speedy trial cases, for instance, where a defendant has suffered years of serious stress but has ultimately been fairly convicted, a relatively significant sentence reduction might easily be justified in corrective terms. Such a remedy would also serve the expressive purpose of condemning the prosecutor's misconduct. But complications arise when the harm experienced by the defendant seems quite minor, but the wrongdoing by the prosecutor seems to merit an expressive remedy with some teeth. If sentence reduction is to be justified as an expressive remedy in such cases, it will have to be solely in terms of its value in *condemning* the prosecutor's conduct.

In such cases, sentence reduction is more likely to succeed in expressing condemnation if the windfall to the defendant is not dramatically excessive relative to the magnitude of the prosecutor's misconduct. That is, the message's audience is likelier to tolerate a windfall that is unjustified in corrective terms—and thus to accept the message as morally legitimate—if the remedy satisfies the principle of desert in the retributive sense. The remedy must therefore be tailored to the wrong.

But what would it mean to tailor a sentence reduction to the magnitude of the wrong, or for that matter to the magnitude of the harm caused? One potential objection is that of incommensurability. It is difficult to define and quantify the harm done by prosecutorial misconduct when unrelated to the conviction. Translating that harm into a number of years' reduction may be even more difficult. How many years off a sentence is a seven-year delay in trial “worth,” for instance? Similar questions arise if the magnitude is tailored to the magnitude of the wrongdoing, rather than to the harm suffered.

A related objection concerns commodification: does sentence reduction send the message that prosecutors can go ahead and violate defendants' rights, so long as they are willing to pay a price? Does even trying to quantify the harm done by such violations inherently treat those rights as commodities, or at least, as mere interests that legitimately can be traded off against other interests? If so, then the expressive message of sentence reduction could be clouded or even counterproductive. Pricing, scholars have sometimes argued in other contexts, can reduce the stigma that attaches to bad acts—it treats them not as wrongdoing but as costs of doing business.<sup>186</sup>

These objections are serious, yet I do not think either provides sufficient reason to reject sentence reduction as a remedy. First, it would be incongruous to reject sentence reduction for these reasons when our legal system embraces money damages as a compensatory remedy for non-monetary injuries

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<sup>186</sup> See, e.g., Jonathan Remy Nash, *Framing Effects and Regulatory Choice*, 82 NOTRE DAME L. REV. 313, 325-26 (2006) (discussing similar criticism of tradeable pollution permits); Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. LEGAL STUD. 1, 13-16 (2000) (finding that when day care centers instituted fines for late pickup of children, late pickups increased, perhaps due to reduced stigma). But see Lior Strahilevitz, *How Changes in Property Regimes Influence Social Norms*, 75 IND. L.J. 1231, 1262-64 (2000) (finding that pricing access to carpool lanes strengthened the pro-carpooling social norm).

including constitutional violations. Such remedies are equally plagued by commensurability problems<sup>187</sup> and seem to “price” violations in expressly monetary terms, the same way goods are valued in market exchanges.<sup>188</sup>

Indeed, sentence reduction may be less susceptible to commodification and commensurability objections than damages are. The remedy and its costs to the prosecution (or the “people”) cut directly against the benefits the prosecution (acting on behalf of the “people”) sought to gain through the misconduct. It restores some of the liberty that the prosecution sought to take away.<sup>189</sup> If government actors do not usually violate constitutional rights for the purpose of adding money to the public fisc, then damage awards do not offer this same correspondence.<sup>190</sup>

Damages, of course, are a time-honored way of redressing apparently unquantifiable harms—they are deeply embedded in our legal culture, which helps to lend them the moral legitimacy they need to serve as effective expressive remedies despite incommensurability concerns. And it may be coherent after all to ask what an injury is “worth” in dollars—you can always ask yourself what you would have to be paid to agree to suffer it. Likewise, we can coherently talk about money damages in essentially punitive terms—that is, we can talk about their value in expressing moral condemnation. Plaintiffs’ lawyers routinely ask juries to use high punitive damage awards to “send a message” to the defendant,<sup>191</sup> and fines may also be imposed as criminal punishment. It is the surrounding culture that gives those remedies their meaning—if we treat them as condemnatory acts, they are not merely “prices.”<sup>192</sup>

Analogous observations, however, apply to sentence reduction. Using years of liberty to “quantify” harm or moral wrongfulness is just as familiar to our legal culture as are money damages: liberty is the currency of the criminal law. Courts and juries, or legislatures under modern determinate sentencing schemes, routinely quantify how “bad” conduct is in terms of the liberty of the person who commits it. The incommensurability problem is no more serious when the liberty in question is that of the victim of misconduct rather than that

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<sup>187</sup> See, e.g., Levinson, *Making Government Pay*, *supra*, at 410 (suggesting “constitutional harms and dollars are incommensurable”); Richard Abel, *General Damages Are Incoherent, Incalculable, Incommensurable, and Inegalitarian (But Otherwise a Great Idea)*, 55 DEPAUL L. REV. 253, 270-82 (2006) (discussing tort damages); Robert L. Rabin, *Pain and Suffering and Beyond*, 55 DEPAUL L. REV. 359, 365 (2006); Radin, *supra*, at 69-75 (same).

<sup>188</sup> See Richard Abel, *Civil Rights and Wrongs*, 38 LOY. L.A. L. REV. 1421, 1430 (2005); Friedman, *supra*, at 288; Walter E. Dellinger, *Of Rights and Remedies*, 85 HARV. L. REV. 1532, 1563 (1972).

<sup>189</sup> See Levinson, *Making Government Pay*, *supra*, at 417 (arguing that the exclusionary rule appropriately “imposes on police [costs that] come in the same currency as the benefits the police capture from convicting criminals”).

<sup>190</sup> See *id.*

<sup>191</sup> See White, *supra*, at 1279.

<sup>192</sup> See Saul Levmore, *Norms as Supplements*, 86 VA. L. REV. 1989, 1990 (arguing that “norms help us know whether to regard legal rules and sanctions as mere prices”); Radin, *supra*, at 56, 85 (arguing that compensation need not be understood as commodification).

of the person committing it. It is perfectly coherent, for instance, to ask yourself how many months or years of your liberty you would give up to avoid a particular rights violation. Such an inquiry may put a “price” on your rights, but no more than criminal punishment itself puts a price on crime victims’ rights. Few contend that we should stop punishing crimes—or punish them all with the death penalty—for this reason.

By issuing a sentence reduction, a court would thus measure its response to prosecutorial misconduct in the same currency used to punish the defendant’s underlying crime: years of the defendant’s liberty. This, in and of itself, might amount to an important expressive signal—it treats prosecutorial misconduct as fundamentally *comparable to crime itself*, and worthy of moral condemnation in the same sense that crime is.<sup>193</sup> It seeks to quantify wrongfulness and harm, but in terms that we usually associate with condemnation, not with market transactions. As Canadian scholar Alan Manson has argued:

[Sentencing] is the aspect [of the criminal process] which is most readily and widely communicated to members of the community. . . . The accused’s blameworthiness usually occupies the sentencing judge’s message but this is only part of the larger message about community norms and values. A message about the values which underlie Charter guarantees . . . may equally be relevant.<sup>194</sup>

A possible countervailing concern is that this perceived parallel treatment of the crime and the rights violation might muddle the expressive message (and the deterrent impact) of criminal punishment itself, and might engender resentment, particularly among crime victims. Such concerns have been alluded to in at least two Canadian court decisions.<sup>195</sup> But as Oren Bick argues in his discussion of those decisions, it should be fairly easy for judges “to make it plain . . . that the ‘discount’ does not stem from reduced culpability, and cannot be expected in the future, by the offender or by others.”<sup>196</sup> Bick asserts that courts will only be able to draw this distinction if they follow the

<sup>193</sup> Cf. Robinson & Darley, *supra*, at 480 (discussing the unique power of criminal punishment to condemn).

<sup>194</sup> Allan Manson, *Charter Violations in Mitigation of Sentence*, 41 C.R. (4<sup>th</sup>) 318, 323 (1995).

<sup>195</sup> In *R. v. Carpenter*, the British Columbia Court of Appeal rejected a sentence reduction in part because of its “potential for mixed messages.” 2002 CarswellBC 1057, para. 26. That case involved a “non-serious” Charter violation, however—the court emphasized that the “message . . . about the seriousness of the appellant’s crime . . . would be substantially undermined” by treating it as comparable to “non-serious” misconduct. *Id.* at para. 27. In *R. v. Glykis*, 100 C.C.C. (3d) 97 (Ont. 1995), the Ontario Court of Appeal cited a similar concern. It suggested, however, that sentence reduction could be appropriate where the violation had inflicted some “punishment or added hardship” that could legitimately be offset against the sentence. *Id.*; see Bick, *supra*, at 211, 219-22 (arguing in favor of this “punishment or hardship” restriction); Manson, *supra* (criticizing this restriction).

<sup>196</sup> Bick, *supra*, at 224-25.

rule he proposes confining sentence reduction to situations where it truly “corrects” a hardship to the defendant,<sup>197</sup> but it is hard to see why. Even when sentence reductions go beyond what is correctively justified, on expressive or deterrent grounds, it should still be possible for courts to emphasize that the reduction is a response to prosecutorial misconduct alone and not the defendant’s culpability. Court decisions routinely encompass more than one message, and there is no reason the messages need get mixed.

In addition, there is nothing new about weighing competing values against the value of vindicating crime victims’ interests (or, for that matter, against the value of deterring crimes or incapacitating criminals<sup>198</sup>). Existing sentencing schemes do not base punishment solely on the harm done by the crime. Sentences are also based on the defendant’s individual history, and may be reduced for reasons quite unrelated to the crime—for instance, the “substantial assistance” a defendant happens to be able to give the government in another case. Indeed, sentences are often reduced or suspended due to prison overcrowding—an unfortunate reason, but one that reflects the fact that the criminal justice system routinely trades off the value of achieving the “right” punishment against other legitimate social interests.<sup>199</sup>

Moreover, existing windfall remedies for procedural violations more dramatically sacrifice crime victims’ interests. Sentence reduction at least can be tailored to serve the objective of proportionality relative to the defendant’s sentence. The higher the base sentence, the smaller an equal-size reduction will be relative to that sentence—in contrast to reversal or dismissal remedies, which amount to bigger windfalls the more serious the underlying crime. This approach would help to minimize the appearance that the defendant’s crimes are not being treated with appropriate seriousness, or that victims’ interests are being disregarded.

Finally, there is also nothing new, or necessarily objectionable, about the criminal justice system metaphorically “pricing” defendants’ rights. In-

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<sup>197</sup> *Id.*

<sup>198</sup> A related objection is that reducing the sentence could undermine the goals of deterrence or incapacitation. As to deterrence, the concern seems insubstantial: it is quite unlikely that any particular potential offender would be appreciably influenced by what remedial scheme would be in effect in the unlikely event that his case goes to trial and results in prosecutorial misconduct that is later detected.

The incapacitation concern is more serious. Where a very long sentence is truly necessary for incapacitation of a dangerous defendant, I agree with Bick that it “could fairly be asked: can we instead choose a remedy that does not put the public at risk?” *Id.* at 225. A sentence reduction scheme could provide exceptions for such circumstances. But I also agree with Bick that for most sentences, incapacitation concerns provide no serious basis for objection to marginal reductions. Generally, if the public will not be endangered by the defendant’s release after thirteen years, it probably won’t be endangered after ten—or at least, the marginal increase in risk will not be so much that it cannot be outweighed by competing considerations. *See id.*

<sup>199</sup> *See* M.C.L.A. 801.57 (ordering reduction of all prisoners’ sentences in response to overcrowding); Jack Leonard & Doug Smith, *Hilton Will Do More Time Than Most, Analysis Finds*, L.A. TIMES, June 14, 2007, p. A-1 (discussing California early release program).

deed, nearly all such rights are routinely “priced” by the plea bargaining system, which allows defendants to trade them for reduced charges or sentencing recommendations.<sup>200</sup> Plea bargaining essentially treats those rights as property that can be traded at prices the parties choose; law-and-economics scholars have not had to stretch to describe this process in market terms.<sup>201</sup> Likewise, the current remedial schemes for rights violations can be similarly described. Some remedial rules are premised expressly on deterrence concerns—courts already talk explicitly about the need to set a price for the violation. And for rights subject to the harmless error rule, the current price of violation is simply zero, except in the very unlikely event that the court finds prejudice. Compared to this approach, sentence reduction hardly devalues rights.<sup>202</sup>

I do not mean to trivialize the difficulty of translating “badness” of misconduct into sentence-reduction-years. Indeed, this difficulty may introduce a new source of potentially arbitrary variation in sentencing, as different judges may disagree as to how much of a reduction particular misconduct is “worth.”<sup>203</sup> Such variation may affect the expressive effectiveness of the remedy by interfering with the perception that the remedies are deserved. Moreover, the variations may not be randomly distributed—like any source of sentencing discretion, allowing judges to tailor sentence reductions risks introducing racial disparities.<sup>204</sup>

These problems could be alleviated considerably if the magnitude of the sentence reduction were fixed by statute. That approach may, in fact, be

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<sup>200</sup> See Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 670-80 (1981) (arguing that plea bargaining commodifies rights); cf. Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure*, 88 CORNELL L. REV. 1361, 1407 (2003) (arguing that *Alford* and *nolo contendere* pleas treat punishment “as a marketable good, undermining its moral authority”).

<sup>201</sup> See, e.g., Easterbrook, *supra*.

<sup>202</sup> See Jedediah Purdy, *The Promise (and Limits) of Neuroeconomics*, 58 ALA. L. REV. 1, 32 (2006) (suggesting that “in practice when things have no price, we treat them not as priceless but as worthless”). Gneezy and Rustichini’s day care study, *supra* note 186, does suggest that leaving violations unpunished might be better than imposing fines in terms of social stigma. But that study involved an extremely small fine—about US\$3.68, far less than other publicly assessed fines in Israel. *Id.* at 4-5. The upshot may simply be that *trivial* “prices” are worse than nothing—they imply that the norm is not serious.

<sup>203</sup> Similar translation problems infect jury awards of punitive damages, see, e.g., Daniel Kahneman et al., *Shared Outrage, Erratic Awards*, in PUNITIVE DAMAGES: HOW JURIES DECIDE 31, 34-36, 40-41 (Sunstein et al. eds., 2002) (finding that mock juries are consistent in assessing wrongfulness, but wildly inconsistent in translating wrongfulness into dollar figures), and there is no reason to assume judges are immune from such difficulties, see W. Kip Viscusi, *Do Judges Do Better?*, in PUNITIVE DAMAGES, *supra*, at 186, 206. Indeed, traditional discretionary sentencing resulted in wide disparities, e.g., Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988), suggesting difficulty translating crime wrongfulness into sentence-years.

<sup>204</sup> See, e.g., William W. Wilkins, Jr., Phyllis J. Newton, and John R. Steer, *The Sentencing Reform Act of 1984* CRIM L. F. 355, 359-62 (1991) (citing studies of pre-Guidelines sentencing disparity).



the best option, although it would reduce the remedy’s advantage in terms of tailorability. A legislatively specified reduction need not be completely one-size-fits all. Rather, it could at least achieve some degree of nuance by specifying different reductions for different kinds of violations and prosecutorial mental states.<sup>205</sup> Inevitably, though, there is bound to be some degree of tradeoff between permitting appropriate tailoring and reducing disparities—a tradeoff that is familiar to sentencing policy more generally.

In any event, however, even if a sentence reduction scheme permitted complete judicial discretion as to the magnitude of the reduction, it would be hard to imagine it producing *more* arbitrary variations in treatment than those produced by current all-or-nothing remedies. Under those schemes, a few defendants enjoy windfalls while most get nothing at all—and there is no sharp break between the situations of the lucky and unlucky ones that justifies such dramatic disparities.<sup>206</sup> That would be a problem even if all judges drew the line between “all” and “nothing” at exactly the same place, but given the inherent subjectivity of the task, it would be astonishing if they did.

In sum, a remedial scheme that includes sentence reduction as an intermediate alternative would serve corrective and expressive purposes better than the current “stronger” remedies do—even if both schemes faced equal remedial deterrence problems. That advantage is compounded by the fact that courts will in fact probably be more willing to grant sentence reduction, in part because of the very corrective and expressive advantages discussed here: judges, like people generally, can be expected to resist remedies that go beyond what they see as deserved. Remedies that are perceived as fairer are thus not only likely to be more effective in condemning misconduct and restoring respect for defendants’ rights, but also likelier to be granted in the first place.

## V. Applications

This Part explores in greater detail several potential applications of the sentence reduction remedy. Sections A and B consider misconduct that currently triggers automatic remedies not subject to harmless error review: speedy trial violations and race discrimination in jury selection. Section C considers serious prosecutorial misconduct that *is* subject to harmless error review—for instance, failure to disclose exculpatory evidence or flagrantly inflammatory courtroom comments.

The current remedies for each of these kinds of misconduct have been subject to vigorous scholarly debate. Here, I explain how sentence reduction

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<sup>205</sup> Such an approach would bear some resemblance to sentencing guidelines schemes themselves, sharing their objective of balancing individualization and equal treatment. See Adam Lamparello, *Introducing the “Heartland Departure,”* 27 HARV. J. L. & PUB. POL’Y 643, 668 (2004); Breyer, *supra*, at 4.

<sup>206</sup> Cf. Gideon Parchomovsky et al., *Of Equal Wrongs and Half Wrights*, 82 N.Y.U. L. Rev. 738, 744 (2007) (arguing that “winner-take-all” remedies make most common law litigation “inherently arbitrary”).

could address the major problems identified by detractors of each remedial scheme, without encountering the pitfalls presented by other reform proposals.

### A. Speedy Trial Violations

The Supreme Court has addressed the possibility of sentence reduction as a criminal procedure remedy in a single context: the Speedy Trial Clause. The Sixth Amendment protects criminal defendants' right to a "speedy . . . trial," and the traditional remedy for violations has been dismissal of charges with prejudice. In *Barker v. Wingo*, the Court noted that the traditional dismissal remedy is sometimes "unsatisfactorily severe" because "a defendant who may be guilty of a serious crime will go free."<sup>207</sup> Nonetheless, it concluded without further explanation that dismissal is the "only possible remedy."<sup>208</sup>

One year later, in *Strunk v. United States*, the Court was presented with a challenge to this conclusion. The Seventh Circuit, which decided the case two months after *Barker*, had found a speedy trial violation, and notwithstanding *Barker*'s holding, had ordered a sentence reduction as a remedy.<sup>209</sup> It reasoned that the "severity" of the dismissal remedy "has caused courts to be extremely hesitant in finding a failure to afford a speedy trial. . . . [W]e know of no reason why less drastic relief may not be granted in appropriate cases."<sup>210</sup>

The Supreme Court unanimously reversed. This was an unsurprising result, given the court of appeals' disregard of its clear holding in *Barker*. For this reason perhaps, the Court offered little reasoning for *why* the court of appeals' remedy was constitutionally insufficient, stating merely:

The speedy trial guarantee recognizes that a prolonged delay may subject the accused to an emotional stress. . . . [O]ther factors such as the prospect of rehabilitation may also be affected adversely [by this stress]. The remedy chosen by the Court of Appeals does not deal with these difficulties.

The Court gave no reason for this final conclusion, and it is hard to think of one. Of course sentence reduction could not *eliminate* the emotional stress that the defendant suffered while awaiting trial. But neither could any appellate remedy—including dismissal—as that stress was past. The defendant was seeking a remedy to *compensate* him for harm already done. Sentence reduction could serve that compensatory purpose. Indeed, dismissal itself (when granted on appeal for speedy trial violations not affecting the verdict, as in *Strunk*) is also a compensatory remedy—only a disproportionate one.

As critics of the dismissal remedy—most prominently, Anthony Amsterdam and Akhil Amar—have pointed out, dismissal is really only necessary when delays have rendered it impossible to provide the defendant a fair trial,

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<sup>207</sup> 407 U.S. at 522.

<sup>208</sup> *Id.*

<sup>209</sup> 467 F.2d 969 (7<sup>th</sup> Cir. 1972).

<sup>210</sup> *Id.* at 972.

perhaps because evidence has become unavailable.<sup>211</sup> But this is not always the case, and the other interests protected by the Speedy Trial Clause—“avoiding prolonged pretrial detention [and] minimizing the anxiety and loss of reputation accompanying public accusation”<sup>212</sup>—can be protected in other ways. If speedy trial claims are raised in an interlocutory posture, the court can take measures to expedite the process, including ordering the prosecutor to stand ready for trial; it can also release the defendant from pretrial detention. When such claims are raised on appeal or not raised pretrial until significant harm has already been suffered, dismissal is not the only way to compensate the defendant for the stress and reputational harms suffered. In cases in which the fairness of the trial was not affected by the delay, dismissal provides an unnecessary windfall to guilty defendants, who escape punishment entirely, and disserves crime victims and society.<sup>213</sup>

Nor is dismissal necessary to deter or condemn prosecutorial foot-dragging effectively. Indeed, because of remedial deterrence, automatic dismissal may undermine both goals. And its expressive value is further undermined by the windfall problem.

A better approach is to allow courts the option of sentence reduction in cases where the verdict is unaffected by the delay. Because courts would be willing to invoke it, this remedy would be a more effective deterrent. And the windfall problem is much less severe. The reduction might amount to some degree of windfall, but it would be comparatively small and could be justified as the cost of encouraging respect for constitutional rights. The court of appeals in *Strunk* may thus have picked the right remedy, albeit one that was unlikely to be upheld in light of conflicting Supreme Court precedent.

Oddly, despite *Strunk*, scholars criticizing the dismissal remedy have not focused on sentence reduction as an alternative.<sup>214</sup> Most have instead emphasized the above-mentioned interlocutory remedies,<sup>215</sup> which are fine as far as they go, but are solely oriented toward cessation of ongoing violations. They thus cannot correct or condemn past violations, nor can they deter effectively, because the prosecutor will go unpunished for harm already caused.

This problem is not solved by Amar’s additional proposal that defendants be permitted to bring suits for money damages for injuries that have al-

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<sup>211</sup> Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 649-58 (1996); Anthony G. Amsterdam, *Speedy Criminal Trial*, 27 STAN. L. REV. 525, 535-36 (1975); see also Note, *Dismissal of the Indictment as a Remedy for Denial of the Right to Speedy Trial*, 64 YALE L.J. 1208, 1209 n.9 (1955).

<sup>212</sup> Amar, *supra*, at 649.

<sup>213</sup> See *id.* at 646; Amsterdam, *supra*, at 539.

<sup>214</sup> Amar does note that sentences should be offset “for time served [in pretrial detention] to avoid double punishment,” but this is routine (defendants are always credited for time served even in the absence of any constitutional violation) rather than being a remedy for a violation. 84 GEO. L. J. at 652.

<sup>215</sup> Amsterdam, *supra*, at 535; Amar, *supra*, at 649-58; John C. Godbold, *Speedy Trial—Major Surgery for a National Ill*, 24 ALA. L. REV. 265, 289-93 (1972); Erik G. Luna, *The Models of Criminal Procedure*, 2 BUFF. CRIM. L. REV. 389, 430 (1999).

ready occurred.<sup>216</sup> While damages may be the best way to compensate acquitted defendants,<sup>217</sup> they provide little recourse for convicted defendants, who are unlikely to win civil suits and have little incentive even to bring them.<sup>218</sup> Indeed, Amar acknowledges that his scheme would not provide much benefit for convicted defendants, and to him this is one of its prime selling points—the Sixth Amendment, he argues, is meant to protect the innocent, not to provide windfalls for the guilty.<sup>219</sup>

Even if so, however, it may be necessary to provide remedies to guilty defendants because those remedies' expressive and deterrent effects benefit the innocent. Amar's damage remedy fails on both counts. The vast majority of criminal cases end in convictions, and Amar's proposal provides no expressive remedy in those cases. Moreover, a prosecutor, when deciding whether to expedite her case preparation to avoid a speedy trial violation, would know that it was highly likely that the defendant would be convicted and have virtually no chance at a damage remedy. She might rationally choose to roll the dice. Sentence reduction is thus a better alternative on deterrent and expressive grounds.

Although the Supreme Court is unlikely to overrule *Strunk*, sentence reduction could nevertheless be adopted as a remedy in speedy trial cases that do not involve violations of the federal Constitution. Congress could adopt it for violations of the Speedy Trial Act<sup>220</sup> that do not amount to constitutional violations; state courts could adopt it for violations of speedy trial clauses in their state constitutions, which are sometimes more expansive than their federal equivalent;<sup>221</sup> and state legislatures could adopt it for violations of their speedy trial statutes, which almost always are more expansive than the Sixth Amendment's protections.<sup>222</sup>

The remedy for these legislative and state constitutional provisions is probably more important than the Sixth Amendment remedy, because many more claims are now brought under them. As Susan Herman explains, "One important reason why the Supreme Court has not decided a constitutional speedy trial case since 1992 is undoubtedly that many claims which might otherwise have been raised under the Constitution have been superseded by the more specific and often more demanding speedy trial standards of an increasingly comprehensive set of federal and state rules."<sup>223</sup> States are, of course, free to adopt their own remedies for state rights, and the remedies that they have adopted

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<sup>216</sup> Amar, *supra*, at 669-76.

<sup>217</sup> The Rwanda Tribunal accordingly generally orders conditional remedies for pretrial rights violations: sentence reduction if the defendant is convicted and damages if he is acquitted. See *supra* note 6 (citing cases).

<sup>218</sup> See *supra* notes 55-57 and accompanying text.

<sup>219</sup> Amar, *supra*, at 670.

<sup>220</sup> The Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174, provided specific time limits for each stage in a federal criminal prosecution.

<sup>221</sup> See Andrew M. Siegel, *When Prosecutors Control Criminal Dockets*, 32 AM. J. CRIM. L. 325, n.116.

<sup>222</sup> *Id.*; HERMAN, *supra*, at 207.

<sup>223</sup> HERMAN, *supra*, at 204.

vary, although dismissal is common.<sup>224</sup> For federal prisoners, the Speedy Trial Act orders a dismissal remedy, although courts have discretion as to whether the dismissal is with or without prejudice.<sup>225</sup>

### B. Race Discrimination in Jury and Jury Venire Selection

In *Batson v. Kentucky*, the Supreme Court held that Constitution prohibits prosecutors from striking jurors from a jury venire on the basis of race.<sup>226</sup> Such discrimination, the Court held, violated both the juror’s and the defendant’s Equal Protection rights, as well as the defendant’s Sixth Amendment right to a venire composed of a fair cross-section of his peers. Although the juror’s rights are violated, the defendant alone receives the remedy. In *Batson* and subsequent cases finding similar discrimination, the Supreme Court has always reversed the defendant’s conviction without applying harmless error analysis.<sup>227</sup> It has thus implied, without ever actually stating, that automatic reversal is the appropriate remedy at the appellate stage.

Although the Court has never explained its remedial choice, it appears to be grounded in the violation of the juror’s rights, not the defendant’s. It has granted the same remedy in cases that focused on the juror’s rights alone. Consider its 1990 decision in *Powers v. Ohio*.<sup>228</sup> That case did not raise a Sixth Amendment issue, because it involved the selection of the jury itself, while the Court had earlier held that the “fair cross-section” requirement applied only to the jury venire.<sup>229</sup> Likewise, the *Powers* Court never resolved the thorny question of whether the white defendant’s Equal Protection rights were violated by the exclusion of black jurors. Instead, it focused on the Fourteenth Amendment right of the juror and devoted extensive analysis to the question of whether the defendant had third-party standing to invoke that right.<sup>230</sup> Finding that the defendant did have standing and that there was a violation, the Court granted reversal.<sup>231</sup>

In addition, the automatic reversal remedy appears more logically grounded in the juror’s right, because harmless error review is logically inapposite to that right. The juror’s right has nothing to do with the outcome—an excluded juror is equally harmed even if the juror who replaced him would have decided the case the same way. In contrast, violations of the defendant’s rights, in prin-

<sup>224</sup> *Id.* (discussing the effect of the Interstate Agreement on Detainers).

<sup>225</sup> 18 U.S.C. §§ 3161-3174.

<sup>226</sup> 476 U.S. 79 (1986); see *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (applying this rule to sex-based strikes).

<sup>227</sup> See Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, nn.148-49 (1996) (discussing cases).

<sup>228</sup> 499 U.S. 400.

<sup>229</sup> *Holland v. Illinois*, 493 U.S. 474, 478-89 (1990).

<sup>230</sup> 499 U.S. 400, 1410-16 (1991).

<sup>231</sup> *Id.* See *Peters v. Kiff*, 407 U.S. 493 (1972) (likewise granting reversal in a case with a white defendant and no Sixth Amendment claim); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 734-36 (1992).

ciple, could be subject to harmless error review.<sup>232</sup> If the evidence for conviction is so overwhelming that any reasonable juror would have convicted, the exclusion could be harmless.<sup>233</sup>

But using the automatic reversal remedy (in either the venire or jury selection context) to vindicate the juror's Equal Protection rights confers a windfall on the defendant—the remedy does not match the violation.<sup>234</sup> This result, as Peter Henning has argued, “does not necessarily vindicate the interests of the community” in punishment of crime.<sup>235</sup> And as discussed in Part IV, this windfall problem could potentially undermine the expressive and corrective value of the reversal remedy.

Many scholars have defended the automatic reversal remedy despite this windfall, arguing that it is necessary to protect jurors who “have no ability to detect and correct violations” themselves by “giving defendants an incentive” to bring violations to light.<sup>236</sup> Although jurors themselves receive no remedy, the risk of reversal deters prosecutors from violating their rights.<sup>237</sup>

These are real advantages, if the reversal remedy is actually implemented effectively—but remedial deterrence presents a serious problem. The

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<sup>232</sup> There is a reasonable doctrinal argument that the remedy would be automatic reversal for the defendant's right too, because the violation is “structural”—a “defect affecting the framework within which the trial proceeds.” *Neder v. United States*, 527 U.S. 1, 8 (1999). Discriminatory jury selection might “defy harmless-error review,” *id.*, because it is impossible to know whether a different juror would have decided the case differently. Analogously, race discrimination in *grand* jury selection, which has been treated as a violation of the defendant's rights, is subject to automatic reversal. *Vasquez v. Hillery*, 474 U.S. 254 (1986). But there is a strong counter-argument. Other kinds of constitutional errors are routinely deemed harmless on the basis of overwhelming evidence, even though doing so requires considerable counterfactual speculation—for instance, cases in which jury instructions have omitted or misstated one of the elements of the crime. See *Neder*, 527 U.S. at 10-11 (compiling cases). It is not evident that substitution of one or two jurors is more of a “structural” error than failure to have *any* jurors adjudicate one of the elements. See generally Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63 (1993) (arguing for focus on defendant's right combined with harmless error review).

<sup>233</sup> Indeed, Eric Muller has suggested that the Court's doctrine means that violations of the defendant's right are *inherently* harmless, because the “Court has firmly rejected the idea that a juror's race or gender has any bearing on how that juror will view the evidence.” Muller, *supra*, at 96. This point seems overstated, however, because even if race does not predict decision-making, substituting one juror for another could matter—different individuals can make different decisions, regardless of race.

<sup>234</sup> Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L. Q. 713, 788-90 (1999)

<sup>235</sup> Henning, *supra*, at 717.

<sup>236</sup> Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases*, 86 GEO. L.J. 945 (1998); accord Albert W. Alschuler, *The Supreme Court and the Jury*, 56 U. CHI. L. REV. 153, 193-95 (1989); Underwood, *supra*.

<sup>237</sup> See Russell D. Covey, *The Unbearable Lightness of Batson*, 66 MD. L. REV. 279 (2007); Henning, *supra*, at 717; Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CINN. L. REV. 1139, 1158 (1993).

drastic remedy makes judges reluctant to reverse convictions and too willing to accept pretextual race-neutral explanations for peremptory strikes.<sup>238</sup> If violations are virtually never found, prosecutors can feel free to discriminate with impunity, and jurors remain unprotected.<sup>239</sup>

Sentence reduction could help to solve this dilemma. The arguments for an automatic appellate remedy that benefits the defendant do not necessarily require automatic *reversal*—automatic sentence reduction would carry the same benefit of giving defendants the incentive to raise claims.<sup>240</sup> Meanwhile, while automatic sentence reduction would still be something of a windfall to the defendant in harmless error cases, the magnitude of the windfall would be much less, making it preferable on expressive and corrective grounds.

Some defenders of the reversal remedy might raise an expressive objection, arguing that only reversal can send an unambiguous message condemning such discrimination.<sup>241</sup> Under this view, sentence reduction would send the message that race discrimination is to some degree tolerable. This objection does not persuade me. To say that reversal is not warranted by a constitutional violation is not to say that the violation is acceptable, but rather that reversal is not the remedy that best fits the violation in light of other important social values at stake in the case.<sup>242</sup> Moreover, as discussed in Part IV.C, the most dramatic remedy is not always the most effective one from an expressive perspec-

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<sup>238</sup> See *supra* notes 28-30 and accompanying text; Alschuler, *supra*, at 171-73; Leonard L. Cavise, *The Batson Doctrine*, 1999 WIS. L. REV. 501, 527-41; Gershman, *supra*, at 441; Henning, *supra*, at 786.

<sup>239</sup> See Karlan, *supra*, at 2022-23.

<sup>240</sup> See Calabresi, *supra*, at 115 (“One of the things I have noticed as a judge is that even when people have been sentenced to thirty or forty years in jail, they fight desperately to get two points down on the sentencing guidelines.”); POSNER, *supra*, at 623 (noting that defendants will appeal even when “the expected benefits of appealing may be slight” because “the expected costs are zero”); Kate Stith, *The Risk of Legal Error in Criminal Cases*, 57 U. Chi. L. Rev. 1, 29 (1990). Of course, raising arguments has costs for defense counsel’s time. See Stuntz, *supra*, at 32, 36-37; Darryl Brown, *Criminal Procedure, Justice, Ethics, and Zeal*, 96 MICH. L. REV. 2146, 2148-49 (1998). Still, if defense counsel has a good chance of winning an argument on appeal, she would be plainly irresponsible not to do so even if the result would only be a sentence reduction and not reversal.

<sup>241</sup> E.g., Covey, *supra*, at 16 (arguing that *Batson* “symbolizes official intolerance of discrimination in jury selection”).

<sup>242</sup> Analogously, Muller argues:

[A] prosecutor’s illegal courtroom decision to dismiss a juror on account of race or gender should have the same consequences for the defendant as that prosecutor’s illegal office decision to fire a secretary on account of race or gender. In both instances, the prosecutor has offended deep and important equal protection values. But when the appellate court reviews a criminal conviction, it does not police those values for their own sake; it polices the reliability of the verdict.

Muller, *supra*, at 121. I would not go this far; obviously, I do argue for a remedy to the defendant, and I argue that verdict-reliability ought not to be the sole focus of appellate courts. Still, I agree with Muller that rejection of a particular remedy for a constitutional violation ought not to be confused with approval of the violation itself.

tive. Resentment of excessive windfalls may cloud the remedial message, making a “lesser” remedy a better option.

Most importantly, sentence reduction could provide an appellate remedy that courts would actually be willing to enforce. It thus could serve the purposes of the automatic reversal remedy better than that remedy itself does, providing a greater deterrent of prosecutorial discrimination in jury selection. Reversal could be maintained as an option for those few especially egregious instances in which courts are willing to grant it, which would preserve any advantages that it offers while allowing for some remedy to be granted when courts are unwilling to reverse.

Some scholars have critiqued courts’ emphasis on the juror’s right, arguing that the defendant’s rights (under either the Sixth Amendment or the Equal Protection Clause) are the proper focus.<sup>243</sup> If the *Batson* problem is conceived in terms of the defendant’s rights, sentence reduction would be an unsatisfying remedy in cases in which the violation renders the trial unfair. I take no position as to whether the right is better conceived as belonging to the juror, the defendant, or both—I assume the maintenance of current doctrine, under which the remedy appears to be justified by the juror’s right. That said, defendants too might be better off with something less than automatic reversal, because courts would be more willing to recognize violations. If the *Batson* prohibition’s substance is being diluted as a result of its remedy, neither the interests of defendants nor those of jurors are well served.

Sentence reduction could, in any case, play an important role in a remedial scheme that addressed *both* the defendant’s rights and those of the juror, provided that violations of the former were subject to harmless error review. The scheme would then encompass separate remedies, each less than automatic reversal, for each right. The defendant would get an automatic sentence reduction as a “remedy” for the violation of the juror’s rights, and *if* the prosecutor failed to prove the error harmless, reversal to remedy the violation of the defendant’s own rights. That approach would retain the benefits of sentence reduction—providing an intermediate remedy that courts would be willing to invoke—but still allow reversal where trial fairness was compromised.

### C. Harmless but Serious Errors

For most kinds of prosecutorial misconduct, most defendants receive no remedy at all because the violations, even if egregious, are deemed harmless. Sentence reduction could be adopted as a remedy for such “harmless but serious” errors. This approach would address several significant objections raised by critics of the harmless error doctrine.

First, by eliminating the remedy for the great majority of violations, the harmless error doctrine seriously undermines deterrence. As Judge Harry Edwards puts it, “when evidence is not excluded, indictments are not quashed, and convictions are not overturned, we eviscerate the deterrent effect of these

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<sup>243</sup> See *id.* at 150; King, *supra*.



and other similar measures. . . . After all, we can hardly expect prosecutors to respect the rights of criminal defendants whom they believe to be guilty when . . . judges are unwilling to do so.”<sup>244</sup> Many scholars have agreed that the doctrine encourages prosecutorial misconduct.<sup>245</sup>

A second criticism is that the doctrine ignores constitutional values other than “accuracy in the determination of guilt.”<sup>246</sup> As Charles Ogletree argues, constitutional criminal procedure is designed “to restrain the government’s human rights abuses . . . and sometimes to protect the human dignity of the accused.”<sup>247</sup> But by only redressing errors that change the outcome of a trial, the Court “virtually tosses aside all other competing structural and constitutional values.”<sup>248</sup> Thus, the doctrine is problematic both from a corrective justice perspective—it leaves non-conviction-related harms unremedied—and from an expressive one: as Edwards says, it “infect[s] the entire criminal process with an ambivalence toward our most fundamental liberties.”<sup>249</sup>

If mere words were enough to counter the expressive harms inflicted by procedural violations, then a finding that error has occurred but is harmless might be perfectly satisfactory to vindicate the “other constitutional values” to which Ogletree refers. But as discussed in Part IV, words alone often “ring hollow” when unaccompanied by a remedy.<sup>250</sup> Anderson and Pildes make an analogous argument about criminal punishment:

Suppose a defendant convicted of a vicious crime is brought before a judge for sentencing. The judge declares, ‘Your crime is horrific and wrong, and the State condemns you for it,’ and—then releases the convict without punishment. The outraged public would naturally think that the judge did not really mean what he said. . . . To condemn meaningfully requires not a mere utterance, even in the form of a stern lecture from the bench,

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<sup>244</sup> Harry T. Edwards, *To Err is Human, but Not Always Harmless*, 70 N.Y.U. L. REV. 1167, 1195 (1995).

<sup>245</sup> E.g., Posner, *supra*, at 623; Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 Va. L. Rev. 1, 59 (2002); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure?*, 94 MICH. L. REV. 2466, 2548 (1996); Charles F. Campbell, Jr., *An Economic View of Developments in the Harmless Error and Exclusionary Rules*, 42 BAYLOR L. REV. 499, 511 (1990); Bennett L. Gershman, *The Gate Is Open but the Door Is Locked—Habeas Corpus and Harmless Error*, 51 WASH. & LEE L. REV. 115, 131-32 (1994); Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 437-38 (1980); Alschuler, *supra*, at 659.

<sup>246</sup> Charles J. Ogletree, Jr., *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 162 (1991).

<sup>247</sup> *Id.* at 170.

<sup>248</sup> *Id.*; see also Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 86-91 (1988).

<sup>249</sup> Edwards, *supra*, at 1195.

<sup>250</sup> Friedman, *supra*, at 289.

but a practice of punishment socially understood to express condemnation effectively.<sup>251</sup>

Finally, the harmless error doctrine arguably impedes the development of legal doctrine. Judge Edwards criticizes “judicial use of the harmless-error rule to avoid reaching a difficult issue in a case,” which “leaves unresolved the question of whether an error even occurred, thus offering no guidance to trial courts.”<sup>252</sup> Many scholars likewise contend that courts’ ability to bypass the substantive issue results in doctrinal confusion or “law-freezing.”<sup>253</sup> Avoidance of constitutional questions is not always undesirable—it is traditionally required in some contexts.<sup>254</sup> But this canon is typically invoked in the context of judicial review of legislation or non-litigation-related conduct. Its concern with judicial overreaching seems inapplicable to appellate guidance to lower courts on procedural questions involving the conduct of the lawyers before them. The Supreme Court has never cited constitutional avoidance to justify skipping to the harmless error question, and indeed has held that harmless error review “is triggered only after the reviewing court discovers that an error has been committed.”<sup>255</sup> Surprisingly, however, many appellate courts have simply ignored this holding and continue to bypass the question of error.<sup>256</sup>

Unfortunately, the cure that some scholars propose for these problems—abolishing harmless error review entirely for constitutional errors, replacing it with automatic reversal<sup>257</sup>—may be worse than the disease. As discussed in Part I, automatic strong remedies for rights violations often discourage courts from finding violations in the first place. The result may be “manipulation or

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<sup>251</sup> Anderson & Pildes, *supra*, at 1567.

<sup>252</sup> Edwards, *supra*, at 1182.

<sup>253</sup> John M. M. Greabe, *Mirabile Dictum! The Case for “Unnecessary” Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 405 (1999); accord Jeffrey O. Cooper, *Searching for Harmlessness*, 50 KAN. L. REV. 309, 310-11 (2002); Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. PA. L. REV. 15, 61 (1976); Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 39-40 (2004). Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 435-36 (1980).

<sup>254</sup> *E.g.*, *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944); see Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 851-58, 891-95, 935-36 (suggesting that this principle should be applicable to harmless error cases).

<sup>255</sup> *Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993); see *United States v. Vilches-Navarrete*, 523 F.3d 1, 23 (1<sup>st</sup> Cir. 2008) (noting that *Lockhart* means the avoidance canon does not apply to harmless error cases); *In re Fashina*, 486 F.3d 1300, 1303 (2007) (same); Richard Fallon, *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 660 n.90 (2006).

<sup>256</sup> Healy, *supra*, at 893; see, *e.g.*, *United States v. Cusumano*, 83 F.3d 1247, 1250-51 (10<sup>th</sup> Cir. 1996) (ignoring *Lockhart* despite a dissent relying on it).

<sup>257</sup> See Goldberg, *supra*, at 441-42; Ogletree, *supra*, at 167; James Edward Wicht III, *There is No Such Thing as a Harmless Constitutional Error*, 12 BYU J. PUB. L. 73 (1997).

strained interpretation of substantive rules in order to justify affirmance.”<sup>258</sup> As Stephen Saltzburg put it, “[i]f the subversion of federal rights is an object, state judges have a variety of means more effective for achieving that end.”<sup>259</sup>

Indeed, weighed against the “law-freezing” objection is the possibility, raised by Richard Fallon and Daniel Meltzer, that harmless error may actually permit courts to adopt broader rights interpretations because it insulates them from excessively costly remedies.<sup>260</sup> Replacing harmless error review with automatic reversal might thus retard rather than advance the progressive development of rights that the doctrine’s critics desire. Likewise, if courts systematically avoid finding violations, prosecutors are unlikely to be deterred from misconduct, and none of the defendant’s interests will be well served.

Nor is tinkering with the harmless error standard, as some scholars suggest,<sup>261</sup> likely to solve these problems. Harmless error standards have proven easy for courts to manipulate to achieve desired results—even the purportedly demanding *Chapman* test, which requires the prosecutor to prove constitutional violations harmless beyond a reasonable doubt.<sup>262</sup> And to the extent that the new standard precluded courts from finding an error harmless, they might simply respond by not finding a violation.

Finally, of course, even if (under any of the reform or elimination proposals) courts *did* end up finding violations and order reversal frequently, the resulting proliferation of retrials would significantly undermine judicial efficiency,<sup>263</sup> which is the reason the harmless error doctrine exists in the first place. These costs may be disproportionate to the harm suffered by the defendant in cases in which procedural violations do not affect the verdict.

A better alternative is to maintain harmless error review as to the question of whether the conviction should be reversed, but to allow or require a lesser remedy of sentence reduction when courts recognize a “serious but harmless” instance of prosecutorial misconduct—perhaps better referred to as “non-conviction-related” rather than “harmless” errors, in light of the harm they do inflict. The seriousness threshold triggering the sentence reduction remedy could be set in any of a number of ways—for instance, it could turn on whether

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<sup>258</sup> Francis Allen, *A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review*, 70 IOWA L. REV. 311, 332 (1985); Stuart P. Green, *The Challenge of Harmless Error*, 59 LA. L. REV. 1101, 1102-03 (1999).

<sup>259</sup> Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 1026 (1973).

<sup>260</sup> Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1799-1800 (1991); accord Ted Sampsell-Jones, *Reviving Saucier: Prospective Application of Criminal Laws*, 14 GEO. MASON L. REV. 725, 766 (2007).

<sup>261</sup> See, e.g., TRAYNOR, *supra*, at 17-51; Cooper, *supra*, at 312-13; Edwards, *supra*, at 1171; Field, *supra*, at 16; Saltzburg, *supra*, at 989; Stacy & Dayton, *supra*, at 91-92.

<sup>262</sup> See, e.g., Kamin, *supra*, at 62, 67-71 (showing that pro-death-penalty justices on the California Supreme Court were vastly more likely than anti-death-penalty justices to deem constitutional errors in capital cases harmless).

<sup>263</sup> See *supra* Part I (discussing the costs of retrials); Henning, *supra*, at 820.

the Constitution is violated, whether the misconduct was deliberate, or some combination of those factors.

This approach is a satisfying solution to all of the above-discussed objections to the harmless error doctrine. It could provide an effective deterrent to prosecutorial misconduct and a measure of compensation for the dignitary and other harms outside of guilt determination that defendants suffer.<sup>264</sup> It serves an expressive purpose, recognizing that severe prosecutorial misconduct is not truly “harmless” even when it does not affect the outcome of the trial.<sup>265</sup> And it avoids the “law-freezing” effect—courts presented with a request for sentence reduction could not skip the merits of a constitutional question on the basis of harmlessness—but without imposing the countervailing pressure against rights expansion that would come with the costly remedy of automatic reversal.

## VI. Practicalities

Although this Article does not seek to work out all the details of a possible sentence reduction scheme, I offer here some initial thoughts on adoption and workability. First, I consider possible legislative and judicial mechanisms for initial adoption, in light of various constitutional and statutory constraints. I then respond to a few practical objections concerning implementation.

### A. Legislative Approaches

Sentence reduction could be prescribed as a remedy for prosecutorial misconduct by a legislature (or sentencing commission). It could be built into determinate sentencing schemes, *e.g.*, as a basis for a downward departure. As discussed in Part IV, the magnitude of the departure could be left indeterminate or else specified. In discretionary-sentencing jurisdictions, sentence reduction could still be required by statute as a remedy for particular kinds of misconduct. If there is an “advisory” sentencing scheme—like the U.S. Sentencing Guidelines after *United States v. Booker*<sup>266</sup>—remedial departure could either be required or recommended with whatever force the sentencing guidelines themselves hold. Nothing in *Booker* or its predecessor *Blakely v. Washington*<sup>267</sup> precludes Congress or the states from specifying mandatory *reductions* to be adjudicated by a judge—only mandatory *increases* in sentencing exposure must be based on facts adjudicated by juries.<sup>268</sup>

Legislatures or sentencing commissions are thus free to create a sentence reduction remedy, but it would then be up to the relevant jurisdiction’s courts to determine whether the remedy is constitutionally sufficient. Where the remedy exceeds what is presently treated as constitutionally required (as it would for “harmless” errors that presently receive no remedy), this would pre-

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<sup>264</sup> See *infra* Part IV.A.

<sup>265</sup> *Id.*

<sup>266</sup> 543 U.S. 220 (2005).

<sup>267</sup> 542 U.S. 296 (2004).

<sup>268</sup> *Blakely*, 542 U.S. at 301; see *id.* at 333 (Breyer, J., dissenting).

sumably be no obstacle.<sup>269</sup> Likewise, there would be no difficulty if the sole source of the underlying right were itself statutory—e.g., the jurisdiction’s rules of criminal procedure or evidence, or the Speedy Trial Act. For such rights, the legislature is free to specify the remedy.

Where the right is constitutional in nature and sentence reduction is less than the current usual remedy, however, defendants can be expected to litigate its constitutional sufficiency. In the case of federal Speedy Trial Clause violations, as discussed in Part V.A, the U.S. Supreme Court has already ruled the remedy insufficient, which would make federal legislation to the contrary almost surely futile. But for corresponding state constitutional claims, the remedial question in many states may be open to litigation in state court.

What about *Batson* claims? Consider a hypothetical statute that orders automatic sentence reduction in cases of prosecutorial race discrimination in jury selection, but requires reversal only when the prosecution fails to prove that the verdict was unaffected. That is, the statute would replace the present remedy of automatic reversal with automatic sentence reduction (plus reversal subject to harmless error review).

The U.S. Supreme Court could and should approve such a remedial scheme. While the Court has not undertaken harmless error review in *Batson* cases, it has never actually held that automatic reversal is constitutionally required.<sup>270</sup> Moreover, under its doctrine, the *Batson* right is the juror’s, not the defendant’s; the reversal remedy exists to deter prosecutors from violating jurors’ rights and to encourage defendants to bring violations to light.<sup>271</sup> Sentence reduction serves both those purposes *better*, in light of the remedial deterrence problem that plagues the current scheme.

Legislatures cannot, of course, safely assume that their efforts to change constitutional remedies will survive judicial scrutiny. There is some chance such legislation would be struck down. As Bill Stuntz argued in 1997 about possible legislative alteration of the *Miranda* warning requirement:

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<sup>269</sup> For simplicity, I assume that federal remedial legislation would cover federal courts while state legislation would cover state courts. However, Congress could in principle reach state court cases under its authority to specify remedies for states’ violations of the Fourteenth Amendment. Cf. Craig Bradley, *The Failure of the Criminal Procedure Revolution*, 47 J. LEG. ED. 129, 130 (1997) (arguing that “Congress has the power, under section 5 of the Fourteenth Amendment, to promulgate a *federal* code of criminal procedure” applicable to state courts). States could be expected to challenge such legislation; the Supreme Court has permitted prophylactic Section 5 remedies that exceed constitutional requirements, but only if they are “congruent and proportional” to underlying constitutional violations. See *City of Boerne v. Flores*, 521 U.S. 507, 518-20 (1997). Sentence reduction legislation would be most likely to satisfy this standard if it was triggered only by clearly *unconstitutional* misconduct, see *id.* at 519, and if the legislature made findings concerning a pattern of such misconduct in state courts, see *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 369, 370-72 (2001).

<sup>270</sup> See Muller, *supra*, at 93nn.148-49 (1996).

<sup>271</sup> *Supra* Part V.B.

legislative overruling is extremely risky. Courts could conclude that the [new remedy] is not an adequate replacement. And under current retroactivity doctrines, that would place at risk every criminal conviction in the trial and appellate pipelines in which evidence obtained under the new regime had been used.<sup>272</sup>

Stuntz’s warning was prescient. The Supreme Court had never previously ruled that the Constitution actually required exclusion of evidence taken absent *Miranda* warnings, but it did so in 2000 in *Dickerson v. United States*, striking down an alternative admissibility rule that Congress had adopted.<sup>273</sup> Its prickly admonition that “*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress” signaled hostility to Congress’s attempt to play on its turf.<sup>274</sup> Risk-averse legislators might thus prefer to avoid substituting constitutional remedies for the Court’s stronger ones.

That said, legislatively altering the remedy for prosecutorial misconduct is much less risky than altering a rule governing admission of evidence, because such remedies are usually given on appeal. A hypothetical Supreme Court case overturning an appellate remedy for prosecutorial misconduct would not require much relitigation of other cases, because cases still “in the trial or appellate pipelines”<sup>275</sup> would not (yet) have been wrongly decided. Thus, the retroactivity concerns Stuntz raises would be far less applicable. Legislatures might reasonably choose to act even in the face of a substantial chance that the legislation would be struck down—especially if they conclude, as I do, that there is a fairly good chance that it wouldn’t be.

## B. Judicial Approaches

Alternatively, courts could bypass the legislature and order sentence reductions themselves, where they have authority to do so. Such authority could be grounded in supervisory powers or in the federal or state constitution.

The U.S. Supreme Court has the supervisory authority “to prescribe rules of evidence and procedure that are binding” in federal courts,<sup>276</sup> and state high courts enjoy similar prescriptive authority with respect to state courts.<sup>277</sup> But his authority is trumped by conflicting legislation or constitutional requirements—it is a gap-filling authority.<sup>278</sup> Notably, this means that the U.S.

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<sup>272</sup> Stuntz, *supra*, at n. 178.

<sup>273</sup> 530 U.S. 428 (2000).

<sup>274</sup> *Id.* at 431. See John T. Parry, *Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation After Chavez v. Martinez*, 39 GA. L. REV. 733, 794 (noting that the “exact scope of Congress’s power to alter remedies . . . remains doctrinally unclear”).

<sup>275</sup> Stuntz, *supra*, at n. 178.

<sup>276</sup> *Dickerson*, 530 U.S. at 437.

<sup>277</sup> See Thomas G. Saylor, *Prophylaxis in Modern State Constitutionalism*, 49 N.Y.U. ANN. SURV. AM. L. 283, 309 (2003); Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L.J. 1191, 1193 (1978).

<sup>278</sup> *E.g.*, *Palermo v. United States*, 360 U.S. 343, 345-48 (1959).

Supreme Court cannot rely on it to order sentence reductions for “harmless” errors. Federal Rule of Criminal Procedure 52(a) requires courts to “disregard” errors that do not “affect substantial rights.” The Supreme Court has held that this rule codifies the harmless error doctrine and that the Court has no supervisory authority to displace it.<sup>279</sup> For the Court to grant sentence reduction in a federal harmless error case, absent prior congressional authorization, it would have to hold that the remedy is constitutionally required.

Supervisory authority might, however, allow state courts to order sentence reduction for “harmless but serious” errors, depending on the wording of the state’s harmless error provisions. All 50 states have such provisions in their statutes or constitutions.<sup>280</sup> But they do not all include language, like that of Rule 52(a), requiring courts to “disregard” harmless errors entirely. Instead, some simply prevent courts from reversing convictions.<sup>281</sup> Such provisions seem to allow room for alternative remedies like sentence reduction. If so, states almost certainly could apply such remedies to federal constitutional errors occurring in state court as well as to errors of state law.<sup>282</sup>

Second, courts also have the power to grant any remedies that are constitutionally required, and this power naturally trumps conflicting legislation. Constitutionally required remedial rules ordered by the Supreme Court extend both to federal and state courts, and state courts may craft state constitutional remedial rules. To the extent existing remedial rules are premised on this constitutional authority, they can be changed by the relevant high courts.

For instance, the U.S. Supreme Court could in its next *Batson* case hold that sentence reduction is a constitutionally adequate remedy. Indeed, even a lower court would probably be free to so hold, because the Supreme Court has never squarely held that automatic reversal is constitutionally required. Likewise, sentence reduction could be ordered by state courts to remedy misconduct violating the state constitution.

One practical concern with judicial adoption of sentence reduction is whether it can be reconciled with existing sentencing legislation. This question

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<sup>279</sup> *Bank of Nova Scotia v. United States*, 108 S.Ct. 2369, 2373 (1988).

<sup>280</sup> *Chapman*, 386 U.S. at 22.

<sup>281</sup> *See, e.g.*, Cal. Const. Art. 6 sec. 13.

<sup>282</sup> Although the question whether a federal constitutional error is harmless is itself a federal question, *Chapman*, 386 U.S. at 21, states apparently may adopt remedies that federal courts would not grant in harmless error cases. In *Delaware v. Van Arsdall*, the Supreme Court suggested that a state court could adopt an automatic reversal rule as a “state prophylactic rule designed to insure protection for a federal constitutional right,” so long as it made clear that the remedial rule was an “adequate and independent state ground” rather than being derived from the federal Constitution. 475 U.S. 673, 678 n.3 (1986); *see also* *Connecticut v. Johnson*, 460 U.S. 73, 91 (1983) (Powell, J., dissenting) (“A state, of course, may apply a more stringent *state* harmless error rule than *Chapman* would require.”). In other contexts, the Court has likewise permitted states to expand remedies for federal constitutional violations. *See, e.g.*, *Danforth v. Minnesota*, 128 S.Ct. 1029, 1038 (2008) (recognizing “the authority of the States to provide [postconviction] remedies for a broader range of constitutional violations than are redressable on federal habeas”).

has been the main source of controversy surrounding the permissibility of the remedy in Canada.<sup>283</sup> If guidelines or mandatory minimums do not allow sufficient discretion to permit remedial sentence reduction, they may preclude courts from relying on their supervisory authority to grant such reductions, because that authority depends on an absence of conflicting law. Sentence reductions would then have to be premised on courts' constitutional authority, or else authorized by the legislature. But advisory guidelines, like the current federal system, almost surely do not present a problem. While the weight accorded such guidelines remains unsettled, the Supreme Court has made clear that courts have broad authority to depart from them.<sup>284</sup>

### C. Implementation Concerns: Responses to Objections

Regardless of which branch initially adopts a sentencing reduction scheme, its implementation raises some practical questions. In Part IV, I addressed concerns related to commensurability and disparity in the magnitude of reductions; here, I respond to a few additional objections.

The first is the possibility that courts would just raise the base sentence to cancel out the required reduction.<sup>285</sup> This is unlikely to happen often. First, in many jurisdictions, determinate sentencing schemes will make it difficult to manipulate the base sentence.<sup>286</sup> Second, it is hard to see how an appeals court could engage in such manipulation, because the trial court's sentence would presumably serve as the starting point for the reduction. Third, most courts are unlikely to want to do so. Studies show that most judges think sentences are too high,<sup>287</sup> and moreover, many courts will presumably *want* to remedy serious prosecutorial misconduct if they can do so without the massive windfall of complete release.<sup>288</sup> Third, any court that would manipulate the base sentence to avoid sentence reduction would surely engage in other kinds of manipulation (like narrowing the right) to avoid current windfall remedies. And finally, even if a court did engage in such manipulation, if it was well disguised, the sentence reduction might still achieve its deterrent and expressive purposes.

A variation on this concern is that prosecutors themselves will attempt to offset the impact of sentence reduction by exercising their discretion in ways that increase base sentences. This concern is more plausible, because prosecu-

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<sup>283</sup> Compare Carpenter, 2002 CarswellBC 1057 para. 26, with MacPherson, 100 C.C.C. (3d) 216; see generally Bick, *supra* (discussing the controversy).

<sup>284</sup> See Gall v. United States, 128 S.Ct. 538, 602 (2007) (holding that "the Guidelines are only one of the factors to consider when imposing sentence").

<sup>285</sup> See Amsterdam, *supra* (raising this objection in the speedy trial context); see also Caldwell & Chase, *supra*, at 71-72 (describing this as a "legitimate concern").

<sup>286</sup> Caldwell & Chase, *supra*, at 72.

<sup>287</sup> See *supra* note 67; Calabresi, *supra*, at 116 (arguing that severe sentencing laws mean that judges won't put a "thumb on the scale" to increase sentences).

<sup>288</sup> Courts have expressed frustration at their own lack of effective remedies for prosecutorial misconduct. See Modica, 663 F.2d at 1182-84; Pallais, 921 F.2d at 691-92.



tors have a significant incentive to keep the sentence high. Still, it is not so easy to see how this would work. Most of prosecutors' considerable power over sentences lies in their control over charging decisions and plea-bargaining.<sup>289</sup> But prosecutors tend already to exercise that control to maximize sentences, especially for defendants who choose to go to trial.<sup>290</sup> Moreover, the kinds of misconduct I have discussed here generally take place well after the charging and plea stages, at or close to trial. So a prosecutor will usually not be able to respond, after committing misconduct and getting caught, by ramping up the charges. She could make a higher-than-usual sentence recommendation, but that would be fairly transparent and therefore likely less convincing to the court. She could start to charge more harshly in *every* case just in case she commits misconduct and gets caught. But any prosecutor so Machiavellian as to plan in all cases for the likelihood of her own misconduct is probably already charging the maximum.<sup>291</sup> Finally, even if she did find a way to compensate for the sentence reduction in a particular case, she wouldn't be able to avoid the reputational cost of being publicly chastised by the appeals court, which may well be the most significant part of the sanction.

A third variation is that legislatures or sentencing commissions will respond by ramping up the base sentences. Analogously, Bill Stuntz has argued that legislatures have historically responded to the expansion of constitutional criminal procedure by expanding the scope and penal severity of the substantive criminal law.<sup>292</sup> These concerns might provide a reason to prefer reforms conducted through the legislature itself, if possible.<sup>293</sup> But in any event, it is not clear that sentence reductions would be likelier than current stronger remedies to trigger this kind of political response. Stuntz does not suggest that harsh sentencing legislation is triggered by innovations in *sentencing* procedure specifically—rather, it responds to perceived “soft on crime” judging more generally. If sentence reductions were less politically controversial than reversals or dismissals, then they might be less likely to provoke a legislative backlash. And there is some evidence that intermediate alternatives might be attractive to legislatures that dislike current all-or-nothing schemes.<sup>294</sup>

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<sup>289</sup> *E.g.*, Standen, *supra*, at 1509.

<sup>290</sup> *See supra* Part III.

<sup>291</sup> Relatedly, Bill Stuntz argues that expanded procedural protections induce prosecutors to change whom they charge, dropping cases that have likely procedural claims in favor of those that don't. Stuntz, *supra*, at 4, 28. That argument largely pertains to police procedure, however—charging practices are much less likely to be affected by improved remedies for prosecutorial misconduct, given the timing of that misconduct.

<sup>292</sup> Stuntz, *supra*, at 7; William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 Harv. L. Rev. 780, 784 (2006); accord William T. Pizzi, *Punishment and Procedure*, 13 CONST. COMMENT. 55, 66-67 (1996).

<sup>293</sup> *See* Stuntz, *Political Constitution*, *supra* note, at 796, 802-03 (noting that legislatures sometimes expand procedural protections themselves even though they resent judicially created protections).

<sup>294</sup> *See* HERMAN, *supra*, at 205-06 (noting that “what remedy to provide [in the Speedy Trial Act] occasioned active debate in Congress because the choices—a severe remedy allow-

Another possible objection is that judicial resources could be strained if defendants start raising claims that would otherwise surely be declared harmless. But Canada's experience, so far, provides little basis for this concern, as in "the vast majority of cases, the offender only asked for a sentence reduction once a preferred remedy, such as exclusion of evidence or a stay of proceedings, had been denied."<sup>295</sup> Thus, reduction requests are adjudicated at the sentencing stage on the basis of submissions already made earlier in the proceedings.<sup>296</sup> Moreover, limiting the remedy to cases involving *serious* prosecutorial misconduct ought to discourage defense counsel from raising frivolous claims. Any lawyer who is willing to decline to raise harmless procedural errors will also probably decline to raise trivial ones. And if serious misconduct *has* occurred, then it would be a good thing if defense counsel had an incentive to bring it to courts' attention.

### CONCLUSION

Current remedies for prosecutorial misconduct are strikingly ineffective, largely because courts view them as too costly to grant. Scholars too often have been unrealistic about this remedial deterrence problem, proposing stronger remedies for misconduct when the more realistic solution might be nominally "weaker" ones. Adding sentence reduction to current all-or-nothing remedial schemes could help to deter and condemn prosecutorial misconduct, while avoiding the social costs of retrial and providing a fair measure of relief to defendants whose rights have been violated.

This Article has sought to make the case for sentence reduction in terms of three distinct remedial purposes—deterrence, corrective justice, and expressive condemnation—that might strike some readers as being in tension. I have been deliberately agnostic as to the "proper" purpose of criminal procedure remedies, for several reasons. First, there may not always be one right answer—such remedies (like, for instance, civil damages<sup>297</sup> or criminal punishment<sup>298</sup>) can and do simultaneously serve multiple purposes, or different purposes in different contexts.<sup>299</sup> Second, because I believe sentence reduction can effectively serve all three goals, there is no real need to choose—the case for sentence reduction, I hope, is overdetermined.<sup>300</sup>

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ing alleged criminals to escape punishment or a remedy with few if any teeth—were not inviting").

<sup>295</sup> Bick, *supra*, at 230.

<sup>296</sup> *Id.*

<sup>297</sup> *E.g.*, Carlson v. Green, 446 U.S. 14, 21 (1980) (holding that "the *Bivens* remedy, in addition to compensating defendants, serves a deterrent purpose").

<sup>298</sup> *E.g.*, Kennedy v. Louisiana, 128 S.Ct. 2641, 2649 (citing "rehabilitation, deterrence, and retribution" as punishment purposes); Dan Kahan, *What's Really Wrong With Shaming Sanctions*, 84 TEX. L. REV. 2075, 2089-90 (2006) (discussing imprisonment's purposes).

<sup>299</sup> *E.g.*, Vasquez, 471 U.S. at 273 (Powell, J., dissenting) (citing corrective and deterrent functions of reversal).

<sup>300</sup> *Cf.* Kahan, *supra*, at 2081-86 (arguing that social policies that are similarly overdetermined are expressively more effective because of their broader cultural appeal).

That said, of course there would be cases, if my proposal were adopted, in which the various goals would support sentence reductions of quite different magnitudes. Most notably, in cases involving serious prosecutorial misconduct that nonetheless caused the defendant little identifiable harm, it might be necessary to sacrifice the objective of corrective justice (by granting a remedy that “overcorrects”) in order to achieve effective deterrence or condemnation. Although I have offered a few thoughts on how to resolve such tensions, I have not proposed any firm rules for balancing competing interests or any formula for calculating the appropriate length of a reduction. If my proposal were adopted, those details would be important subjects of further judicial, legislative, and scholarly debate.

Significantly, adding the option of sentence reduction need not mean giving up on the advantages that current “stronger” remedies may sometimes offer. Under my proposal, reversal would remain required when misconduct has compromised the reliability of the conviction, and dismissal with prejudice would be required when delays or other violations have rendered a fair trial impossible. Moreover, even in cases not involving that kind of prejudice, these strong remedies could remain available as an option for the exceptional cases in which courts are willing to invoke them. My proposal would eliminate the *automatic* remedies of reversal and dismissal for *Batson* and speedy trial cases, but permit those remedies on a discretionary basis. For this reason, if reversal or dismissal *is* necessary for deterrent, expressive, or corrective purposes in some cases, sentence reduction need not displace it. Rather, sentence reduction would target misconduct that exists in the very large zone between proper conduct and the extreme misconduct that currently triggers remedies.

In focusing on cases in which violations have not rendered a conviction unreliable, my proposal poses a challenge to current harmless error doctrine. When deciding what appellate remedy is due for violations of criminal defendants’ procedural rights, courts today start by categorizing the violation in one of two boxes: those requiring some automatic remedy (*e.g.*, *Batson* and speedy trial violations), or those requiring harmless error review (*e.g.*, *Brady* violations and most forms of trial misconduct). When considering cases in the first category, courts face a windfall problem—because the remedy does not depend on the harm experienced by the defendant, it will often be greatly disproportionate to that harm, and the only way to avoid that imbalance is to avoid recognizing a violation at all. When considering cases in the second category, courts face a different problem: they may respond only to one kind of harm (possible wrongful conviction). If that particular harm is absent, no remedy can be given, even if the violation caused other personal or social injuries or involved misconduct of a type that is often harmful and worth deterring.

My proposed approach is fundamentally different. In the context of prosecutorial misconduct, it treats the cases in both categories the same way, without either presuming harm or narrowly cabinning the kinds of harm courts can consider. Instead, for all types of serious misconduct, appeals courts would ask more broadly *what* harm has resulted, and tailor their remedies accordingly.

If the harm includes a reasonable possibility of wrongful conviction, then reversal (or dismissal) is the proper remedy. If not, the inquiry does not end, because the lesser remedy of sentence reduction may still be justified on corrective, expressive, or deterrent grounds.

As the literature on remedial deterrence suggests, all-or-nothing remedies also pose serious dilemmas for courts in contexts other than prosecutorial misconduct. It may be worth rethinking the current remedial schemes in some of those contexts, and sentence reduction might be an alternative worth considering. I do not mean to suggest, however, that automatic or all-or-nothing remedies have no place in criminal procedure. For many kinds of rights violations, such remedies might be the best option, especially if alternatives like sentence reduction are not likely to be taken seriously by the wrongdoer. In any event, I leave that project for another day.

For now, I have focused on prosecutorial misconduct for two reasons. First, the sentence reduction remedy is one that prosecutors, especially, are likely to take seriously. That gives it the prospect of being an effective deterrent, and also means that it is a meaningful condemnatory remedy—it can be understood by prosecutors themselves and by their communities as a punishment for misconduct. Second, there is now a quite longstanding scholarly consensus that the current remedies for prosecutorial misconduct have failed. If so, it is past time to think creatively about solutions.