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# PROSECUTORIAL PASSION, COGNITIVE BIAS, AND PLEA BARGAINING

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The overwhelming majority of criminal defendants plead guilty, rendering jury trials the exception in criminal courts and negotiated pleas the norm.<sup>1</sup> The standard explanation for high rates of guilty pleas is that we have not allocated the prosecutorial, defense, and judicial resources that would be necessary to try every criminal case.<sup>2</sup> To accommodate the vast disparity between the capacity of our criminal court system and the demands placed upon it, prosecutors induce defendants to plead guilty by offering them discounts in the form of reduced charges and both binding and non-binding sentencing recommendations. Prosecutors, defense attorneys, and judges are willing to support fair case resolutions that can be obtained without trials, and the plea bargaining system treats as “fair” outcomes that

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1. According to the Department of Justice, ninety-five percent of state court felony convictions in 2002 resulted from guilty pleas, while only two percent resulted from jury trials. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.5.46.2002 (2004), <http://www.albany.edu/sourcebook/pdf/t5462002.pdf>. Similarly, in federal courts in 2003, more than ninety-six percent of convictions resulted from pleas of guilty or *nolo contendere*. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.5.17.2003 (2005), <http://www.albany.edu/sourcebook/pdf/t5172003.pdf>.

2. See GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 163–64 (2003) (attributing the rise of plea bargaining to caseload pressures); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 50 (1968) [hereinafter Alschuler, *The Prosecutor's Role*] (“The guilty-plea system has grown largely as a product of circumstance, not choice.”); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 37 (2002) (noting that the literature on plea bargaining “assumes that fewer plea bargains will lead to corresponding increases in criminal trials”); see also *Santobello v. New York*, 404 U.S. 257, 260–61 (1971) (“If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”).

favor defendants who waive their trial rights over those who do not.<sup>3</sup>

Advocates of plea bargaining depict the system as advantageous to defendants who reap discounts in exchange for their guilty pleas.<sup>4</sup> Critics of plea bargaining depict the practice more ominously as a system that extracts a trial penalty from defendants who choose to exercise the trial rights to which they are entitled and coerces unconvictable and even innocent defendants to plead guilty.<sup>5</sup> Regardless of whether post-plea sentences are seen as discounts, or post-trial sentences as inflations, a separate consideration is what drives the discrepancy between the two. The standard account in support of plea bargaining is that it reflects both the likely trial and sentencing outcomes. It reflects trial outcomes because a prosecutor's incentive to compromise and a defendant's power to demand consideration in exchange for his plea will depend on the strength of the government's evidence against the defendant.<sup>6</sup> It reflects sentencing outcomes

3. The average federal sentence in 2003 resulting from guilty pleas was 54.7 months compared with the average post-trial sentence of 153.7 months. BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003 75 tbl.5.3 (2005). Estimates of the discount a pleading defendant enjoys vary widely, but the discount is substantial by any account.

4. Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 TEX. L. REV. 717, 763 (2005) (maintaining that plea bargaining benefits a defendant as long as the government has a credible basis for going to trial); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1913–17 (1992). The public, of course, does not tend to see the rewarding of criminals favorably, even in exchange for their guilty pleas. *See id.* at 1909 n.4 (noting that a majority of the public disapproves of plea bargaining as being overly lenient to criminals).

5. *See* Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 670–80, 713–16 (1981) [hereinafter Alschuler, *The Changing Plea Bargaining Debate*]; Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1278–79 (1975) [hereinafter Alschuler, *The Defense Attorney's Role*]; Alschuler, *The Prosecutor's Role*, *supra* note 2, at 60; Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 46–47, 55; Kenneth Kipnis, *Criminal Justice and the Negotiated Plea*, 86 ETHICS 93, 99 (1976); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12–19 (1978); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 70 (1988); Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 779 (1980); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1982–83 (1992) [hereinafter Schulhofer, *Plea Bargaining as Disaster*]; *cf.* Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2302–03 (2006) (advocating the rejection of pleas with substantial concessions as a means of banning plea bargaining when the government has a weak case).

6. *See, e.g.*, Alschuler, *The Prosecutor's Role*, *supra* note 2, at 58–60; Easterbrook, *supra* note 4, at 1972; Scott & Stuntz, *supra* note 4, at 1942. *See generally* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464 n.1, 2465 n.2 (2004) (citing to the many scholarly works that adopt a shadow-of-trial model to explain negotiated settlements in both the civil and criminal contexts).

because whatever discount the defendant is in a position to negotiate is subtracted from his likely post-trial sentence, considering the severity of the offense and the defendant's criminal history and need for punishment.<sup>7</sup>

Although probable trial and post-trial sentencing outcomes are reflected in plea bargaining, they are not determinative. A growing literature explores the ways that other, less justifiable influences can distort plea bargaining. Structural factors such as limited pretrial discovery, attorney self-interest and incompetence, pretrial detention, and determinate sentencing can affect the parties' willingness and power to negotiate.<sup>8</sup> Several scholars have also observed the ways that psychological and cognitive factors can influence plea bargaining. Professor Alschuler, for example, has called for an end to plea bargaining, in part because its outcomes often turn on an individual defendant's optimism about his prospects or denial about his predicament.<sup>9</sup> Professors Scott and Stuntz have explored the ways that information barriers, coupled with risk aversion in innocent defendants, can cause innocent defendants to plead guilty.<sup>10</sup> Perhaps no scholar has done more to call attention to the psychological factors that can drive plea bargaining than Stephanos Bibas.<sup>11</sup> Professor Bibas has compellingly demonstrated how cognitive biases such as overconfidence, framing, denial, anchoring, and risk preferences can skew plea bargaining.<sup>12</sup> The existing literature recognizes, then, that cognitive phenomena can influence the decisions of the negotiating parties and are therefore relevant to plea bargaining. However, previous examinations of the influence of cognitive bias on plea bargaining have focused primarily on the decision making of defendants.<sup>13</sup> This Article

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7. See Bibas, *supra* note 6, at 2495 n.129 (noting that plea bargaining occurs in "the shadow cast by the expected verdict on guilt and the shadow cast by the expected sentence").

8. See generally *id.* at 2468.

9. E.g., Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 932 (1983) ("Plea bargaining makes a substantial part of an offender's sentence depend, not upon what he did or his personal characteristics, but upon a tactical decision irrelevant to any proper objective of criminal proceedings."); Alschuler, *The Changing Plea Bargaining Debate*, *supra* note 5, at 666 (noting factors that determine sentencing in plea bargaining).

10. Scott & Stuntz, *supra* note 4, at 1942-43 (identifying strategic impediments to efficient bargaining and recommending reforms to improve plea bargaining).

11. Bibas, *supra* note 6.

12. *Id.* Professor Bibas's important article also discusses the ways that structural factors such as attorney self-interest, agency costs, determinate sentencing, and pretrial detention can lead to inefficient or unfair bargains. *Id.*

13. See Alschuler, *The Changing Plea Bargaining Debate*, *supra* note 5, at 666

seeks to contribute an additional dimension to the understanding of plea bargaining dynamics by exploring influences on the decision making of prosecutors.

A central tenet of plea bargaining is that prosecutors are willing to negotiate settlements to free up trial resources for other cases. Accordingly, the first step in this Article's exploration of prosecutorial decision making in plea bargaining is an examination of the factors that drive a prosecutor's prioritization of cases. Specifically, Part I argues that prosecutors prioritize cases in part by the amount of passion they feel in each case. Prosecutorial passion—how much a prosecutor cares about a case—is an undefined and unexplored factor in the current literature, and reflects subjective determinations beyond the strength of a case's evidence or its likely post-conviction sentence.

Part II explores the ways that prosecutorial passion might affect plea bargaining. First, passion might create a conscious aversion to plea bargaining in prosecutors. Second, even when a passionate prosecutor believes she desires settlement, passion might trigger or exaggerate cognitive biases that will make settlement less likely. Part III concludes with some brief thoughts regarding the implications of prosecutorial passion for plea bargaining reform.

## I. DEFINING PROSECUTORIAL PASSION

The most common portrait of the plea bargaining prosecutor is, to put it mildly, unflattering. Much of the plea bargaining literature depicts prosecutors as motivated entirely by their own interests, crassly and singularly defined by the maintenance of high rates of conviction.<sup>14</sup> From this view, the power that such prosecutors enjoy permits them to manipulate the plea negotiation process to maximize their self-serving

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(describing the psychology of the defendant who demands a trial); Scott & Stuntz, *supra* note 4, at 1948 (noting that innocent defendants are probably more averse to risk than guilty defendants). Although Professor Bibas explores the ways that prosecutors can be affected by overconfidence, self-serving biases, and framing, his discussions of denial, discounting of future costs, risk propensity, and anchoring focus almost exclusively on the implications for a defendant's decision making. See Bibas, *supra* note 6, at 2498–2519.

14. John Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U. L. REV. 174, 180 (1965); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 882 (1995) (describing “the desire to ‘win’” as “a central characteristic of prosecutorial culture”); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134 (2004) (criticizing “the emphasis district attorneys’ offices place on conviction rates”).

statistics.<sup>15</sup> Using leverage gained through overcharging and from determinate sentencing laws, prosecutors can extract guilty pleas in weak cases. Meanwhile, by refusing to offer meaningful concessions in stronger cases, prosecutors can reserve their easiest cases for trial to establish an impressive conviction record. Were this the end of the story of what motivates prosecutors, then a prosecutor's willingness to negotiate in an individual case would be dictated entirely by the likelihood of gaining a conviction against the defendant, a factor that is already a large part of the traditional explanation of plea bargaining outcomes.

Perhaps, however, prosecutors' values are more complex. Obtaining desirable conviction rates through the manipulation of plea bargaining is not a task that drives most prosecutors into their profession. Prosecutors might accept plea bargaining as the pragmatic side of justice, but ultimately prosecutors are drawn to their jobs because of the identity that comes with it,<sup>16</sup> the well known obligation to be a minister of justice<sup>17</sup>—an obligation, prosecutors frequently and pridefully boast—that sets them apart from other lawyers. As Professor Bruce Green has aptly described the prosecution culture, the doing of justice is carried out in a “muscular,” “unsentimental” way, in “a tradition of machismo, of the prosecutor as aggressive trial lawyer facing down the lawbreaking adversary.”<sup>18</sup> Prosecutors see themselves as warriors in a fight between the good and the guilty.<sup>19</sup> Like any brave warrior, the prosecutor takes pride not simply in his win rate, but in the difficulty of the battles he is

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15. Bibas, *supra* note 6, at 2471; Schulhofer, *Plea Bargaining as Disaster*, *supra* note 5, at 1988.

16. See Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1080 (2006) (reporting that colleagues at the U.S. Attorney's Office “view being a prosecutor as more of a calling than a job” and as “part of their personal identity”).

17. See ABA STANDARDS FOR CRIMINAL JUSTICE Standard 3-1.2 cmt. (1993); MODEL RULES OF PROF'L CONDUCT R. 3.8 (2004). The prosecutor's obligation to do justice imposes a dual responsibility both to punish the guilty and to protect the innocent. *Berger v. United States*, 295 U.S. 78, 88 (1935) (“[The prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.”).

18. Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 609 (1999).

19. See Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 271, 304 (2006) (noting that prosecutors, although more sensitive to individual rights than police, often adopt a “warrior mindset”).

willing to enter.<sup>20</sup>

To the warrior prosecutor, plea bargaining may present an easy route to an impressive win rate, but it is also a challenge to prosecutorial pride. Prosecutors cannot, of course, always indulge their prosecutorial pride. To maximize limited resources, they must prioritize the most important cases throughout each level of their decision making, using discretion to determine which cases warrant charges,<sup>21</sup> which should be plea bargained and under what terms, which should be tried, and, in some instances, which should be dismissed altogether. In making these decisions, prosecutors certainly consider the likelihood of conviction in each case. However, because of the prideful warrior mentality, they are also influenced by prosecutorial passion. They care not only about how many cases they win, but also *which* cases they win and *how* they are won.

One of the most memorable conversations I had as a deputy district attorney was with a career prosecutor in my office who had refused to budge from what he deemed his rock-bottom offer in plea negotiations with defense counsel. We were in the same trial unit, so I was familiar with the case and knew it would be a difficult trial for the state to win. My colleague knew that by cutting off plea negotiations, he had accepted the risk of an acquittal. He was seemingly unfazed by the choice, telling me he would rather go to trial against the defendant and

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20. John Kuhn Bleimaier, *God, Man and the Law*, 39 CATH. LAW. 277, 286 (2000) (noting the pride of prosecutors in winning difficult trials); see also Steve Brewer, *Holmes Won't Seek Re-election*, HOUSTON CHRON., Oct. 13, 1999, at A1 (career prosecutor stating, "I learned that to be called a prosecutor that you need to be honest, you need to be open and you need to have enough grit to try hard cases and enough courage to dismiss them if that's what needs to be done"); Kenneth C. Crowe II, *Long Way to Go in Court Race*, TIMES UNION (Albany, N.Y.), Oct. 19, 1999, at B3 (assistant district attorney running for judge saying that "[i]t's important to try when cases are difficult"); Bill Engle, *50 Weeks of Success: Judge David Kolger*, PALLADIUM-ITEM (Richmond, Ind.), Oct. 31, 2005, at 12A (quoting a judge and former prosecutor as saying that "[s]ometimes you have to try a really difficult case even if the chances of winning are small because it is the right thing to do"); Christine Mahr, *Indio Lawyer Wins County Prosecutor of Year Nod*, DESERT SUN (Palm Springs, Cal.), Apr. 15, 2001, at 1B (prosecutor of the year praised because he "consistently tries more serious, difficult cases—really tough ones"); *Kenneff vs. Totaro DA Race Remains a Hot Topic*, SUNDAY NEWS (Lancaster, Pa.), May 9, 1999, at P-11 (noting that police overwhelmingly supported a candidate for district attorney because "he is willing to try the difficult cases").

21. WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 13.2 (4th ed. 2004); Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1439 (2004) (observing in the context of case screening that "constraints necessarily force prosecutors to choose among possible cases to pursue"); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1542–43 (1981) (noting that funding levels affect prosecutors' charging decisions).

lose than try to fall asleep that night knowing he had let the defendant off with any less than the current offer. I took his comment as more than bluster. It was an honest and revealing description of his own decision making. His pride as a prosecutor had created a singular passion for this case. Of the many files in his cabinet, this was the one that mattered most. This was a case that brought out the warrior.

The factors that drive a prosecutor's passion for a file are certainly linked to the variables that dominate the traditional plea bargaining story. For example, prosecutors are likely to feel most passionate when they are absolutely certain of the defendant's guilt, a certainty that will presumably correlate with the likelihood of obtaining a conviction at trial and therefore with the ultimate plea settlement. Similarly, prosecutors are most likely to be passionate in cases with aggravating factual circumstances, a particularly sympathetic victim, or an especially abhorrent defendant<sup>22</sup>—considerations that will drive up the likely post-trial sentence and therefore increase the negotiated post-plea sentence.

However, despite the correlation between prosecutorial passion and both likely trial and sentencing outcomes, prosecutorial passion can affect plea bargaining in ways independent of those traditional considerations. Importantly, prosecutorial passion, unlike a case's likelihood of conviction and likely post-trial sentence, is specific to the individual prosecutor. Consider, for example, a misdemeanor public indecency case involving genital exposure to a child. A new prosecutor assigned to his office's misdemeanor unit might feel more passion for that case than any other case he is likely to handle in his first year of practice. However, in the hands of a prosecutor assigned to the sex crimes unit, the file might garner little attention. Unlike post-trial sentences and the likelihood of conviction, the passion a prosecutor feels for a case is determined not by an absolute consideration of the severity of the offense, its factual circumstances, the weight of the evidence, or the characteristics of the actors involved, but by a consideration of those factors *relative to other files* in a prosecutor's caseload.<sup>23</sup>

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22. LAFAVE ET AL., *supra* note 21, § 13.2(a) (listing the factors that affect a prosecutor's discretion); *see also* Bibas, *supra* note 6, at 2470. *See generally* MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 103 (1978) (listing the degree of harm caused and violence used, the defendant's criminal history, victim and defendant characteristics, and defendant's motive as factors that determine a crime's severity).

23. To be sure, Bibas has previously observed that individual prosecutors might view the same offense differently and may therefore offer different bargains in similar cases. Bibas,



To get a sense of how prosecutors prioritize the cases assigned to them, I recently asked several prosecutors and former prosecutors for their thoughts about the plea bargaining process.<sup>24</sup> Their narratives illustrated the influence of experience on a prosecutor's perspective. Cases that might have triggered passion as a junior prosecutor look different a few years down the road. One former prosecutor described to me how her sense of justice evolved over time:

I softened around the edges. . . . As a baby DA, I thought all criminals needed to be punished to the fullest extent of the law. . . . As I made my way through each unit . . . , I realized that some crimes are not worth spending a lot of state time and resources. I recall giving away the farm when I helped out at drug call once I had prosecuted more serious person-felonies.<sup>25</sup>

Another prosecutor explained why an experienced prosecutor might offer a lenient plea deal to a sympathetic defendant, even when the evidence was a "slam dunk" and when mandatory minimum sentencing laws would require the sentencing judge to impose a hefty sentence: "There may be people who'd enjoy [the] accolades of trial, but as you season, you see the bigger picture."

Prosecutorial passion not only changes with experience, but can also be wholly subjective. One prosecutor, asked to list the factors that drove his plea bargaining, made a point to include his "own sense of fairness/justice" along with other, more objective factors such as the strength of the case, the victim's desires, and the defendant's criminal history. Another prosecutor explained how two cases involving the identical statutory charge could result in radically different treatment depending on the surrounding circumstances and the culpability of the victim. As an example, he told me that a robber shooting a store clerk

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*supra* note 6, at 2474–75. He did not, however, explore how the relative nature of a case's evaluation might lead to further idiosyncrasies in bargaining. *See id.*

24. I initiated my conversation with prosecutors and former prosecutors with an email asking, "What kinds of considerations went into your determination of whether, when, and under what terms to give a pretrial offer? If the considerations varied from case to case, please do your best to describe different categories of cases and the general decision making process you used when approaching plea bargaining for each category. The question is intentionally broad because I want to hear your reflections about your own decision making process. In response, please say as much or as little, as formally or as informally, as you'd like." Some lawyers responded by email, and others agreed to an oral interview.

25. *See also* HEUMANN, *supra* note 22, at 117–20 (discussing how prosecutors "mellow" with experience in plea bargaining).

wanting to go home to her kids is “just not the same” as a shooting in a drug deal gone bad. Prosecutors develop their passions based on their subjective evaluations of the facts underlying the charge, not from an objective weighing of the statutory charge itself.<sup>26</sup>

A few scholars have previously described the relative nature of plea bargaining, where some cases are pled out so that other cases can be tried. Judge Easterbrook, for example, has noted that, in exchange for sparing a defendant the uncertainty and cost of litigation, “the prosecutor frees up resources to pursue *other* criminals.”<sup>27</sup> Thirty years ago, in his invaluable book capturing the dynamics of plea bargaining, Milton Heumann explained how prosecutors “draw sharp distinctions between serious and nonserious cases.”<sup>28</sup> When cases are deemed nonserious, prosecutors are amenable to quick dispositions because it “is simply not worth the effort to press.”<sup>29</sup> When the case is serious, however, prosecutors will seek lengthier sentences and will be less likely to compromise, leading to more extensive and complex plea negotiations.<sup>30</sup>

Sometimes the trade off among cases is described as occurring at a jurisdictional level, as if crimes for minor offenses are plea bargained so that limited resources can be dedicated to the prosecution of more serious crimes.<sup>31</sup> However, only in an extremely small prosecutors’ office would you find a lawyer who is responsible for such a broad array of cases that she could, for example, negotiate away all of her petty misdemeanors to make time for her murder cases. In a prosecutors’

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26. From this perspective, prosecutorial passion reflects what has been called in the federal sentencing guidelines context a “real offense” system, not a “charge offense” system; it turns not on the statutory offenses listed in the charging instrument, but on the specific circumstances of the case. See generally Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8–12 (1988) (discussing the compromises made by the original United States Sentencing Commission between a real offense and charge offense sentencing system).

27. Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 297 (1983) (emphasis added).

28. HEUMANN, *supra* note 22, at 103.

29. *Id.*

30. *Id.*

31. See, e.g., Easterbrook, *supra* note 27, at 296–97 (discussing the influence of a prosecutor’s office budget on charging decisions and negotiations); see Benjamin A. Naftalis, “Queen for a Day” Agreements and the Proper Scope of Permissible Waiver of the Federal Plea-Statement Rules, 37 COLUM. J.L. & SOC. PROBS. 1, 19 (2003) (stating that plea bargaining “helps law enforcement allocate resources toward more serious offenders”); James P. Dowden, Note, *United States v. Singleton: A Warning Shot Heard ‘Round the Circuits?*, 40 B.C. L. REV. 897, 908–09 (1999) (“Proponents of plea bargaining also contend that it allows both prosecutors and defendants to save their judicial resources for more serious disputes.”).

office of any significant size, a lawyer who is prosecuting murders is not prosecuting petty misdemeanors, and vice versa. Accordingly, the relative severity of a defendant's case is determined by comparing the defendant not to all other defendants being prosecuted in the jurisdiction, but to the other defendants being prosecuted by whatever lawyer happened to be assigned the file.

## II. PROSECUTORIAL PASSION AND PLEA BARGAINING

Prosecutorial passion could conceivably affect plea bargaining in two different ways. First, passion might affect a prosecutor's cost-benefit analysis as a rational decision maker, causing the prosecutor either to refuse to engage in plea negotiations altogether, or to insist upon deep concessions from the defendant to compensate the prosecutor for relinquishing her advocacy role at trial. Second, and outside of a rational decision-making model, prosecutorial passion might skew plea negotiations by inducing or exaggerating cognitive biases that cause the prosecutor to inflate both the likelihood of a conviction in the case and the length of the likely sentence after a conviction obtained at trial. This Part discusses each of these possibilities in turn.

### A. Unwillingness to Bargain

Under a straightforward account of plea bargaining, a defendant who pleads guilty should be sentenced to his likely post-trial sentence, minus a "break" that reflects the resources that the government saved by avoiding the trial. Some scholars have proposed that the break defendants receive as compensation for their pleas should be uniform, so that all defendants enjoy the same opportunity to claim an identical percentage discount from their likely post-trial sentences.<sup>32</sup> Other scholars have argued that sentencing discounts should reflect the likelihood that the defendant would have been acquitted at trial, so that strong government cases lead to smaller discounts than weak ones.<sup>33</sup>

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32. Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1125 (1976) (embracing the idea of judges who would first determine the likely "post-trial sentence" and then apply a "specific discount rate" if the defendant pleads guilty); John Kaplan, *American Merchandising and the Guilty Plea: Replacing the Bazaar with the Department Store*, 5 AM. J. CRIM. L. 215, 222-23 (1977) (proposing a fixed fifty percent sentencing discount in exchange for guilty pleas).

33. Easterbrook, *supra* note 27, at 297; Bibas, *supra* note 6, at 2537. A fixed discount does not differentiate between defendants who are almost certain to be convicted and those who have a strong chance of acquittal and are therefore more likely to be innocent. As Professor Bibas has observed, "The main effect of large fixed discounts is to confer windfalls

Regardless of how the sentencing break is calculated, plea bargaining is premised on the assumption that defendants can claim it in exchange for their trial rights.

However, for a defendant to be able to capture his plea bargaining discount, his prosecutor must be willing to relinquish “the entitlement to seek the highest sentence or pursue the most serious charges possible.”<sup>34</sup> Nearly forty years ago, Albert Alschuler described the various roles that a prosecutor might play when considering whether and under what circumstances to negotiate the outcome of a criminal case.<sup>35</sup> In some cases, she may act as an advocate motivated primarily by the maximization of convictions and sentences.<sup>36</sup> In her role as advocate, a prosecutor would be reluctant to plea bargain unless the certainty of a conviction was more valuable than the discount in the sentence awarded to the pleading defendant.<sup>37</sup> Alternatively, the prosecutor might act more neutrally as the de facto sentencing judge and attempt to do the “right thing” in sentencing, provided that the defendant plead guilty.<sup>38</sup>

In Alschuler’s terms, a defendant cannot claim a sentencing discount in exchange for his plea unless the prosecutor foregoes her ability to act as an advocate and agrees to act instead as the de facto sentencing judge.<sup>39</sup> The value that a prosecutor ascribes to her role of advocate will vary depending on the passion she feels for a case. Typically, a defendant’s plea is described as a gain to prosecutors because it saves them the substantial cost and energy of a trial.<sup>40</sup> However, in a case that triggers a prosecutor’s passion, the prosecutor can attribute significant value to her advocacy role at trial, and any negotiated plea will have to compensate the prosecutor for surrendering it, thereby depriving the defendant of whatever discount would typically be offered by a passionless prosecutor who readily accepted the role of de facto sentencing judge.<sup>41</sup>

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on defendants who have little hope of acquittal.” *Id.*

34. Scott & Stuntz, *supra* note 4, at 1909.

35. Alschuler, *supra* note 2, at 52–53.

36. *Id.* at 52.

37. *Id.*

38. *Id.* at 53.

39. *Id.* at 52–53.

40. Easterbrook, *supra* note 27, at 297; Scott & Stuntz, *supra* note 4, at 1941.

41. See HEUMANN, *supra* note 22, at 103 (noting that in plea bargaining, the prosecutor’s job shifts from establishing guilt to determining the extent of the defendant’s guilt and the appropriate level of punishment); Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403–04 (2003) (noting that in plea bargaining the prosecutor replaces the judge as the decision maker

A prosecutor who feels passion for a case might go still further and refuse to extend a pretrial offer altogether, preventing the defendant from claiming any type of sentencing discount. Every prosecutor and former prosecutor with whom I spoke said they had refused to plea bargain in some of their cases. A former prosecutor told me, for example, that in "one percent" of her cases, the defendants were so deserving of punishment that they "should never get the benefit" of a plea bargain. Another prosecutor said he would refuse to plea bargain "if the crime was particularly egregious, the suspect had a long criminal history, and [the prosecutor] had an air-tight case."

Of course, any prosecutor who refuses to plea bargain so she can remain an advocate takes a chance that her advocacy will fail, the defendant will be acquitted, and the prosecutor will never have the opportunity to fight for any sentence at all. However, a passionate prosecutor might actually prefer to lose the case at trial than to acquiesce to a plea bargain that accurately reflects the likelihood of an acquittal. If prosecutors sought only to maximize sentences, it would be irrational for a prosecutor to prefer to lose at trial than to secure the certainty of a conviction and at least some minimal level of punishment in a plea bargain. However, to the passionate prosecutor, the cost of plea bargaining is not only the possibility of obtaining a higher sentence after trial, but also the toll on the prosecutor's pride if she surrenders without a fight. As one prosecutor explained, "There are some cases where the guy needs to be done because the guy's good for it." Echoing the same words I heard my supervisor use years ago, the prosecutor said, "I'd rather go to trial and lose." When I pressed him about how an acquittal could ever be preferable to a conviction, he told me that to plea bargain the cases in his file drawer about which he cared the most would be "an injury to my own psyche, my coming here to the courtroom everyday."<sup>42</sup>

In cases where the prosecutor refuses to relinquish her role as advocate, the defendant cannot obtain the benefits of a plea bargain.

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regarding the appropriate sentence); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1502 (1993) ("Today, judges no longer control sentences, and thus no longer control prosecutors. Instead, prosecutors control sentences and in turn control judges.").

42. Asked to provide an example of such a case, the prosecutor discussed a defendant who had beaten his wife with a hammer. Even with a previous domestic violence conviction, the defendant had dared to request probation in the parties' initial plea discussions. As a consequence, the prosecutor never discussed settlement again. "If he'd offered to go to prison for two years, I'd still rather have him walk out," the prosecutor explained.

He might attempt to obtain a discount by pleading guilty to all charges, in the hope that the sentencing judge will consider the defendant's contrition as a mitigating factor at sentencing.<sup>43</sup> However, the sentencing judge cannot replicate the power of the prosecutor to show leniency. In a case with multiple charges, only the prosecutor has the power to dismiss some charges in exchange for the defendant's plea to others.<sup>44</sup> Once the plea is entered, determinate sentencing laws can restrict a sympathetic judge's discretion to be lenient.<sup>45</sup> Furthermore, unlike a defendant who strikes a bargain in advance with the prosecutor, a defendant who pleads guilty and accepts open sentencing is opposed by an adversary.<sup>46</sup> Accordingly, the judge may be persuaded to share a prosecutor's passion and deprive the defendant of a sentencing discount for pleading guilty. Moreover, even if the defense convinces the judge that some discount is warranted, the discount might be subtracted from an exceptionally high sentence advocated by the prosecutor.

### B. Skewed Plea Bargaining

Prosecutorial passion might affect plea bargaining not only by altering the prosecutor's rational cost-benefit analysis, but also by injecting irrationality into the prosecutor's decision making. A substantial body of cognitive research has compellingly demonstrated that human decision makers are imperfect utility-maximizers and suffer systematically from a series of cognitive biases.<sup>47</sup> Although scholars

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43. See generally David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 411 (1993) ("The defendant's contrition or willingness to plead guilty . . . traditionally ha[s] had a significant impact on the sentence.").

44. See, e.g., FED. R. CRIM. P. 11(c)(1)(A) (providing that the government can agree not to bring or to dismiss charges as a condition of the defendant's guilty plea).

45. Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 808 (2006) (noting that under the federal sentencing guidelines, "defendants generally have little practical alternative to plea-bargaining: it is only the prosecutor who can reliably release the defendant from the harsh rules of the guidelines"). See generally LAFAVE ET AL., *supra* note 21, § 26.3 (discussing limits on judicial discretion at sentencing, such as mandatory minimum sentencing laws and presumptive sentencing guidelines).

46. As a result of binding sentencing agreements struck through plea bargaining, some defendants enjoy absolute protection against risks at sentencing and may withdraw their guilty plea if the sentencing judge is unwilling to follow the parties' agreed-upon disposition. See, e.g., FED. R. CRIM. P. 11(c)(1)(C). Even in the usual situation of a plea bargain with a mere sentencing recommendation, defendants assume little risk at sentencing because judges rarely depart from the parties' joint recommendation. Alschuler, *supra* note 32, at 1066; see HEUMANN, *supra* note 22, at 150–52.

47. ZIVA KUNDA, *SOCIAL COGNITION: MAKING SENSE OF PEOPLE* 110 (1999); STEVEN

have begun to explore the effects of these cognitive biases on plea bargaining,<sup>48</sup> the plea bargaining literature has not yet explored the interplay between cognitive biases and prosecutorial passion. Even when a prosecutor relinquishes her advocacy role and attempts to negotiate a resolution, her passion may induce or exaggerate cognitive biases that can skew plea bargaining outcomes.

### 1. Selective Information Processing

Consider, for example, the ways that selective information processing can cause a passionate prosecutor to overestimate both the likelihood of a defendant's conviction and the probable post-conviction sentence and therefore inflate the appropriate negotiated outcome. Selective information processing is the tendency for people to recall stored information and interpret new information to conform to their pre-existing views.<sup>49</sup> As a result of selective information processing, people readily accept evidence that is consistent with their current beliefs and find reasons to distrust or dismiss contradictory evidence.<sup>50</sup> A growing body of scholarship on prosecutorial decision making explores the ways that the biased assimilation of evidence can prevent prosecutors from believing defendants' claims of innocence.<sup>51</sup> In the civil negotiation context, Professors Russell Korobkin and Thomas Ulen have noted that self-serving cognitive biases can lead parties to

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PINKER, *HOW THE MIND WORKS* (1997); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1130–31 (1974), reprinted in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 18, 18–20 (Daniel Kahneman et al. eds., 1982); RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 192 (1980); see Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1175 (1997) (noting that although “[c]ognitive errors . . . may press behavior far from the anticipated directions,” human decision making is not “unpredictable, systematically irrational, random, rule-free, or elusive to social scientists”).

48. See *supra* notes 11–12.

49. See Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979).

50. *Id.*

51. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1603–13 (2006); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 312–13; Myrna Raeder, *What Does Innocence Have to Do with It?: A Commentary on Wrongful Convictions and Rationality*, 2003 MICH. ST. L. REV. 1315, 1327 (“[T]he tunnel vision problem has been widely noted in wrongful conviction cases. Officers and prosecutors either don’t realize the significance or accuracy of exculpatory evidence or on occasion affirmatively conceal it because they are convinced of the suspect’s guilt.”).

“systematically anticipate their trial prospects as being better than” their adversaries will perceive.<sup>52</sup> Professor Bibas has observed that selective information processing can have a similar effect on plea bargaining, causing each side to conclude it deserves a better deal than the other side believes is warranted.<sup>53</sup>

Prosecutorial passion can only compound the distorting effects of the prosecutor’s existing beliefs about the strength and gravity of her case. In studies that examine the effects of selective information processing on negotiations, the degree of a negotiating party’s bias is a powerful predictor that the parties will be unable to reach an agreement.<sup>54</sup> Accordingly, the more passion a prosecutor feels for her case, the more likely she will be to overestimate both the likelihood of conviction and the stiffness of the ultimate sentence, thereby making her less compliant in plea negotiations.

Furthermore, prosecutors will have more exposure to the cases about which they are passionate than to other files in their caseload, further cementing their existing views about the case’s strength and severity. Empirical evidence shows that, as a result of selective information processing, exposure to information relating to our pre-existing beliefs only serves to strengthen those beliefs, even when the information is contradictory in nature. For example, in their classic study of biased information processing, Lord, Ross, and Lepper presented subjects with two purported studies reaching contradictory conclusions regarding the deterrent effect of the death penalty.<sup>55</sup> Subjects who opposed the death penalty judged the study finding no deterrent effect to be more persuasive than the contrary study, while proponents of the death penalty preferred the study purporting to show deterrence.<sup>56</sup> As a result of biased assimilation, the new information—even though it consisted of two contradictory studies—deepened the subjects’ commitments to their pre-existing views: advocates of the death penalty reported stronger support for capital punishment after

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52. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1094 (2000).

53. Bibas, *supra* note 6, at 2498–2502.

54. Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSPECTIVES, Winter 1997, at 109, 114; George Loewenstein & Don A. Moore, *When Ignorance Is Bliss: Information Exchange and Inefficiency in Bargaining*, 33 J. LEGAL STUD. 37, 44 (2004).

55. Lord et al., *supra* note 49.

56. *Id.* at 2101–02.



reading the studies, and opponents reported stronger opposition.<sup>57</sup>

If a prosecutor is passionate about a file, she will spend more time preparing that case for trial than the cases she intends to plead out. As one prosecutor explained about his “special” cases, the case “lives in a drawer” pending trial. He “thinks about them more.” He has “more contact with the victim,” checking in with him about pending hearings and verifying facts of the case in preparation for trial. He “thinks about what else can be done investigatively.” As the prosecutor reviews and re-reviews the file while the case is pending, whatever factors first ignited her passion will now strengthen it. If the file does contain any exculpatory or mitigating information, the prosecutor will devalue it as a result of her pre-existing beliefs.<sup>58</sup>

## 2. Loss Aversion and Framing

The phenomena of loss aversion and framing can also affect a passionate prosecutor’s plea bargaining decisions. Cognitive research shows that people are averse to risk when given the opportunity to lock in gains, but are risk seeking if a gamble will help them avoid a loss.<sup>59</sup> Moreover, gain and loss are not intrinsically fixed concepts. People are risk averse when an outcome is framed as a gain (e.g., “money retained”) and risk seeking when the same result is framed as a loss (e.g., “money lost”).<sup>60</sup>

Scholars have previously noted that framing can cause defendants to perceive plea outcomes as either gains or losses, thereby promoting either risk aversion or risk seeking. For example, Professor Richard Birke has argued that defendants should view plea bargaining outcomes as losses, which would typically induce risk seeking (i.e., trials).<sup>61</sup> Birke claims, however, that institutional pressures cause defense attorneys to give their clients inadequate information about the expected value of a trial and to frame plea bargaining offers as gains instead of losses.<sup>62</sup> Similarly, Professor Bibas has explained that defendants “ordinarily”

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57. *Id.* at 2103–04.

58. Burke, *supra* note 51, at 1611.

59. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCIENCE* 453, 453 (1981).

60. Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 *AM. PSYCHOLOGIST* 341, 343 (1984).

61. Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 *UTAH L. REV.* 205, 209.

62. *Id.* at 209, 243.

view plea bargains as losses, but might view them as gains if, for example, they are in pretrial detention or know that a conviction and severe sentence are near certainties.<sup>63</sup>

A prosecutor who is passionate about a case is more likely to make pretrial decisions that will cause the defendant to frame plea bargaining as a gain. For example, a prosecutor who is passionate about a case is more likely to request high bail or pretrial detention, which serve to redefine the defendant's status quo as a state of incarceration and therefore affect the defendant's framing of a plea bargain.<sup>64</sup> By appearing confident about the likelihood of a trial, the chances of prevailing at trial, and the severity of the resulting sentence, the passionate prosecutor might also persuade the defendant that a negative outcome is inevitable, causing him to see plea bargaining as a gain.

The passionate prosecutor, meanwhile, might view plea bargaining as a loss. To the extent that either Birke or Bibas examines the perspective of the prosecutor,<sup>65</sup> each appears to assume that prosecutors always view plea bargains as gains and are therefore willing to bargain.<sup>66</sup> Prosecutors might view plea bargained outcomes as gains in their typical cases. Plea bargaining, after all, guarantees prosecutors a conviction and permits them to dispose of a case without the work of a trial.<sup>67</sup> However, if prosecutors are passionate about a case, they will not view it as a typical case to be plea bargained away to make time for other (i.e., trial) cases. They will instead view the file as a case to be tried so they can request a far weightier sentence than they could receive through plea bargaining. Any disposition of the case that deprives a prosecutor of the chance to go to trial, and results in a sentence short of the sentence requested after trial, would be viewed as a loss. Accordingly, a prosecutor will be more accepting of the risks of a trial and less willing

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63. Bibas, *supra* note 6, at 2514.

64. *See id.* at 2491–93 (setting forth the effects of bail and pretrial detention on plea bargaining).

65. In discussing the influence of framing on plea bargaining, both Professors Birke and Bibas focused primarily on the defendant's decision making.

66. *See* Bibas, *supra* note 6, at 2514 (“Prosecutors stand to gain convictions by plea bargaining.”); Birke, *supra* note 61, at 233 (“[P]rosecutors turn time-consuming and resource-expensive investigations and trials into time-efficient pleas, and in so doing, they can keep the numbers of cases closed and the numbers of new cases that come in at a manageable equilibrium.”).

67. *E.g.*, Bibas, *supra* note 6, at 2471–72 (stating that prosecutors who are motivated to maintain high rates of convictions might prefer plea bargains to trials even when they result in lower sentences); Gazal-Ayal, *supra* note 5, at 2321 (arguing that prosecutors use a “safety margin” in selecting cases for prosecution because their preference for plea bargains is “strong”).

to negotiate a plea.<sup>68</sup>

### 3. Over-Optimism and Hindsight Bias

The cognitive literature suggests that passionate prosecutors might underestimate the odds of an acquittal. As an initial matter, prosecutors have good reason to be confident about their cases; they win the vast majority of their trials.<sup>69</sup> Moreover, people in general are unrealistically optimistic about themselves and their talents, routinely overestimating the likelihood that good things will happen to them and underestimating the probability of less desirable events.<sup>70</sup> Accordingly, a prosecutor may persuade herself that, although her case might be a difficult one, she is more likely than others to win it, particularly because it is a case that she has decided to treat as a priority. A prosecutor's confidence is only inflated by hindsight bias, the tendency for people to overestimate *ex ante* the likelihood of an event once it has already occurred.<sup>71</sup> Each time a prosecutor wins a difficult trial, it reinforces her perception that a conviction was inevitable. A prosecutor who overestimates the likelihood of conviction will be less malleable in plea bargaining.

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68. The interplay I suggest between prosecutorial passion and framing is consistent with recent research suggesting an emotional component to the framing effect. See Benedetto De Martino et al., *Frames, Biases, and Rational Decision-Making in the Human Brain*, 313 SCIENCE 684, 686–87 (2006) (finding that frame-susceptible subjects showed robust activity in the amygdala, which processes emotions, compared to less susceptible subjects, who demonstrated enhanced activity in the prefrontal cortex). See generally Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43, 62 (“Litigants are human beings who possess not only the ability to crunch numbers but also the ability to experience emotion.”).

69. See HEUMANN, *supra* note 22, at 100 (“[Prosecutors] find that in most cases the evidence in the file is sufficient to conclude (and prove) that the defendant is factually guilty.”). In 2003, federal prosecutors won nearly eighty-four percent of their jury trials. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, *supra* note 1, at tbl.5.17.2003. In 2002, convictions at trial in the country's seventy-five largest counties outnumbered acquittals by a three to one ratio. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.5.57.2002 (2004), <http://www.albany.edu/sourcebook/pdf/t5572002.pdf>.

70. See Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1659 & n.22 (1998) (noting that nearly two hundred studies demonstrate people's unrealistic optimism).

71. See Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXP. PSYCH.: HUM. PERCEPTION & PERFORMANCE 288, 298 (1975); Baruch Fischhoff & Ruth Beyth, “I Knew It Would Happen”: Remembered Probabilities of Once-Future Things, 13 ORGANIZATIONAL BEHAV. AND HUM. PERFORMANCE 1 (1975).

#### 4. Anchoring

Prosecutorial passion can also affect the anchors that parties use during plea negotiations. Overwhelming psychological research demonstrates that people estimate or evaluate numbers by “anchoring” on a preliminary number and then adjusting, usually inadequately, from the initial anchor.<sup>72</sup> People inadequately adjust even when the anchor is an arbitrary number. For example, in one study, the researchers spun a wheel in the subjects’ presence to generate a random number between zero and one hundred. Subjects were instructed first to indicate whether the percentage of African countries in the United Nations was higher or lower than the random number, and then to estimate the accurate percentage. The researchers found that the arbitrary numbers spun from the wheel substantially influenced the subjects’ responses.<sup>73</sup>

Several scholars have previously explored the ways that anchoring can distort negotiations between attorneys in civil litigation. Initial settlement demands, however arbitrary or unrealistic, influence later counteroffers and concessions.<sup>74</sup> Professor Bibas has used anchoring to help explain the dynamics of plea bargaining.<sup>75</sup> A prosecutor might make an unreasonably high initial offer that the defendant readily rejects; however, the initial offer serves as a high anchor that makes a subsequent, revised offer appear reasonable in comparison.<sup>76</sup>

Prosecutorial passion can exaggerate this anchoring effect by triggering an even higher initial anchor. In cases that provoke a prosecutor’s passion, the prosecutor will charge the case more aggressively.<sup>77</sup> As one former prosecutor told me, “I started out in the

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72. Tversky & Kahneman, *supra* note 47, at 14–18.

73. *Id.* at 14. For example, subjects who received the numbers ten and sixty-five for their starting points gave median estimates of twenty-five and forty-five, respectively, for the percentage of African countries in the United Nations. *Id.*

74. See JEFFREY Z. RUBIN & BERT R. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* 267–69 (1975); Russell Korobkin & Chris Guthrie, *Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way*, 10 OHIO ST. J. ON DISP. RESOL. 1, 16 (1994); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 139–42 (1994).

75. See Bibas, *supra* note 6, at 2517–19.

76. See *id.*

77. Several scholars have noted that broad prosecutorial discretion in the initial charging decision gives leverage to prosecutors in plea negotiations. See Scott & Stuntz, *supra* note 4, at 1962–63 (observing how redundancy and overbreadth in criminal codes, coupled with broad prosecutorial discretion, permits prosecutors to manipulate post-trial sentences); Standen, *supra* note 41, at 1506–12 (setting forth the connection between the federal sentencing guidelines and increased prosecutorial power to shape plea outcomes through

pleading stage to set the stage for a plea. . . . My philosophy was . . . to charge aggressively to allow for a plea to a lesser offense.”<sup>78</sup> The inflated charging instrument produces a higher possible maximum sentence and a higher initial anchor.<sup>79</sup> Once the parties commence negotiations, the prosecutor will make a higher pretrial offer than she would without passion, again influencing the anchors used by the parties. Finally, high demands made by passionate prosecutors can also influence judges, who tend to anchor on the prosecutors’ positions at sentencing.<sup>80</sup>

### 5. Sunk Costs

Finally, prosecutorial passion can decrease prosecutors’ willingness to negotiate because of sunk cost effects. Although a rational decision maker should evaluate the utility of his options prospectively,<sup>81</sup> ample evidence demonstrates that people are affected by sunk costs and permit prior investments of time, money, and resources to influence their current choices.<sup>82</sup> The sunk cost fallacy can affect a prosecutor’s plea negotiations in differing ways, depending on where the prosecutor is sinking her costs. In a typical case that the prosecutor assumes will eventually be plea bargained, the prosecutor is unlikely to do much work in preparation for a trial. To the extent she expends any effort on the case, those efforts are more likely to be dedicated to the bargaining process itself, increasing her commitment to reaching an ultimate

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charging decisions); William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2558 (2004) (“[G]iven the array of weapons the law provides, prosecutors are often in a position to dictate outcomes.”).

78. As Justice Blackmun observed long ago, “prosecutors, without saying so, may sometimes bring charges more serious than they think appropriate for the ultimate disposition of a case, in order to gain bargaining leverage with a defendant.” *Bordenkircher v. Hayes*, 434 U.S. 357, 368 n.2 (1978) (Blackmun, J., dissenting).

79. See also *Bibas*, *supra* note 6, at 2519 (explaining that overcharging provides high anchors).

80. *Id.* at 2518–19 (summarizing empirical research).

81. See, e.g., Richard H. Thaler, *The Psychology and Economics Conference Handbook: Comments on Simon, on Einhorn and Hogarth, and on Tversky and Kahneman*, in RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY 95, 98 (Robin M. Hogarth & Melvin W. Reder eds., 1987) (“Historical or sunk costs should be irrelevant.”).

82. See generally Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, 35 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 124 (1985); Hal R. Arkes & Laura Hutzler, *The Role of Probability of Success Estimates in the Sunk Cost Effect*, 13 J. BEHAV. DECISION MAKING 295 (2000); Glen Whyte, *Escalating Commitment in Individual and Group Decision Making: A Prospect Theory Approach*, 54 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 430 (1993).

agreement.<sup>83</sup>

In contrast, when a prosecutor is passionate about a case, she has selected it as special among the competing files in her caseload. She has chosen the case as one she is willing to take to trial to maximize the possible sentence against the defendant. Accordingly, she will estimate the likelihood of a trial in that case as being higher than in the cases in which she is flexible about negotiations. Because the chances of a trial are higher, she will complete more and earlier trial preparation.<sup>84</sup> Once she has expended substantial time and energy preparing for the trial, those efforts become sunk costs that will reduce her willingness to negotiate a plea bargain.<sup>85</sup>

One might argue that factoring in the sunk costs of trial preparation in negotiating a plea is in fact rational. A central premise of plea bargaining is that defendants are rewarded for helping to conserve the government's resources. Accordingly, defendants who consume more resources by pleading guilty late in the process should receive less of a discount than defendants who plead early. Moreover, to create an incentive for defendants to plead guilty early and to dissuade them from refusing early offers in hopes of a better deal later, prosecutors should be less flexible in negotiations as the trial date approaches.<sup>86</sup> Both of these arguments, however, focus on the amount of time that the *defendant* allows to pass before entering a plea. They do not justify treating defendants differently on the basis of a prosecutor's unilateral decision to expend more preparatory work in some cases than in others, well in advance of trial.

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83. See Robert S. Adler, *Flawed Thinking: Addressing Decision Biases in Negotiation*, 20 OHIO ST. J. ON DISP. RESOL. 683, 740 (2005) (warning that parties might view protracted settlement efforts as sunk costs that prevent them from walking away from a potential deal).

84. See Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 107 (1993) (noting that prosecutors give more attention to the preparation of high priority cases than to cases that are plea bargained).

85. See Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 24 (1999) (observing in the civil context that "[a] client who has spent a great deal of money on pretrial motions and discovery may be very reluctant to settle a case for less than costs or to walk away from the case"); Samuel Issacharoff & George Loewenstein, *Unintended Consequences of Mandatory Disclosure*, 73 TEX. L. REV. 753, 758-59 (1995) (arguing in the civil context that mandatory disclosure requirements reduce the likelihood of settlement because the required disclosure is a sunk cost that parties do not ignore).

86. I am grateful to Professor Bruce Green for this point.

### III. IMPLICATIONS FOR PLEA BARGAINING REFORM

This is the natural moment in the Article to set forth normative proposals. I cannot move on to prescriptive suggestions, however, without first noting that the question of how—or even whether—to respond to prosecutorial passion implicates two broader debates that I do not seek to resolve here. First, because my observations about prosecutorial passion have assumed that individual prosecutors have unfettered discretion, they raise the question of how much discretion individual prosecutors should enjoy. One way of mitigating the role of prosecutorial passion and to increase uniformity in plea bargaining outcomes would be to reduce prosecutorial discretion. Office-wide prosecutorial policies could require, for example, that prosecutors file all charges for which probable cause exists and then comply with rigid plea bargaining guidelines.<sup>87</sup>

Arguably, however, prosecutorial discretion, and even the passions it permits, advance legitimate justifications for criminal punishment. Because of either retributive or utilitarian reasons, perhaps prosecutors should, for example, distinguish between a shooting that occurs between strangers and one between rival drug dealers.<sup>88</sup> Conceivably, prosecutors use their discretion fairly and wisely to identify the cases that warrant the most attention, relying on factual distinctions that would elude any workable set of guidelines established *ex ante*.<sup>89</sup> I do not attempt to resolve here the desirability of prosecutorial discretion. Just as many who have studied plea bargaining's imperfections have concluded that plea bargaining is inevitable,<sup>90</sup> this Article assumes likewise about prosecutorial discretion.

Similarly, although I have attempted to explain the ways that prosecutorial passion might deprive defendants of the presumed

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87. O'Hear, *supra* note 45, at 756 (suggesting that binding charging and plea bargaining guidelines for prosecutors would increase uniformity in sentencing); Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1126–27 (1998).

88. Bibas, *supra* note 6, at 2470 (recognizing that prosecutors may legitimately “drive hard bargains on particular crimes to send messages, teach lessons, and deter especially harmful or prevalent crimes”).

89. Cf. Breyer, *supra* note 26, at 8–12 (noting the tension between the substantive justice found in real offense sentencing and the procedural justice that comes with charge offense sentencing).

90. See Bibas, *supra* note 6, at 2547; Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 699 (2001) (“[a]ccepting the premise that plea bargaining is an essential component of our criminal justice system”); Gazal-Ayal, *supra* note 5, at 2299; Fred C. Zacharias, *supra* note 87, at 1123 (“This Article accepts plea bargaining as a given.”).

advantages of plea bargaining,<sup>91</sup> I do not attempt to answer here the question of whether all defendants should be entitled to obtain a sentencing discount in exchange for their guilty pleas. Whether defendants should be granted an opportunity to plea bargain implicates the broader question of whether negotiated plea outcomes are discounted or whether post-trial sentences are inflated. If plea bargained outcomes are viewed as lenient, then denying them to the most serious offenders is justified. If, however, plea bargained outcomes are just, and post-trial sentences impose additional punishment simply to penalize the defendant's choice to go to trial, then all defendants should have the opportunity to exchange their trial rights for a negotiated plea outcome.

Even without tackling the desirability of prosecutorial discretion or a defendant's entitlement to claim a plea bargaining discount, understanding the ways that prosecutorial passion can color plea bargaining nevertheless has implications for both plea bargaining practice and reform. This Part considers those implications from the perspective of prosecutors, courts, and defense attorneys.

#### *A. Prosecutors*

As an initial matter, prosecutors' offices should consider the implications of prosecutorial passion when determining how to assign cases within the office. Because the seriousness of a case, and therefore the passion that it triggers, will be assessed relative to other files assigned to the same attorney,<sup>92</sup> defining the jurisdiction of various trial units amounts to an important policy decision. For example, relatively new misdemeanor prosecutors will be more passionate about low-level sex offenses or other person crimes than an experienced prosecutor in a major crimes unit. Accordingly, the supervisors who determine case assignments should take into account not only the level of the offense and the experience of the attorneys in the various trial units, but also the likely priority that various types of cases will receive in different units.<sup>93</sup>

Both supervisors and individual prosecutors should also reflect on the considerations that should properly drive prosecutorial passion. I

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91. *See supra* Part II.A.

92. *See supra* notes 23–30 and accompanying text.

93. When I was a prosecutor, for example, the office determined that misdemeanor cases with children as victims should be assigned to the misdemeanor lawyers in the domestic violence unit. These attorneys were more seasoned than prosecutors in the general misdemeanor unit but would give the cases more attention than they could receive in the major crimes unit that handled felonies with person victims.



have suggested that the passion that comes with prosecutorial discretion may be defensible because individual prosecutors arguably draw legitimate distinctions among their cases. However, prosecutorial passion should not be based on illegitimate factors such as discrimination, personal animosity, self-interest, or media attention.<sup>94</sup> Accordingly, even if a prosecutors' office does not set forth detailed policies to mandate specified plea outcomes in individual cases, it might nevertheless set forth the principles that should guide prosecutorial discretion in plea bargaining. Professors Green and Zacharias, for example, have advocated that prosecutorial supervisors articulate "factors that society wishes prosecutors to implement or ignore."<sup>95</sup>

Finally, even if prosecutorial passion is justifiable when based on legitimate considerations, prosecutors should prefer a decision-making process that approximates rationality and avoids the distortions of cognitive biases that can be induced and exaggerated by prosecutorial passion.<sup>96</sup> One potential method of reducing cognitive bias in prosecutors would be to educate them about the influences of biases like selective information processing, anchoring, framing, loss aversion, over-optimism, hindsight bias, and sunk cost effects on plea bargaining, and the ways that prosecutorial passion can either induce or exaggerate these effects. Although research on debiasing suggests that awareness of cognitive biases is no panacea for perfect rationality,<sup>97</sup> some evidence suggests that educating people about the cognitive processes that cause bias can improve the quality of decision making.<sup>98</sup>

Prosecutors could also be educated about debiasing strategies that

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94. See generally Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 849–52 (identifying the lack of bias, partisanship, and arbitrariness as three dimensions of prosecutorial neutrality).

95. *Id.* at 896; see also Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 524 (2000) (arguing that prosecutorial discretion should be governed by articulated principles); Zacharias, *supra* note 87, at 1184 (advocating that prosecutors' offices specify the model of plea bargaining that individual prosecutors should use).

96. See generally Alafair S. Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512 (2007) (calling on prosecutors to implement strategies to mitigate the cognitive biases that can contribute to wrongful convictions).

97. See, e.g., P.C. WASON & P.N. JOHNSON-LAIRD, *PSYCHOLOGY OF REASONING: STRUCTURE & CONTENT* 194–97 (1972); Lee Ross et al., *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. OF PERSONALITY & SOC. PSYCHOL. 880, 888 (1975).

98. NISBETT & ROSS, *supra* note 47, at 191 ("The effectiveness of a variety of procedures for discrediting information also may depend on their capacity to make subjects aware of some of the processes underlying the perseverance of their beliefs."); Ross et. al, *supra* note 97, at 887–88.

have been proven to improve rationality. For example, empirical evidence demonstrates that the biasing effects of people's pre-existing beliefs are mitigated when people are forced to articulate the opposing perspective.<sup>99</sup> Accordingly, prosecutors could reduce the biasing influences of prosecutorial passion by considering both the evidence of the defendant's guilt and the relevant sentencing considerations from the perspective of the defense.<sup>100</sup>

### B. Courts

The distorting influences of prosecutorial passion upon plea bargaining also provide further support for increased judicial involvement in plea negotiations.<sup>101</sup> Although the ABA Standards for Criminal Justice,<sup>102</sup> the Federal Rules of Criminal Procedure,<sup>103</sup> and several states<sup>104</sup> currently limit, prohibit, or discourage the participation of judges in plea bargaining, empirical evidence suggests that, when permitted, judicial involvement in negotiations can improve both efficiency and fairness in plea bargaining.<sup>105</sup> One contribution of judicial

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99. Charles G. Lord et al., *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231, 1231–32 (1984).

100. Bibas, *supra* note 6, at 2523–24; Burke, *supra* note 96, at 524 (proposing “switching sides” as a means to reduce the effects of cognitive biases on prosecutorial decision making); Korobkin & Ulen, *supra* note 52, at 1094 (suggesting in the civil context that litigating parties could reduce bias by examining disputes “through the eyes of their opponents”).

101. Several scholars have called for a more active role of the judiciary in plea bargaining. E.g., Bibas, *supra* note 6, at 2542 (exploring the possibility of giving judges a more active role in plea bargaining); Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2049–52 (2006) (proposing increased judicial scrutiny of negotiated pleas as a means of reigning in prosecutorial discretion in plea bargaining); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 284–85 (2006) (calling for a stronger role for judges in plea colloquies); cf. Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1106–07 (1984) (proposing short trials as an alternative to plea bargaining).

102. ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-3.3(d) (1999).

103. FED. R. CRIM. P. 11(c)(1) (prohibiting judicial participation in plea negotiations).

104. See, e.g., ARIZ. R. CRIM. P. 17.4; COLO. REV. STAT. ANN. § 16–7–302(1) (West 2006). See generally Alschuler, *supra* note 32, at 1059 (“The general consensus seems to be that trial judges should not participate in the pretrial negotiations . . . .”); Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 202 n.6 (2006) (listing nine states and the District of Columbia as prohibiting judicial participation in plea negotiations and five others that discourage the practice).

105. Seung-Hee Lee, *The Scales of Justice: Balancing Neutrality and Efficiency in Plea-Bargaining Encounters*, 16 DISCOURSE & SOC’Y 33, 34 (2005) (summarizing results of empirical studies); see also Alschuler, *supra* note 32, at 1129–33; HEUMANN, *supra* note 22, at 150–52; Turner, *supra* note 104, at 200 (favorably reviewing the significant judicial

involvement in plea bargaining might be judges' ability to mitigate the irrational distortions of a prosecutor's passions on plea outcomes. Presumably, judges, if not unaffected by cognitive biases, are at least less affected by them than prosecutors, because they have no (or at least fewer) pre-existing beliefs about the case to induce selective information processing and have little (or at least, less) at stake in the case to induce framing and sunk cost effects. Accordingly, judges stand in a better position to make a more objective, accurate assessment of the likelihood of conviction.<sup>106</sup> One of the prevailing concerns about judicial involvement in plea bargaining is that the judge might be or appear to be biased should negotiations fail and the case proceed to trial. However, concerns about a trial judge's neutrality can be resolved by reassigning the case to another judge should negotiations prove fruitless.<sup>107</sup>

Judges can help the parties assess not only the likelihood of conviction at trial, but also the likely sentence after a conviction is obtained at trial. Indeed, in indeterminate sentencing jurisdictions, judicial involvement may be the best method of yielding an accurate assessment of the likely post-trial sentence.<sup>108</sup> A pretrial assessment of a defendant's likely post-trial sentence could enhance the chances of a resolution between the parties by providing an objective counterpoint to a prosecutor's passion-induced and perhaps unrealistic sentencing hopes. A judge's sentencing evaluation could also at least partially restore a defendant's ability to exchange his guilty plea for a sentencing discount when a passionate prosecutor refuses to plea bargain.<sup>109</sup> Although only the prosecutor has the authority to dismiss charges in exchange for the defendant's plea, a judge with sentencing discretion could conduct an informal pretrial sentencing inquiry to determine the likely post-trial sentence, and then offer the defendant whatever discount is warranted.<sup>110</sup>

Another preliminary suggestion for mitigating the distorting effects

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participation in plea bargaining in Germany, Florida, and Connecticut).

106. See Alschuler, *supra* note 32, at 1131.

107. Bibas, *supra* note 6, at 2543; Turner, *supra* note 104, at 201 (noting that Connecticut permits judges to be involved actively in plea negotiations but prohibits them from also acting as trial judge).

108. See Turner, *supra* note 104, at 209.

109. See *supra* Part II.A.

110. See *supra* notes 32–33 and accompanying text for the debate between scholars about whether sentencing discounts should be fixed or should reflect the defendant's likelihood of an acquittal at trial.

of prosecutorial passion on plea bargaining would be to improve parties' access to objective sentencing information. Despite the focus in much of the plea bargaining literature on the power that prosecutors enjoy under determinate sentencing schemes,<sup>111</sup> indeterminate sentencing is still the norm in state courts.<sup>112</sup> Because indeterminate sentencing is uncertain, the parties may not agree on the likely post-trial sentence, preventing them from reaching a plea agreement.<sup>113</sup> The cognitive biases explored in Part II.B suggest that prosecutors are especially likely to overestimate likely sentences in cases about which they are passionate. One way of increasing the accuracy of the parties' sentencing assessments is to increase their access to sentencing outcomes in their own jurisdictions.<sup>114</sup> For example, sentencing information systems in Australia and Scotland provide judges with computerized historical sentencing data by offense and offender categories.<sup>115</sup> In the United States, Multnomah County, Oregon has implemented a "Decision Support System" that contains detailed sentencing information among other data.<sup>116</sup> Increased access

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111. See *supra* note 45.

112. See MICHAEL TONRY, *THE FRAGMENTATION OF SENTENCING AND CORRECTIONS IN AMERICA* 2 (1999); Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 382 n.18 (2005); Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1191 (2005) (noting that at least eighteen states and the District of Columbia have adopted sentencing guidelines). Moreover, even under the federal sentencing guidelines, the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), injects increased judicial discretion and therefore increased uncertainty into sentencing.

113. Bibas, *supra* note 6, at 2495 n.129 ("In indeterminate-sentencing states, sentencing remains uncertain and thus will cast fuzzy shadows as well.").

114. *Id.* at 2532 (recommending creation of a database of post-trial and post-plea sentences).

115. See Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1372-75 (2005).

116. Multnomah County's Decision Support System is a vast data warehouse that includes not only offense and sentence information but also recidivism and other data. The System's underlying sentencing purpose is to provide judges with an empirical basis for determining the sentence most likely to prevent the defendant from reoffending in the future, a more ambitious goal than simply helping judges and parties to know what has been done in the past. See Michael H. Marcus, *Sentencing in the Temple of Denunciation: Criminal Justice's Weakest Link*, 1 OHIO ST. J. CRIM. L. 671, 679 (2004) ("The point of all of this is not to ask technology to select a sentence, but to focus the attention of the sentencing process on the issue of public safety."); Michael Marcus, *Smarter Sentencing: On the Need to Consider Crime Reduction as a Goal*, 40 CT. REV., Winter 2004, at 16, 21 (noting public safety purpose of system); Michael Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It*, 16 FED. SENT'G REP. 76, 79 (2003) ("[W]e have constructed a data warehouse and have developed the tools with which to give all involved in sentencing decisions rapid access to information about what works on which offenders.") (citation

to objective sentencing information could reduce the chance of prosecutorial inflation of estimated post-trial sentences.

### *C. Defense Attorneys*

Although defense attorneys have little control over decisions by the prosecutors with whom they negotiate, understanding the influence of passion on prosecutors might assist defense attorneys strategically. Defense attorneys who believe they face a passionate prosecutor should attempt to determine the factors triggering the prosecutor's passion. Persuading a prosecutor to revisit her assessment of a case is inherently difficult,<sup>117</sup> but a defense attorney would be in a better position to do so if he at least understood that a prosecutor might be driven by unobvious factors. Moreover, simply as a strategic matter, defense attorneys negotiating with a passionate prosecutor might search for opportunities to plea bargain with a different prosecutor in the office or to appeal to the judge or the prosecutor's supervisor.

## IV. CONCLUSION

A traditional assumption of plea bargaining is that its results mirror both probable trial and sentencing outcomes. Scholars are increasingly challenging that assumption by demonstrating how structural imperfections and cognitive biases can influence plea bargaining in ways that are wholly unrelated to any legitimate penological purpose. This Article has attempted to add to the growing literature on plea bargaining by exploring the ways that individual, in contrast to institutional, prosecutorial discretion—particularly when guided by passion—can magnify non-penological influences on plea bargaining and by discussing the implications of prosecutorial passion on current reform proposals.

Throughout the Article, I have used the narratives of several prosecutors to illustrate the arguments I have advanced. I made that decision not only because I found their perspectives—offered in their own voices—to be consequential, but also because those narrators are part of the audience I am trying to reach. The largest challenge for the dynamic and growing body of scholarship on plea bargaining is to reach its target audience. By its very nature, plea bargaining is the quick,

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omitted).

117. See *supra* Part II.B.1, for a discussion of selective information processing; see also Burke, *supra* note 51, at 1603–13; Findley & Scott, *supra* note 51, at 312–13; Raeder, *supra* note 51, at 1327.

dirty, and unreflective aspect of criminal law practice. Parties strike deals without deliberating their reasons for doing so, let alone considering the flaws that might exist in their cognitive processes. I have tried to explore the prosecutor's perspective *from* the prosecutor's perspective in the hope that the parties who have the greatest ability to create and implement reforms will choose to do so.

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