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Some Reflections on Ethics and Plea Bargaining: An Essay in Honor of Fred Zacharias

R. MICHAEL CASSIDY*

Fred Zacharias was an accomplished scholar who authored over fifty law review articles in an academic career spanning thirty years at Cornell and the University of San Diego law schools. A leader in the field of professional responsibility, Zacharias unapologetically promoted the view that lawyers have important professional obligations beyond simply advancing the interests of their clients, including obligations to the court, the legal system, and the public. Having served as chair of the American Association of Law Schools Professional Responsibility Section, as editor and frequent contributor to its newsletter, and as a consultant to the American Law Institute's Restatement of the Law Governing Lawyers, Zacharias was one of the leading modern scholars in the field of legal ethics and certainly one of the most cited. Perhaps his greatest intellectual contribution to the discourse about attorney conduct lays in his work in my own field—the subspecialty of prosecutorial ethics. Zacharias was a regular commentator on the use and abuse of prosecutorial power and frequently lamented that courts, rules drafters, and disciplinary boards have done very little to curtail prosecutorial misconduct. Zacharias penned seventeen law review

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articles on the subject of prosecutorial ethics, nine of them coauthored with Professor Bruce Green of Fordham Law School.

Academics frequently walk in the footsteps of the giants who preceded them. I certainly have felt Fred Zacharias's enormous influence in my own career—especially, but not exclusively, with respect to his many contributions in the field of prosecutorial ethics. I always learned something new whenever I read one of Zacharias's articles, even when I disagreed with him. His opinions challenged me to question and rethink my own, and his research opened up new vistas of inquiry for me.

I was first “introduced” to Fred Zacharias (virtually) in 1992 when I read his important early work *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*¹ A prosecutor at the time, I was deeply interested in legal ethics and responsible for the professional training of lawyers within my office. That article struck me then, as it does now, as a watershed work. Zacharias was not comfortable construing a prosecutor's obligation as a “minister of justice”² as a mere hortatory ideal, devoid of any moral content or direction. This “special prosecutorial duty is worded so vaguely that it obviously requires further explanation,” yet ethics codes “provide remarkably little guidance on its meaning.”³ Zacharias's 1991 Vanderbilt article began to put some much-needed flesh on the “do-justice” bones, a project that he continued for the next two decades.

Zacharias recognized that the Model Rules of Professional Conduct “do not exempt prosecutors from the [basic] requirement[] of zealous advocacy” on behalf of their client—the state.⁴ But at the trial stage of criminal proceedings, a prosecutor also has a duty to ensure that the basic elements of a fully adversarial system exist, which Zacharias identified as (1) attorneys who are competent, (2) attorneys who possess a similar level of resources and information, and (3) a tribunal that is neutral.⁵ These are the essential premises upon which our adversarial system is based. The only way that prosecutors can both do justice and still act as aggressive advocates at trial is if they take an *adversarial* view of justice rather than an *outcome-oriented* view.⁶ “The paradigm

1. Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991).

2. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2010).

3. Zacharias, *supra* note 1, at 46; *see also* Fred C. Zacharias & Bruce A. Green, *The Duty To Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 13 (2009) (“Language in the codes exhorting prosecutors to serve justice has been similarly ignored, largely because of the codes' failure to define the meaning of ‘justice.’”).

4. Zacharias, *supra* note 1, at 52.

5. *See id.* at 61.

6. *See id.* at 53.

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of the prosecutor as an unaligned ‘minister of the system’ makes sense in the trial context only if it targets situations in which competitive fact-finding will not produce results that are ‘acceptable’ within the meaning of the adversary system.”⁷ When the adversarial process breaks down at trial in any significant respect, the code can “no longer expect competition to achieve adversarially appropriate results.”⁸ Zacharias concluded that when any one of these three building blocks is absent, “prosecutors must help reestablish the essential adversarial balance that is missing.”⁹ The remainder of Zacharias’s 1991 article goes on to explore in probing detail exactly how prosecutors might correct an adversarial imbalance at trial in certain situations without disserving the state’s other important interests.¹⁰

The disciplinary codes ask prosecutors to be conscious at all times of a “dual, somewhat schizophrenic”¹¹ responsibility; that is, they must act simultaneously as “player and referee,”¹² zealous advocate and minister of justice. What Zacharias recognized in 1991—and indeed emphasized throughout his writing career—was that prosecutors are uniquely situated among legal advocates to seek “justice” because they are “unencumbered by [formal] client ties.”¹³ Zacharias perceived a prosecutor’s representation of the state as a form of “multirepresentation” of several constituencies simultaneously.¹⁴ A prosecutor must consider the victim’s interest in retribution, the community’s interest in deterrence and public safety, the defendant’s entitlement to a fair process, and the system’s need for efficient resolution of disputes.¹⁵ Viewing a prosecutor as having *constituencies* rather than *clients* helps emphasize the importance of contextualized decisionmaking, in contrast to a purer agency model where lawyers identify their clients’ interests and then pursue those interests zealously within the bounds of the law.¹⁶ Because the prosecutor represents various constituencies whose interests might at times diverge, it is essential to seek some method of ordering priorities.

7. *Id.* at 60.

8. *Id.* at 61.

9. *Id.* at 62.

10. *Id.* at 65–102.

11. *Id.* at 107.

12. *Id.* at 110.

13. *Id.* at 60.

14. *Id.* at 57.

15. *Id.*

16. *See* R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 5–6 (2005).

It is on these occasions that the do-justice mandate, while admittedly vague, serves to highlight for prosecutors the importance of a thoughtful, careful, and nuanced balancing of interests. So-called integrity rules, such as the do-justice exhortation in comment 1 to rule 3.8, serve as reminders to prosecutors about the limits of their adversarial role.¹⁷

I have been thinking recently about Zacharias's "procedural fairness"¹⁸ concept with respect to research I am doing on plea bargaining. Maintaining a fair process might work as a touchstone for justice at the trial stage of criminal proceedings, where the adversarial system is perhaps closest to a real competition. Making sure the deck is fairly stacked seems like a laudable and indeed necessary goal if we hope for trials to produce an acceptable result—a result that is *as likely as humanly possible* to be accurate and a result that will be respected by both the participants and the community. But between ninety and ninety-five percent of criminal charges are resolved by plea bargain rather than by trial.¹⁹ Whether one views a plea bargain as a "compromise"²⁰ for efficiency sake or as a "contract,"²¹ the model of procedural fairness Zacharias constructed in 1991 does not accurately capture a prosecutor's primary ethical concerns because at the plea bargaining stage of a criminal case the facts and legal outcomes are bargained for rather than contested, and no neutral fact finder is deciding the case. So if procedural fairness cannot be an adequate guidepost for justice during plea bargaining, what can we substitute in its place?

Given the pervasiveness of plea bargaining in the criminal justice system, it may seem startling at first blush that the Model Rules of Professional Conduct and the disciplinary rules in effect in most states have so little to say about it. Model Rule 3.8, entitled "Special Responsibilities of a Prosecutor," is silent on the subject.²² Admittedly, there are other disciplinary rules—applicable to lawyers in all aspects of their work—that constrain a prosecutor's conduct during plea bargaining. For example, the prohibition in Model Rule 8.4 of dishonesty or misrepresentation would prohibit a prosecutor from falsely characterizing the facts or available evidence in order to induce a defendant to plead

17. Fred C. Zacharias, *Integrity Ethics*, 22 GEO. J. LEGAL ETHICS 541, 559 (2009).

18. Zacharias, *supra* note 1, at 62.

19. See GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 223 tbl.9.1 (2003); Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 732 (2010).

20. See Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975–77 (1992).

21. See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1909 (1992).

22. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2010).

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guilty.²³ The requirement of candor to the tribunal in Model Rule 3.3(a)(1) would prohibit a prosecutor from making false statements to the court in order to induce the court to accept a bargained-for change of plea, such as misstating or minimizing the defendant's prior criminal record in order to obtain a favorable sentence, or misstating the evidence in order to satisfy the elements of an offense other than the one originally charged in the indictment.²⁴ Model Rule 3.4(f), prohibiting an attorney from requesting a person other than a client or relative or employee of a client to refrain from giving relevant information to another party, would preclude a prosecutor from entering into a plea agreement with a defendant in a multiple-party case on the condition that the defendant refuse to testify on behalf of or cooperate with a codefendant.²⁵ But that is essentially it. Aside from those general proscriptions, a prosecutor's conduct during plea negotiations is pretty much unregulated as a professional matter except by the do-justice admonition.

Why do the disciplinary rules take such a "hands-off" approach to plea bargaining? The courts tend to look to contract principles to ascertain the legitimacy and enforceability of plea agreements.²⁶ Both sides achieve an advantage by resolving matters short of trial. The prosecution conserves government resources and avoids the privacy, safety, and other concerns that may be raised by calling victims and other civilian witnesses to the stand. The defendant avoids the uncertainties of litigation, achieves a more prompt resolution of the dispute than the defendant otherwise would, minimizes the public spectacle and embarrassment that may flow from a public airing of the charges, and often reduces the defendant's exposure to punishment through either charge bargaining or an agreed or capped sentencing recommendation. It is this mutuality of advantage that causes courts to look at plea bargaining through the lens of contract: both sides are giving something up, and both sides are getting something in return. Due to the prevailing contract framework, a defendant's waiver of certain statutory and constitutional rights in a plea agreement will be enforced after

23. *Id.* R. 8.4.

24. *Id.* R. 3.3(a)(1).

25. *See also Id.* R. 3.4(a) ("A lawyer shall not . . . unlawfully obstruct another party's access to evidence . . .").

26. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); *Santobello v. New York*, 404 U.S. 257, 263 (1971).

conviction and imposition of sentence if they are entered into voluntarily and knowingly.²⁷ In any given case, there may be power inequities and imbalances in incentives and information between the prosecution and the defense. For example, the defendant may have a stronger incentive to plead guilty if the defendant is otherwise facing a harsh mandatory sentence; the prosecution may have a stronger incentive to recommend a lenient sentence if its evidence is weak or it needs the defendant to cooperate in the prosecution of others. But absent unconscionability or adhesion, an imbalance of bargaining power alone typically will not be considered sufficient grounds to decline to enforce a contract.²⁸

Bar disciplinary authorities, and by extension the state supreme courts that authorize and supervise them, appear to be uninterested in regulating plea bargaining for reasons very similar to the nonchalant approach that they take to enforcement of rule 3.8(d), which requires prosecutors to disclose exculpatory evidence.²⁹ That is, they assume that contract principles, coupled with a trial court's obligation to conduct a plea colloquy that ensures both that there is a factual basis for the plea and that the defendant's relinquishment of rights is voluntary and informed,³⁰ will be sufficient to curtail prosecutorial misconduct, just as those courts assume that the constitutional disclosure obligations under *Brady v. Maryland*³¹ and local rules of criminal procedure will be adequate to police a prosecutor's discovery obligations.³² With these safeguards in place, why should we seek consensus around what it means to seek justice in the plea bargaining context?

Zacharias's 1998 article, *Justice in Plea Bargaining*, made a compelling case for the vitality of the do-justice obligation, even at the plea bargaining stage of criminal cases.³³ If one accepts the premise that

27. *Brady v. United States*, 397 U.S. 742, 747 (1970). Although some circuits will refuse to enforce a defendant's waiver in a plea agreement if such a waiver would result in a "miscarriage of justice," see, e.g., *United States v. Burns*, 409 F.3d 994, 996 (8th Cir. 2005); *United States v. Teeter*, 257 F.3d 14, 26 (1st Cir. 2001), this safety valve is not dissimilar to a court's common law ability to refuse to enforce the terms of a contract if it would violate public policy. See Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 954-55 (1984).

28. See Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 144 (2005).

29. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2010).

30. See, e.g., FED. R. CRIM. P. 11(b)(1)-(2); see also *Brady*, 397 U.S. at 748.

31. 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

32. See Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 732-34 (1987); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 760 (2001).

33. See generally Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121 (1998).

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the overriding goals of the criminal justice system are to punish the guilty and protect the innocent, it is an undesired result if an innocent defendant pleads guilty to a crime that the defendant did not commit. Zacharias recognized several reasons why this happens and why legal ethicists should be concerned about it. First, there may be an imperfect flow of information from the prosecution to the defense, leading the defendant to believe that the government's case is stronger than it is.³⁴ Second, the defense attorney might be communicating poorly with the client or otherwise providing inadequate representation due to the presence of factors such as an overwhelming caseload, insufficient investigatory resources, laziness, or a desire to curry favor with the government.³⁵ The defense attorney could also be laboring under an undisclosed conflict of interest.³⁶ Any of these forms of agency cost³⁷ might lead to an inaccurate guilty plea. The defendant might be dissatisfied with the services of the lawyer but not in a position economically to hire a new one.³⁸ Finally, the defendant might be facing a harsh mandatory sentence and could rationally view a plea of

34. *Id.* at 1159. Just what forms of "exculpatory" evidence prosecutors are constitutionally required to disclose prior to a guilty plea is a question left unsettled by *United States v. Ruiz*, 536 U.S. 622 (2002), where the Court ruled that due process was not violated where the government conditioned a fast-track plea offer on the defendant's waiver of her right to impeachment information. *Id.* at 633. Evidence supporting factual innocence was not waived or alleged to have been withheld in *Ruiz*, so the Court did not need to address whether a waiver of this most substantial form of exculpatory evidence was enforceable or whether a plea of guilty in the face of its nondisclosure could later be vacated. *Id.* at 631. Justice Thomas concurred only in the judgment, seeming to suggest that because *Brady v. Maryland* was designed to protect a defendant's right to a fair trial, it may have no application whatsoever to a prosecutor's discovery obligations prior to a guilty plea. *Id.* at 633-34 (Thomas, J., concurring); see generally John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437 (2001).

35. Zacharias, *supra* note 33, at 1175-76; see Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2476 (2004).

36. See Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407, 414 (1998).

37. Of course, the prosecutors may encounter agency problems of their own with respect to their representation of the state that may lead them to offer unduly lenient sentence offers notwithstanding society's interests in optimal deterrence. A prosecutor's goals might fail to be completely congruent with that of the principal when political or career advancement concerns make the prosecutor unduly risk averse about the possibilities of acquittal, or when issues of job satisfaction or desire for leisure time cause the prosecutor to prefer a guilty plea to a more extended trial. See Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1987-88 (1992).

38. Zacharias, *supra* note 36, at 414-15.

guilty to a lesser offense—even one that the defendant did not commit—as preferable to “rolling the dice” at trial.³⁹

In *Justice in Plea Bargaining*, Zacharias wisely suggested that prosecutors cannot possibly identify “just” conduct in the context of plea bargaining without a clearer picture of what plea bargaining is supposed to accomplish.⁴⁰ Zacharias identified eight possible rationales for plea bargaining: approximating trial results, allowing the prosecutor to take equitable and mitigating factors into account, pursuing equalization among defendants, empowering the participants, recognizing the inevitable, saving resources, maximizing deterrence, and improving the position of both parties.⁴¹ Discussing a series of deftly constructed hypotheticals, Zacharias demonstrated how “applying different theories of plea bargaining produces different conceptions of justice.”⁴² According to Zacharias, the profession cannot possibly ascertain what justice means in the context of plea bargaining unless and until it decides on the primary objective being pursued.⁴³ Zacharias concluded that prosecutors’ offices should identify *ex ante* the plea bargaining theory or theories to which they ascribe so that individual prosecutors are not left to impose their own individual views of justice on the defendant and the public in an arbitrary and internally inconsistent way.⁴⁴

The important insight of Zacharias’s 1998 article stems not so much from the conclusions he reached—they were admittedly tentative⁴⁵—but from the challenge he presented. I would like to pick up where Zacharias left off in identifying the state’s legitimate objectives during plea bargaining in the hopes that this might help us shape a model of just conduct for prosecutors. But first, my own feelings about justice and plea bargaining differ from Zacharias’s in two very important respects.

First, I believe Zacharias’s eight possible theories of plea bargaining conflated *rationales* for engaging in plea bargaining—as opposed to insisting on public trials for resolving criminal disputes—with the *objectives* that a prosecutor might properly seek to pursue during plea bargaining once the prosecutor decides to engage in that process. Inevitably, likely approximation of trial results and improving the positions of both parties are *apologias* for the plea bargaining process itself that clearly fall into the former category, while achieving equity in individual cases and equality across multiple cases are objectives to be

39. Zacharias, *supra* note 33, at 1145–47.

40. *Id.* at 1126.

41. *Id.* at 1137.

42. *Id.* at 1150.

43. *See id.* at 1127.

44. *Id.* at 1127, 1184–85.

45. *Id.* at 1150.

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pursued during plea bargaining that clearly fall into the latter.⁴⁶ I think this is an important distinction because a prosecutor striving to do justice within a plea bargaining milieu should be focusing primarily on the results to be achieved rather than the reason the prosecutor agreed to engage in the process in the first place.

Second, Zacharias suggested that electing a “primary theory” of plea bargaining is a prerequisite to developing a coherent and nonarbitrary model of justice.⁴⁷ I am skeptical that a single coherent theory of plea bargaining exists or can be agreed upon by any single prosecutorial entity—not to mention the profession as a whole. Moreover, I think it is possible to advance the dialogue about what it means to do justice in the context of plea bargaining while recognizing that prosecutors have a *number* of valid interests they are seeking to advance simultaneously, so long as those interests are not inherently antagonistic. That is, the fact that our disciplinary norms vest prosecutors with discretion to balance priorities in the context of individual cases does not mean there are not better (more just) and worse (unjust) outcomes that can flow from this deliberative process. The key to ethical judgment is *practical wisdom* or, what Aristotle termed, “*phronesis*.”⁴⁸ This requires sensitivity to the salient features of each particular situation and the ability to synthesize thoughtfully the multiplicity of interests at stake.⁴⁹

What is the “multiplicity of interests” at stake in plea bargaining? I believe that a prosecutor’s primary objectives during plea bargaining should be efficiency, equality, autonomy, and transparency. A thoughtful balancing of these interests will approximate justice. Disregard for one or more of these interests, or a failure to calibrate them properly in individual cases, will result in injustice. First, I will define each of these terms. Then I will identify two troublesome yet recurring situations that arise in the plea bargaining setting that, in my view, violate a prosecutor’s duty to do justice but are currently not prohibited by any specific disciplinary rule. I will then try to demonstrate how a focus on

46. In my view, empowering the defendant, saving resources, and maximizing deterrence might properly be viewed both as reasons to plea bargain and objectives to be pursued within a plea bargaining setting.

47. Zacharias, *supra* note 33, at 1188.

48. ARISTOTLE, *NICOMACHEAN ETHICS* bk. VI, at 179–80 (Christopher Rowe trans., Oxford Univ. Press 2002) (c. 384 B.C.E.).

49. R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty To “Seek Justice,”* 82 NOTRE DAME L. REV. 635, 650–51 (2006).

efficiency, equality, autonomy, and transparency might help prosecutors navigate these ethical minefields.

Efficiency. A prosecutor should be seeking in a plea agreement to achieve the maximum amount of deterrent value at the lowest possible cost to the state. That is, the prosecutor should (1) seek to assess the likely sentence the defendant will face for the criminal conduct were the defendant to be convicted following trial, and then (2) discount this sentence by the risk of acquittal and the external costs to the state of proceeding to trial, including threat to witness safety, privacy, fees for experts, and so forth.⁵⁰

Equality. A prosecutor should attempt to achieve horizontal equity across cases and across time. That is, similarly situated defendants should be treated similarly in terms of the deals they are offered.⁵¹ Exact equality of circumstance is difficult to imagine—even with similarly charged crimes—because defendants differ in their criminal records, and crimes are committed with differing levels of impact on the community. But the challenge here is for prosecutors to articulate differences that are relevant and meaningful and disregard those that are not. For example, a prosecutor should not offer a more lenient plea bargain to a defendant than someone previously prosecuted for a similar crime because the prosecutor is on more friendly terms with the defendant’s counsel or because the prosecutor identifies in some reflexive way with the present defendant’s personal background or circumstances. Simply put, a prosecutor should not favor or disfavor one defendant over another on any grounds that society is not prepared to say are relevant to the degree of the defendant’s moral blameworthiness.

Autonomy. This theory of plea bargaining assumes that it is a good thing for the defendant to participate in important decisions that affect the defendant’s life.⁵² Plea bargaining allows a defendant to take ownership and responsibility for the criminal conduct that led to the

50. Under an efficiency rationale, a prosecutor would attempt to predict the likely result after trial and discount it by the risk of acquittal and the external costs of litigation. Predicting the sentence after trial allows a prosecutor to take into account the same mitigating factors regarding the crime or the defendant’s background that the judge would be able to consider at sentencing, or what Zacharias called “equitable” considerations. Zacharias, *supra* note 33, at 1137 & n.43. The one outlier to this assumption is when the trial judge has no sentencing discretion, and the prosecutor seeks through plea bargaining to avoid the harsh impact of a mandatory sentence on equitable grounds, such as a “three-strikes-and-you-are-out” statute. Here I think that equity would be a consideration independent of the four I identify above.

51. See Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 680 (1981) (arguing that a just sentence is one that treats defendants equally with respect to their degrees of culpability).

52. Zacharias, *supra* note 33, at 1143.

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indictment, and thus begin the process of rehabilitation and restorative justice that are necessary to repair the harm and eventually reintegrate the defendant into the community.⁵³ The autonomy or “empowerment”⁵⁴ model suggests that, when the defendant is able to participate meaningfully in the process leading to the guilty plea and sentence, the defendant will be more invested in the outcome, more likely to accept it as legitimate, and more likely to benefit penologically from its terms. Because this theory is premised on consent, it assumes that the defendant’s decisions in the plea bargaining process are voluntary and informed.

Transparency. Public criticism of plea bargaining seems to run the gamut from a perception that the state sometimes steamrolls innocent citizens to the perception that plea bargaining is a form of “bargain-basement justice” that lets the guilty off too lightly. If the public loses faith in the fairness or legitimacy of plea bargaining, it undermines the deterrent value of the criminal law. One of a prosecutor’s objectives during plea bargaining thus should be to counter or eliminate the perception of backroom politics. This has three implications. First, if a prosecutorial entity has office policies with respect to plea bargaining, for example, “charges carrying minimum-mandatory sentences will not be reduced after indictment in the absence of the defendant’s agreement to cooperate in the prosecution of others,” these policies should be in writing and fairly accessible to the defense bar in order to create a level playing field.⁵⁵ Second, an individual prosecutor’s reasons for recommending charging or sentencing concessions in specific cases should be fully explained on the record at the time of the defendant’s

53. See Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303, 313 (“The agreement into which the offender enters is only part of the means to that greater end. Because reconciliation is its goal, restorative justice implicitly recognizes that crime does more than cause harm: it damages the trust and equality that ideally define the relationship existing among all citizens of a genuine political community. The offender’s crime breached that trust and denied that equality. The repair of that relationship is thus the real goal of restorative justice practices.”).

54. See Joseph Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 YALE L.J. 683, 699 (1975); see also George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193, 219–21 (1977).

55. See AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.3(2) (1975) (“Each prosecution office in the state shall issue regulations pursuant to Section 10.3 setting forth guidelines and procedures with respect to plea discussions and plea agreements designed to afford similarly situated defendants equal opportunities for plea discussions and plea agreements.”).

allocation unless special circumstances such as jeopardizing witness safety or compromising an ongoing sensitive investigation dictate that it be done in camera. Third, any promises, rewards, or inducements the prosecutor makes to the defendant in exchange for the defendant's cooperation against others should be reduced to writing to make future *Giglio*⁵⁶ disclosures more accurate.⁵⁷

With these goals in mind, let me now examine two practices sometimes undertaken by prosecutors during plea negotiations that in my view are unethical—and here I use the term *unethical* to denote moral deficiency. This will help us test the usefulness of the taxonomy described above. The first scenario is threatening to prosecute a defendant's loved ones unless the defendant pleads guilty upon certain terms. Neither the Model Rules of Professional Conduct nor the ABA Standards for Criminal Justice: Prosecution Function prohibits such conduct.⁵⁸ Nevertheless, the Supreme Court has recognized that this practice is fraught with danger,⁵⁹ and several lower courts have ruled that “special care” must be taken in such circumstances to ensure that the defendant's ultimate plea of guilty is not the product of coercion.⁶⁰

56. *Giglio v. United States*, 405 U.S. 150, 154–55 (1972) (ruling that due process requires the prosecutor to disclose to the defendant any “understanding or agreement” made to its witnesses so that such material can be used to impeach the government witness for bias on cross-examination).

57. See R. Michael Cassidy, “*Soft Words of Hope: Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*,” 98 NW. U. L. REV. 1129, 1172–73 (2004).

58. Although both the ABA Model Rules of Professional Conduct and the ABA Criminal Justice Standards establish a threshold of probable cause to commence criminal prosecution, neither addresses the circumstances under which a prosecutor may threaten prosecution. Compare MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2010), with ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 3-3.9 (3d ed. 1993), available at <http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf>.

59. In *Bordenkircher v. Hayes*, 434 U.S. 357, 364–65 (1978), the Supreme Court ruled that it does not offend due process for a prosecutor to indict the defendant on greater charges after the defendant rejects a plea agreement and elects to proceed to trial, recognizing that “the imposition of these difficult choices [is] an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas.” *Id.* at 364 (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973)). Even in *Bordenkircher*, however, the Court stated that threatening the prosecution or promising the nonprosecution of *third parties* “might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider.” *Id.* at 364 n.8 (citing *Brady v. United States*, 397 U.S. 742, 758 (1970)). Lower courts since *Bordenkircher* have found this danger to be at its apex when the third party is related to the defendant. See cases cited *infra* note 60.

60. *United States v. Carr*, 80 F.3d 413, 417 (10th Cir. 1996); *United States v. Nuckols*, 606 F.2d 566, 569 (5th Cir. 1979) (“Recognizing, however, that threats to prosecute third persons can carry leverage wholly unrelated to the validity of the underlying charge, we think that prosecutors who choose to use that technique must observe a high standard of good faith. Indeed, absent probable cause to believe that the third person has

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Threatening family members and loved ones to leverage a guilty plea seems improper to me, for at least two reasons. First, it represents a degree of coercion that implicates the *autonomy* of the defendant and the exercise of the defendant's true volition.⁶¹ Forcing a defendant to choose between the constitutional right to a trial and the desire to protect a loved one impresses me as a cruel and abusive exercise of the state's power—the presentation of a “Sophie's Choice,”⁶² as it were. Moreover, it implicates the goal of *equality*. If the government is morally justified in using such leverage, it will necessarily be in a stronger plea bargaining position with respect to defendants who choose to participate in crimes with family members than it will be with defendants who choose to participate in crimes with unrelated coconspirators. No legitimate goal of the criminal law is advanced when the former category of offender faces a greater certainty or degree of punishment than the latter.

A second troublesome practice occurs when a prosecutor includes an explicit provision in a plea agreement whereby the defendant waives the right to later challenge the conviction on the grounds that the defendant was deprived of the Sixth Amendment right to the effective representation of counsel during the proceedings. Prosecutors seem to be going “waiver crazy” these days, trying to insulate all plea agreements from collateral attack on *any* grounds in order to achieve finality to the criminal process.⁶³ Emboldened by *Ruiz* and the tendency of courts to view plea agreements primarily through the lens of

committed a crime, offering ‘concessions’ as to him or her constitutes a species of fraud.”); *see also* State v. Danh, 516 N.W.2d. 539, 542 (Minn. 1994).

61. The American Bar Association suggests that in connection with plea negotiations, a prosecutor “should not bring or threaten to bring charges against the defendant *or another person*, or refuse to dismiss such charges, where admissible evidence does not exist to support the charges *or the prosecuting attorney has no good faith intention of pursuing those charges.*” ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-3.1(h) (3d ed. 1999) (emphasis added), available at <http://www.abanet.org/crimjust/standards/pleasofguilty.pdf>. The commentary to this standard states that such “deliberately coercive prosecutorial conduct in plea negotiations undermines the fairness of guilty pleas.” *Id.* Standard 14-3.1(h) cmt.

62. *See generally* WILLIAM STYRON, *SOPHIE'S CHOICE* (1979).

63. *See* Daniel P. Blank, *Plea Bargaining Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 *FORDHAM L. REV.* 2011, 2013 (2000) (noting that plea agreement waivers seem to have “multiplied without limit”); Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 *DUKE L.J.* 209, 246 (2005) (discussing frequency of certain forms of waiver in a sample of 971 completed federal plea agreements).

contract,⁶⁴ prosecutors now routinely include in their standard plea agreements waiver of the right to appeal the court-imposed sentence; waiver of the right to challenge the conviction or sentence through collateral attack, such as by habeas petition;⁶⁵ waiver of statutory rights, such as the Speedy Trial Act;⁶⁶ waiver of the right to contest asset forfeiture; waiver of the right to contest deportation; and so forth. The emerging trend seems to be “let’s throw every possible waiver”—including a waiver to the kitchen sink—into a plea agreement and see what will stick. The practice is becoming so common in federal courts that the ABA Standards Committee is considering amending the Criminal Justice Standards: Prosecution Function to discourage certain waivers in plea agreements.⁶⁷

The most troublesome of these waivers is a waiver of the right to the effective assistance of counsel. The case law in the federal circuits on whether an appeal waiver can bar a subsequent claim of ineffective assistance of counsel is conflicting. Some circuits will enforce any waiver that is knowing and voluntary, unless such enforcement would result in a “miscarriage of justice.”⁶⁸ Other circuits have carved out an express exception to the category of valid waivers for ineffective assistance of counsel claims,⁶⁹ and still others have ruled that an appeals waiver will bar a subsequent challenge on ineffective counsel grounds if it relates to the quality of the representation leading up to the plea or

64. See *United States v. Mezzanatto*, 513 U.S. 196, 208 (1995).

A sounder way to encourage settlement is to permit the interested parties to enter into knowing and voluntary negotiations without any arbitrary limits on their bargaining chips. To use the Ninth Circuit’s metaphor, if the prosecutor is interested in “buying” the reliability assurance that accompanies a waiver agreement, then precluding waiver can only stifle the market for plea bargains. A defendant can “maximize” what he has to “sell” only if he is permitted to offer what the prosecutor is most interested in buying.

Id.

65. See 18 U.S.C. § 2255 (2006 & Supp. 2009).

66. 18 U.S.C. § 3161 (2006).

67. See PROPOSED STANDARD 3-5.9: WAIVER OF RIGHTS AS CONDITION OF PLEA AGREEMENT (June 2010) (on file with author).

(b) A prosecutor should not routinely require plea waivers of post-conviction claims of ineffective assistance of counsel, prosecutorial misconduct, or destruction of evidence unknown to the defendant at the time of the guilty plea. The prosecutor may seek and accept such waivers on an individualized basis if knowing and voluntary. No waiver should be accepted without an exception for manifest injustice including actual innocence based on newly discovered evidence.

Id.

68. *United States v. Gwinnett*, 483 F.3d 200, 203 (3d Cir. 2007); *United States v. Teeter*, 257 F.3d 14, 25–26 (1st Cir. 2001).

69. See, e.g., *United States v. Rhodes*, 330 F.3d 949, 952 (7th Cir. 2003); *United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir. 1994).

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during sentencing, but not if it alleges constitutionally substandard performance that directly tainted the waiver itself.⁷⁰

Regardless of whether a reviewing court will *enforce* a general waiver of appellate rights in the face of a subsequent claim of ineffective assistance of counsel, the ethical question is whether a prosecutor should *draft* a plea agreement that expressly and specifically waives ineffective counsel claims. This is a question of important consequence because although a reviewing court might be willing to entertain a later claim of ineffective assistance under the strictest “miscarriage of justice” exception to waiver, some convicted defendants might be deterred from bringing even the most meritorious of such challenges in the face of a written instrument specifically barring it.

Bar ethics committees in five states have ruled that defense counsel may not ethically counsel clients to sign a plea agreement containing an express waiver of ineffective assistance of counsel claims, either because defense counsel is inherently conflicted on that subject,⁷¹ or because such a waiver is the functional equivalent of prospectively limiting the lawyer’s liability to the client for malpractice in violation of the state’s

70. See *Parisi v. United States*, 529 F.3d 134, 138–39 (2d Cir. 2008) (noting that a challenge to the *process* by which defendant entered into agreement containing waiver was not barred, but a challenge to other ineffective conduct by attorney leading up to plea could be barred); *United States v. White*, 307 F.3d 336, 343 (5th Cir. 2002) (“[A]n ineffective assistance of counsel argument survives a waiver of appeal only when the claimed assistance directly affected the validity of that waiver or the plea itself.”).

71. See, e.g., Advisory Comm. of the Supreme Court of Mo., Formal Opinion 126: Waiver of Post-Conviction Relief (2009), <http://www.mobar.org/formal/formal-126.doc> (interpreting Missouri disciplinary rule 4-1.7(b)(1), the state analogue to Model Rule 1.7); Tex. Comm. on Prof’l Ethics, Opinion No. 571 (2006) (interpreting Texas Disciplinary Rule 1.06, the state analogue to Model Rule 1.7), *reprinted in* TEX. B.J., Jan. 2006, at 790, 790–93. Under Model Rule 1.7, a concurrent conflict of interest exists when there is a significant risk that the representation will be materially limited by the “personal interest of the lawyer.” MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2) (2010). A future judicial finding of ineffective assistance is against the lawyer’s personal interests not only because it could damage the lawyer’s professional reputation but also because it could lead to disciplinary action against the lawyer under Model Rule 1.1. *Id.* R. 1.1 (“A lawyer shall provide competent representation to a client.”). A lawyer may proceed in the face of such a concurrent conflict only if (1) the lawyer reasonably believes that he will be able to provide competent and diligent representation, (2) the representation is not prohibited by law, and (3) the client gives informed consent, confirmed in writing. *Id.* R. 1.7(b). If any of these three requirements are not met, the client must be advised by separate counsel with respect to that aspect of the plea agreement.

equivalent to Model Rule 1.8(h),⁷² or on both grounds.⁷³ The Ethics Advisory Committee of the National Association of Criminal Defense Attorneys has issued a similar advisory.⁷⁴ If these ethical opinions are correct, a prosecutor should not be *drafting* ineffective waivers because the defense attorney should not be *signing* ineffective waivers.⁷⁵ After all, it is improper for a prosecutor to encourage defense counsel to engage in any conduct that may violate the applicable rules of professional responsibility.⁷⁶

Insisting on so-called ineffective counsel waivers impresses me as overreaching of the worst sort and fundamentally inconsistent with a prosecutor's obligation as a minister of justice. As in my first hypothetical, it places efficiency at a substantially higher level of priority during the plea bargaining process than autonomy and equality. When defense counsel may have failed to conduct even the barest threshold of investigation or preparation of a client's case or when defense counsel has an undisclosed conflict of interest due to a secret representation of an unindicted third party, the voluntariness of the defendant's plea is called into serious question. Especially considering how high a bar the Supreme Court has set to establish a Sixth Amendment violation,⁷⁷ constitutionally defective representation strikes at the core of the defendant's ability to choose freely the options presented.

72. Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 2001-6 (2001), available at http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2001/op%2001-006.doc; Tenn. Bd. of Prof'l Responsibility, Advisory Ethics Op. 1994-A-549 (1994); Vt. Bar Ass'n, Advisory Ethics Op. 95-04 (1995), available at https://www.vtbar.org/intus/cms/Display_Page.asp?PageID=5 (follow "Advisory Ethic Opinions" hyperlink; then follow "Plea Bargains" hyperlink). One state, Arizona, has rejected the analogy between ineffective assistance of counsel claims and malpractice claims for purposes of the prospective limitation of liability prohibition in Model Rule 1.8(h). Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Op. 95-08 (1995), available at <http://www.myazbar.org/Ethics/opinionview.cfm?id=460>.

73. N.C. State Bar, Ethics Op. RPC 129 (1993), available at <http://www.ncbar.gov/ethics/index.asp> (select number "RPC 129"; then follow "View Opinion" hyperlink).

74. Nat'l Ass'n of Criminal Def. Lawyers Ethics Advisory Comm., Proposed Formal Op. 03-02 (2003), available at [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/ethicsopinions/\\$FILE/op03-02.pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/ethicsopinions/$FILE/op03-02.pdf).

75. Douglas A. Morris, *Waiving an Ineffective Assistance of Counsel Claim: An Ethical Conundrum*, CHAMPION, Dec. 2003, at 34, 35-36 (2003).

76. Model Rule 8.4(a) provides that it is professional misconduct for a lawyer to "knowingly assist or induce" another lawyer to violate the disciplinary rules. MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2010). When a prosecutor drafts and encourages a defense attorney to execute an appeal waiver that purports to waive ineffective assistance claims, that prosecutor is essentially abetting a violation of Model Rule 1.8(h). See *Id.* R. 1.8(h) (2010); see also *Id.* R. 8.4(d) (2010) (requiring that a lawyer shall not "engage in conduct that is prejudicial to the administration of justice").

77. *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (crafting a two-prong test for ineffective claims under the Sixth Amendment).

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Ineffective counsel waivers also jeopardize the equal treatment of similarly situated defendants. Instead of inspiring defense counsel to expend their best possible efforts on behalf of a client, an express waiver of ineffective assistance claims signals to the defense bar that they need not worry about substandard performance when their clients intend to plead guilty. This has the potential of heightening the disparity in charging and sentencing treatment between defendants based on the quality of their representation rather than based on the nature and extent of their criminal acts. In a system where approximately ninety-five percent of criminal cases are resolved by guilty plea,⁷⁸ such a government-induced disincentive to quality representation simply should not be tolerated. Even in *Mezzanatto*—perhaps the high-water mark of the Supreme Court’s treatment of plea agreement as contract—the Court recognized that “[t]here may be some . . . provisions that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably ‘discredit[ing] the federal courts.’”⁷⁹

The enactment of more explicit disciplinary rules detailing a prosecutor’s ethical responsibilities during plea bargaining is unlikely. As Fred Zacharias so prudently recognized throughout his distinguished career, there are “inherent limitations on what ethics rules and the disciplinary process can accomplish.”⁸⁰ Nonetheless, because many prosecutors and courts now tend to view plea bargaining only through the lens of contract law, encouraging prosecutors to recognize that the do-justice mandate of rule 3.8 applies to plea bargaining and is more than a hortatory ideal is important.

Interpreting the general exhortation to do justice in light of the four critical plea bargaining objectives I identified above will have several salutary effects. First, it will encourage prosecutors to be more introspective about their roles and more thoughtful about their choices. Second, it will provide them with some context to order the government’s priorities in individual cases. Third, it might guide them toward more consistent and less arbitrary plea bargaining practices

78. See *supra* note 19 and accompanying text.

79. *United States v. Mezzanatto*, 513 U.S. 196, 204 (1995) (citing 21 WRIGHT & GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5039 (1977)); see also *United States v. Melancon*, 972 F.2d 566, 575–78 (5th Cir. 1992) (Parker, J., concurring) (arguing that courts should take systemic goals and integrity of the courts into account in determining whether to accept waivers in plea agreements).

80. Zacharias & Green, *supra* note 3, at 58.

across the multitude of cases they will handle throughout their careers. And finally, as Fred Zacharias himself recognized, putting some flesh on the do-justice admonition may help focus the professional training of prosecutors and the development of coherent office policies within prosecutorial units.⁸¹

81. Zacharias, *supra* note 33, at 1186–87.