

# Seeking Justice by Plea: The Prosecutor's Ethical Obligations During Plea Bargaining

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## Résumé de l'article

Les procureurs de la Couronne bénéficient d'un pouvoir discrétionnaire considérable. Ils peuvent tirer profit de ce pouvoir au moment des négociations sur le plaider en utilisant des tactiques agressives, et en structurant les termes des accords sur le plaider, exerçant ainsi une énorme influence sur le processus et le résultat de négociations. Cet article discute l'exercice du pouvoir des procureurs de la Couronne et comment ceux-ci devraient l'utiliser pour façonner les négociations à la lumière de leur obligation éthique de s'assurer que justice soit rendue. Cet article examine en particulier comment les procureurs de la Couronne devraient identifier les résultats considérés justes qu'ils poursuivront lors des négociations sur le plaider et évalue les stratégies de négociation qu'ils devraient adopter ou éviter pour atteindre ces résultats. L'article aborde au passage quelques questions particulièrement épineuses, telles que de savoir comment déterminer si les procureurs devraient toujours surcharger stratégiquement les défendeurs pour faciliter les négociations sur le plaider; comment les procureurs devraient établir un équilibre entre la justesse des accusations criminelles et l'équité des peines criminelles lorsque les deux ne concordent pas; et comment les procureurs peuvent parvenir à un équilibre approprié entre un processus de négociation sur le plaider équitable et une gestion efficace des ressources judiciaires. Finalement, l'article propose quelques recommandations de politiques publiques visant à aider les procureurs de la Couronne à satisfaire à leur obligation éthique de s'assurer que justice soit rendue dans le contexte des négociations sur le plaider.

## SEEKING JUSTICE BY PLEA: THE PROSECUTOR'S ETHICAL OBLIGATIONS DURING PLEA BARGAINING

*Palma Paciocco\**

Canadian Crown prosecutors enjoy tremendous discretionary power. They can leverage this power during plea bargaining by structuring the terms of plea deals and by engaging in aggressive negotiation tactics, thereby exerting a disproportionate influence on plea bargaining processes and outcomes. This article considers how Crowns should wield their power to shape plea bargains in light of their ethical obligation to seek justice. In particular, it considers how Crowns should identify the just case outcomes they will pursue through plea bargaining and assesses which bargaining strategies they should employ or eschew in pursuit of those outcomes. In the process, the article addresses a few especially thorny questions, including: whether Crowns should ever strategically overcharge defendants to facilitate plea negotiations; how Crowns ought to balance the accuracy of criminal charges against the fairness of criminal sentences when the two are in tension; and how Crowns can strike an appropriate balance between plea bargaining fairness and efficient case management. The article offers several concrete policy recommendations aimed at helping Crowns satisfy their ethical obligation to seek justice in the context of plea bargaining.

Les procureurs de la Couronne bénéficient d'un pouvoir discrétionnaire considérable. Ils peuvent tirer profit de ce pouvoir au moment des négociations sur le plaidoyer en utilisant des tactiques agressives, et en structurant les termes des accords sur le plaidoyer, exerçant ainsi une énorme influence sur le processus et le résultat de négociations. Cet article discute l'exercice du pouvoir des procureurs de la Couronne et comment ceux-ci devraient l'utiliser pour façonner les négociations à la lumière de leur obligation éthique de s'assurer que justice soit rendue. Cet article examine en particulier comment les procureurs de la Couronne devraient identifier les résultats considérés justes qu'ils poursuivront lors des négociations sur le plaidoyer et évalue les stratégies de négociation qu'ils devraient adopter ou éviter pour atteindre ces résultats. L'article aborde au passage quelques questions particulièrement épineuses, telles que de savoir comment déterminer si les procureurs devraient toujours surcharger stratégiquement les défendeurs pour faciliter les négociations sur le plaidoyer; comment les procureurs devraient établir un équilibre entre la justesse des accusations criminelles et l'équité des peines criminelles lorsque les deux ne concordent pas; et comment les procureurs peuvent parvenir à un équilibre approprié entre un processus de négociation sur le plaidoyer équitable et une gestion efficace des ressources judiciaires. Finalement, l'article propose quelques recommandations de politiques publiques visant à aider les procureurs de la Couronne à satisfaire à leur obligation éthique de s'assurer que justice soit rendue dans le contexte des négociations sur le plaidoyer.

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## Introduction

Some twenty-five years have passed since Robert E. Scott and William J. Stuntz made the startling yet indisputable claim that plea bargaining “is not some adjunct to the criminal justice system; it is the criminal justice system.”<sup>1</sup> They were writing in the American context, but they could just as easily have been describing the Canadian criminal justice system.<sup>2</sup> Although precise statistics about the frequency of plea bargaining in Canada are unavailable, the Supreme Court has affirmed that “plea resolutions help to resolve the vast majority of criminal cases.”<sup>3</sup> Many commentators concur that, without plea bargaining, “the administration of justice could not operate efficiently and would in fact grind to a halt.”<sup>4</sup> Recently

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<sup>1</sup> Robert E Scott & William J Stuntz, “Plea Bargaining as Contract” (1992) 101:8 Yale LJ 1909 at 1912. I adopt the term “plea bargains” here. Plea bargains are also commonly referred to as plea negotiations, negotiated guilty pleas, plea resolutions, and resolution agreements.

<sup>2</sup> This article focuses on plea bargaining and prosecutorial ethics in the Canadian context but draws on the wealth of American commentary on those issues. Much (though by no means all) of the American literature is helpful because plea bargaining practices are broadly similar in the United States and Canada, and because prosecutors in those two jurisdictions have much in common: they work in adversarial criminal justice systems; they resolve most cases through plea bargaining; and the codes of ethics that govern them are animated by the same core obligation to ‘seek justice’. There are, of course, crucial differences between the jurisdictions too, which I have borne in mind when citing American sources.

<sup>3</sup> *R v Nixon*, 2011 SCC 34 at para 47, [2011] 2 SCR 566.

<sup>4</sup> Department of Justice of Canada, “Plea Bargaining”, by Milica Potrebic Piccinato (Ottawa: Department of Justice Canada, 2004) at 6, online: <[www.justice.gc.ca/eng/rp-pr/csj-sjc/ilp-pji/pb-rpc/pb-rpc.pdf](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ilp-pji/pb-rpc/pb-rpc.pdf)>. For discussions of the necessity of plea bargaining in Canada, see e.g. Gregory Lafontaine & Vincenzo Rondinelli, “Plea Bargaining and the Modern Criminal Defence Lawyer: Negotiating Guilt and the Economics of 21st Century Criminal Justice” (2005) 50:1&2 Crim LQ 108 at 108; Carol A Brook et al, “A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States” (2016) 57:4 Wm & Mary L Rev 1147 (“[r]esolution discussions are certainly important in Canada, given the demands on the justice system. ... In some places, it is a necessity” at 1192); Marie Manikis, “Recognizing Victims’ Role and Rights During Plea Bargaining: A Fair Deal for Victims of Crime” (2012) 58:3&4 Crim LQ 411 at 411 (“[i]n Canada, as with other common law jurisdictions, plea bargaining is considered a legitimate and necessary practice for the effective functioning of the criminal justice system” at 411). See also Joseph Di Luca, “Expedient McJustice or Principled Alternative Dispute Resolution? A Review of Plea Bargaining in Canada” (2005) 50:1&2 Crim LQ 14 at 23–24:

One of the primary arguments advanced in favour of plea bargaining is the necessity-based argument. Plea bargaining, it is suggested, is required to keep the wheels of justice moving. Without it the justice system will grind to a halt.

...

the Supreme Court expressed the view that, “Properly conducted, [resolution discussions, including plea bargains] permit the system to function smoothly and efficiently”<sup>5</sup>—a position that is shared by numerous Canadian courts.<sup>6</sup>

Despite its endorsement by courts and government officials, the practice of plea bargaining remains controversial among criminal justice practitioners and scholars.<sup>7</sup> Common objections to plea bargaining include: concerns that the practice is secretive and arbitrary; that it can result in disproportionately low or high sentences; that it can elicit guilty pleas from innocent people, thereby contributing to the scourge of wrongful convictions; and that it subverts trial rights and processes.<sup>8</sup> John Langbein has persuasively argued that “[w]e indulge in this practice of condemnation without adjudication because we think we have to, not because we want to. ... Even among the proponents of plea bargaining, few indeed would contend that it is an intrinsically desirable mode of rendering criminal justice.”<sup>9</sup> In this light, the endorsement, or at least tolerance, of plea bargaining within the Canadian criminal justice system reads less as full-throated approval, and more as widespread acceptance of the inevitable.

Indeed, while practitioners and scholars are generally critical of plea bargaining, most accept it as a virtually ineradicable feature of the crimi-

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In Canada, the necessity argument has been repeatedly presented by experienced participants in the criminal justice system. ... Over time it has become a well accepted fact that plea bargaining helps prevent backlogs and assists in decreasing the already long delays in getting matters to trial.

<sup>5</sup> *R v Anthony-Cook*, 2016 SCC 43 at para 1, [2016] 2 SCR 204 [Anthony-Cook]. The term “resolution discussions” generally refers to conversations or negotiations between the Crown and defence intended to streamline or expedite the criminal justice process, which “may involve discussions about the charges, the procedure, the facts, the trial issues and sentencing matters”: see Mary Lou Dickie, “Through the Looking Glass: Ethical Responsibilities of the Crown in Resolution Discussions in Ontario” (2005) 50:1&2 Crim LQ 128 at 131. Plea bargains are a subset of resolution discussions whereby the accused agrees to enter a guilty plea on one or more charges in exchange for some concession(s) from the Crown. For examples of other Canadian courts endorsing the view that resolution discussions are essential, see e.g. *R v Shaw*, 2005 BCCA 380 at para 11, 199 CCC (3d) 93; *Dumont c R*, 2013 QCCA 576 at para 13, 2013 CarswellQue 2835 (WL Can); *R v Sepka*, 2017 BCPC 356 at paras 32–36, 2017 CarswellBC 3390 (WL Can); *R v Werbiski*, 2017 ABCA 204 at paras 4–6.

<sup>6</sup> See Simon N Verdun-Jones, “Plea-Bargaining” in Julian V Roberts & Michelle G Grossman, eds, *Criminal Justice in Canada: A Reader*, 5th ed (Toronto: Nelson Education, 2016) 168 at 171.

<sup>7</sup> See Piccinato, *supra* note 4 at 3.

<sup>8</sup> *Ibid* at 3–5.

<sup>9</sup> John H Langbein, “Land Without Plea Bargaining: How the Germans Do It” (1979) 78:2 Mich L Rev 204 at 205.

nal justice system.<sup>10</sup> Many critics therefore focus their attention not on abolition efforts, but on developing reform proposals that could improve plea bargaining's fairness and reliability.<sup>11</sup> I count myself among this group. Whatever its deficiencies—and I agree with the critics that there are many—plea bargaining serves converging economic, personal, political, and institutional interests that make its eradication highly unlikely. I therefore follow the courts and the majority of commentators in accepting plea bargaining as a stable and central institution within our criminal justice system.

The claim that plea bargaining *will* occur does not, however, tell us *how* it ought to occur. Even plea bargaining's most vociferous critics can hardly dispute that individual plea bargaining practices can be better or worse. And even those who campaign for plea bargaining's abolition would presumably agree that—to the extent it persists—better plea bargaining practices are preferable. Given plea bargaining's supremacy and tenacity, the most immediate normative question is consequently how to make it as just as it can possibly be. This article takes up that question, focusing in particular on the role of the Crown prosecutor (Crowns). I ask how Crowns should identify the charges and sentences they will seek through plea bargaining, and I query which negotiation strategies they should embrace or eschew in order to promote substantive and procedural justice through plea bargaining.

Many plea bargaining reformers and commentators have already considered the role of the Crown prosecutor during plea bargaining. Among them, many specifically focus on the effects of prosecutorial discretion.<sup>12</sup>

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<sup>10</sup> See Stephen J Schulhofer, "A Wake-Up Call from the Plea-Bargaining Trenches" (1994) 19:1 Law & Soc Inquiry 135 (describing the "extensive literature argu[ing] that bargaining is unavoidable" at 139). See also George Fisher, "Plea Bargaining's Triumph" (2000) 109:5 Yale LJ 857; Jacqueline E Ross, "The Entrenched Position of Plea Bargaining in United States Legal Practice" (2006) 54:4 Am J Comp L 717.

<sup>11</sup> See Michael M O'Hear, "Plea Bargaining and Procedural Justice" (2008) 42:2 Ga L Rev 407 ("[i]ncreasingly, scholars are turning their attention from abolition to reform, seeking ways to improve an institution that seems unlikely to disappear anytime soon" at 409). See also Douglas D Guidorizzi, "Should We Really 'Ban' Plea Bargaining?: The Core Concerns of Plea Bargaining Critics" (1998) 47:2 Emory LJ 753 (arguing that plea bargaining is a natural feature of the adversarial justice system and suggesting reforms to plea bargaining).

<sup>12</sup> See e.g. Di Luca, *supra* note 4 at 55–56; Angela J Davis, *Arbitrary Justice: The Power of The American Prosecutor* (Oxford: Oxford University Press, 2007); Donald G Gifford, "Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion" [1983] 1 U Ill L Rev 37; H Mitchell Caldwell, "Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System" (2011) 61:1 Cath U L Rev 63; Ari Linds, "A Deal Breaker: Prosecutorial Discretion to Repudiate Plea Agreements After *R v Nixon*" (2012) 38:1 Queen's LJ 295 at 321–23.

As I explain below, Crown prosecutors have tremendous discretionary authority that they can mobilize in order to put extraordinary pressure on defendants to accept plea bargains. As such, restrictions on prosecutorial discretion are often seen as a promising means of improving plea bargaining's fairness. In practice, however, calls to limit prosecutorial discretion have consistently been ignored—perhaps because, like plea bargaining itself, expansive prosecutorial discretion serves a host of institutional interests that conspire to shield it from meaningful reform.<sup>13</sup> Given the tenacity of broad prosecutorial discretion, it is surprising that relatively few scholars have considered how to encourage Crowns to use their discretion in a manner that promotes fairer plea bargains rather than simply considering how to curtail that discretion. My central aim in this article is to help address this gap in the literature by investigating how Crown prosecutors can use their discretion ethically and purposively in order to make plea bargaining more just.

An obvious starting point for any analysis of how Crown prosecutors ought to behave is prosecutorial ethics: the body of jurisprudence that details norms for prosecutors' behaviour. The central tenet of prosecutorial ethics is that Crowns have a duty to seek justice, or to act as ministers of justice.<sup>14</sup> This duty is central to their institutional role. Indeed, expansive prosecutorial discretion is largely justified on the grounds that it empowers Crowns to fulfill their mandate to seek justice. Crown prosecutors are better able to pursue just outcomes, it is argued, to the extent that they are empowered to make discrete, context-sensitive judgments in individual cases. The problem, of course, is that the discretionary authority that allows Crowns to make good judgments also enables them to make bad ones. In other words, discretion can enable wise, empathetic, and humane decisions, but it can also provide cover for rash, cruel, or biased decisions. In the pages that follow, I explore this tension by considering how Crown prosecutors ought to use their discretion for the purposes of plea bargaining.

I begin in Part I by sketching out the background: I consider why prosecutorial discretion is both troubling and promising, and I explain its

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<sup>13</sup> See *infra* notes 21–24 and accompanying text.

<sup>14</sup> See Alice Woolley, *Understanding Lawyers' Ethics in Canada* (Markham, Ont: LexisNexis Canada, 2011) at 277; *R v Regan*, 2002 SCC 12 at paras 156–57, [2002] 1 SCR 297 [*Regan*]. See also *R v Boucher*, [1955] SCR 16 at 23–24, 110 CCC 263, Rand J:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. ... The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.

role in plea bargaining. I also consider the chief rationales for maintaining expansive prosecutorial discretion, including the notion that it enables Crowns to fulfill their overarching ethical mandate to seek justice, or to act as ministers of justice. I note that, while this mandate provides important guidance to Crowns and has been helpfully elaborated in various ways, it remains open-textured: inasmuch as reasonable people disagree about what *justice* requires, two reasonable, ethically minded Crowns, both of whom are genuinely trying to fulfill their *seek justice* mandate, may adopt wildly different stances on the same case.

How then should Crowns who are trying to fulfill their ethical duty to seek justice identify the just outcomes and processes they will pursue in individual cases? I take up this problem in Part II, wherein I develop a general framework for measuring and identifying just outcomes, before offering concrete suggestions as to how Crowns can promote justice through plea bargaining. In so doing, I address a couple of especially thorny questions, including whether it is ethical for Crowns to use strategic overcharging to facilitate plea negotiations and how Crowns ought to balance the accuracy of criminal charges against the fairness of criminal sentences, to the extent that the two are incompatible. Throughout, I advocate for a more contemplative, resource-intensive approach to charge screening and plea bargaining.

In Part III, I consider how to square this more resource-intensive approach with concerns about the criminal justice system's efficiency—concerns that motivate the institution of plea bargaining in the first place, and which have become more pressing in recent months following the Supreme Court's landmark decision in *R. v. Jordan*.<sup>15</sup>

## I. The Prosecutor's Power and Ethical Obligations During Plea Bargaining

### A. Prosecutorial Discretion and Plea Bargaining

To understand the Crown's role in plea bargaining, we must first understand something about the nature of prosecutorial discretion. Crown prosecutors in Canada enjoy tremendous discretionary power, including the power to decide which charges, if any, to pursue. Because charges entail predetermined sentencing ranges, Crown charging decisions go a long way towards setting the penalties that accused persons face. Crowns can therefore use their charging discretion to elicit guilty pleas by bringing more serious criminal charges at the outset, and then offering to reduce

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<sup>15</sup> 2016 SCC 27, [2016] 1 SCR 631 [*Jordan*].



them—thereby lowering the associated penalty range—if the accused agrees to plead guilty.<sup>16</sup> Crowns can also leverage their authority to make submissions at the post-plea sentencing phase by offering to make more favourable sentencing recommendations in exchange for guilty pleas. Both practices—called *charge bargaining* and *sentence bargaining*, respectively—present the accused with the option of securing a more lenient sentence if she pleads guilty, as compared to the heavier sentence that she can anticipate if she goes to trial and loses. The disparity between these two sentences—the so-called *sentencing differential*—puts pressure on the accused to plead guilty; the greater the sentencing differential, the more intense the pressure.<sup>17</sup> Notably, Crowns can use their discretion to control the magnitude of the sentencing differential, thereby calibrating the pressure to plead out. In this way, they can assume some of the power to determine case outcomes that is traditionally vested with judges and juries.<sup>18</sup> Accordingly, a significant power imbalance results. Donald Gifford puts the matter starkly: “Plea bargaining’ is in reality the prosecutor’s unilateral administrative determination of the level of the defendant’s criminal culpability and the appropriate punishment for him.”<sup>19</sup>

Many scholars concerned about this dynamic have suggested curtailing prosecutorial discretion or subjecting it to greater oversight.<sup>20</sup> In reali-

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<sup>16</sup> In the United States, prosecutors are expressly allowed to charge defendants with less serious offences, then threaten to file more serious charges if defendants refuse to plead guilty: see *Bordenkircher v Hayes*, 434 US 357 (1978). In contrast, the Supreme Court of Canada has indicated that the practice of threatening to elevate charges by way of pressuring an accused to plead guilty is incompatible with the Crown’s ethical mandate and may even constitute an abuse of process in some circumstances: see *R v Babos*, 2014 SCC 16 at paras 58–66, [2014] 1 SCR 309. The pressure to plead will be felt more keenly by some accused persons than others, depending on such factors as one’s personal level of risk aversion, familiarity with the criminal justice system and degree of anxiety about facing imprisonment and/or a criminal record, financial resources and quality of representation, whether one is awaiting trial in custody, and so forth: see Stephanos Bibas, “Plea Bargaining Outside the Shadow of Trial” (2004) 117:8 Harv L Rev 2464; Gail Kellough & Scot Wortley, “Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions” (2002) 42:1 Brit J Crim 186 at 200; Christopher Sherrin, “Guilty Pleas from the Innocent” (2011) 30:1 Windsor Rev Legal Soc Issues 1.

<sup>17</sup> See Langbein, *supra* note 9 at 204.

<sup>18</sup> See H Richard Uviller, “The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit” (2000) 68:5 Fordham L Rev 1695 at 1714. See Lafontaine & Rondinelli, *supra* note 4 (noting the “diminished discretion in the judiciary in the sentencing process” means that “[t]he Crown, not the judge, is the critical decision-maker in the result obtained by a plea bargain” at 120); David Ireland, “Bargaining for Expedience? The Overuse of Joint Recommendations on Sentence” (2015) 38:1 Man LJ 273 at 288.

<sup>19</sup> Gifford, *supra* note 12 at 38.

<sup>20</sup> See e.g. Davis, *supra* note 12, ch 10; Gifford, *supra* note 12 at 68, 85; Candace McCoy, “Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform” (2005)

ty, when scholars talk about reducing prosecutorial discretion, they are actually talking about reallocating it to other criminal justice actors, such as judges or legislators. Our laws are neither self-generating nor self-executing: ultimately, *someone* must decide which laws will exist and how they will be applied in individual cases. While we can distribute discretionary authority more or less widely, and make its exercise more or less transparent, our ability to actually reduce discretion is strictly limited. The question, therefore, is not whether to permit discretionary authority, but how to distribute it among different criminal justice actors. Some have expressly advocated for a redistribution of discretionary power in the criminal justice system, arguing that Crown prosecutors should have less while others—usually judges—should have more.<sup>21</sup> The legislators and judges to whom these calls are directed have, however, consistently ignored them.

Legislators have tended not to interfere with broad prosecutorial discretion, perhaps because it serves them in at least two ways. First, as explained above, broad prosecutorial discretion helps prosecutors orchestrate plea bargains. Plea bargaining is desirable to legislators because it enables the criminal justice system to sustain a formal commitment to generous procedural rights for accused persons while nonetheless processing cases quickly and cheaply. It thereby helps lawmakers put off meaningful criminal justice reforms, which would undoubtedly be expensive, controversial, or both. Second, prosecutorial discretion allows legislators to promulgate aggressive and redundant criminal laws,<sup>22</sup> feeding the

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50:1&2 Crim LQ 67; Jennifer Smith, “Scrapping the Plea-Bargain: Mandatory Mediation of Criminal Cases Would Further Justice, at a Lower Cost” (2000) 7:1 Dispute Resolution Magazine 19; Abraham S Goldstein, *The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea* (Baton Rouge: Louisiana State University Press, 1981).

<sup>21</sup> See especially Kate Stith & José A Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (Chicago: University of Chicago Press, 1998) (offering a sustained argument in the American context). See also Athar K Malik, “Mandatory Minimum Sentences: Shackling Judicial Discretion for Justice or Political Expediency?” (2007) 53:2 Crim LQ 236 at 251–252; Paul Calarco, “*R v Anderson*: The Narrow Review of Crown ‘Discretion’ Means Less Justice” (2015) 62:1&2 Crim LQ 33 at 41–42. But see Lafontaine & Rondinelli, *supra* note 4 at 123–25 (arguing that, where judges reject joint sentencing submissions, accused persons should be permitted to retract their guilty pleas—a reform that would further decrease the judiciary’s influence).

<sup>22</sup> For a recent example of proposed redundant criminal laws, consider Bill C-365, a private members bill that would make the theft of fire equipment a distinct *Criminal Code* offence carrying a maximum penalty of life imprisonment and would aim to elevate the penalties for mischief relating to firefighting equipment, even though these acts are already criminalized and are already liable to attract higher penalties under traditional sentencing analyses. See Bill C-365, *An Act to Amend the Criminal Code (firefighting equipment)*, 1st Sess, 42nd Parl, 2017 (first reading 3 October 2017), online: <www.parl.ca/DocumentViewer/en/42-1/bill/C-365/first-reading>.

public's appetite for "tough on crime" policies while deflecting backlash if those laws are applied in ways that are unpopular.<sup>23</sup> If Crowns had less discretion, then legislators would need to accept greater responsibility for individual criminal case outcomes—a reality that would not serve their professional interests. For their part, Crown prosecutors are disinclined to give up their discretionary power because it affords them a high degree of control and flexibility. Stuntz sums up the situation as follows: "[D]iscretionary enforcement frees legislators from having to worry about criminalizing too much, since not everything that is criminalized will be prosecuted; likewise, legislative power liberates prosecutors, widening their range of charging opportunities."<sup>24</sup>

For their part, judges are likewise reluctant to curtail or even oversee the exercise of prosecutorial discretion.<sup>25</sup> Indeed, Supreme Court of Canada jurisprudence has established that judges are only permitted to interfere with a Crown's discretionary decision—including a decision about whether to negotiate, accept, or repudiate a plea bargain—if that decision is found to constitute an abuse of process.<sup>26</sup> The Court has defined abuse of process in this context as: "Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system."<sup>27</sup> Few decisions meet this high threshold. Judicial involvement in plea bargaining is further reduced by jurisprudence encouraging judges to

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<sup>23</sup> See William J Stuntz, "The Pathological Politics of Criminal Law" (2001) 100:3 Mich L Rev 505 at 528 [Stuntz, "Pathological Politics"]. See also William J Stuntz, *The Collapse of American Criminal Justice* (Cambridge, Mass: The Belknap Press of Harvard University, 2011) at 263 (discussing the rise of redundant, overlapping criminal laws). The flip side of this dynamic is illustrated by Julia Hughes' analysis of the public reaction to the low number of criminal prosecutions of corporate actors following Canadian criminal law reforms designed to increase corporate accountability. See Julia Hughes, "Restraint and Proliferation in Criminal Law" (2010) 15:1 Rev Const Stud 117 ("[t]he groups engaged in lobbying during the legislative process of the [Westray Bill] have not returned to Parliament Hill to complain about its complete lack of effectiveness. Instead, they have blamed provincial prosecutors for inaction" at 141).

<sup>24</sup> Stuntz, "Pathological Politics", *supra* note 23 at 528.

<sup>25</sup> *Ibid* at 558.

<sup>26</sup> See *R v Anderson*, 2014 SCC 41 at paras 36, 40, 44, [2014] 2 SCR 167 [Anderson]; *Krieger v Law Society of Alberta*, 2002 SCC 65 at paras 30–32, [2002] 3 SCR 372 [Krieger]; *R v Power*, [1994] 1 SCR 601 at 627, 89 CCC (3d) 1 (quoting *United States v Redondo-Lemos*, 955 F (2d) 1296 at 1299 (9th Cir 1992)). See also Benjamin L Berger, "The Abiding Presence of Conscience: Criminal Justice Against the Law and the Modern Constitutional Imagination" (2011) 61:4 UTLJ 579 at 610–11 [Berger, "Abiding Presence of Conscience"]; Kent Roach, "Crime and Punishment in the *Latimer* Case" (2001) 64:2 Sask L Rev 469 (describing "the enduring importance of prosecutorial discretion in criminal law, especially when mandatory sentencing is involved" at 473).

<sup>27</sup> *Anderson*, *supra* note 26 at para 50.

accept joint sentencing submissions<sup>28</sup> and by the fact that plea discussions are protected from judicial scrutiny by settlement privilege.<sup>29</sup>

Why has our Supreme Court largely insulated prosecutorial discretion from judicial review? It has justified its decisions in part by invoking the separation of powers—specifically the independence of the Attorney General<sup>30</sup>—which the Court has characterized as a “hallmark of a free society.”<sup>31</sup> Close judicial oversight of prosecutorial decision-making could compromise that independence. Relatedly, the Court has taken the position that prosecutorial discretion merits protection because it facilitates the Crown’s ethical mandate to seek justice.<sup>32</sup> According to this rationale, prosecutorial discretion empowers Crowns to enforce the law in a conscientious and purposeful manner, without undue regard to questions of political popularity. As Benjamin Berger observes, “prosecutorial discretion is the chief and most common means by which the justice of the law is assessed in the criminal justice system.”<sup>33</sup> The Supreme Court has echoed this view, stating:

[T]he fundamental importance of prosecutorial discretion ... lie[s], “not in protecting the interests of individual Crown attorneys, but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations

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<sup>28</sup> See *Anthony-Cook*, *supra* note 5 (“[u]nder the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest” at para 32). See also *R v Tsicos (MC)* (2006), 216 OAC 104 at paras 2, 4, 2006 CanLII 33849 (Ont CA); *R v FGF*, 2002 ABQB 680 at paras 21–22, [2002] AJ No 942 (QL); *R v Oxford*, 2010 NLCA 45 at paras 48–79, 257 CCC (3d) 484; *R v Webster*, 2001 SKCA 72 at para 7, 207 Sask R 257. See also Ontario, Ministry of the Attorney General, *Report of the Attorney General’s Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Ontario Ministry of the Attorney General, 1993) (Chair: The Honourable Arthur Martin) at 47; Faizal R Mirza, “Mandatory Minimum Prison Sentencing and Systemic Racism” (2001) 39:2&3 Osgoode Hall LJ 491 at 504–05; The Honourable Michel Proulx & David Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at 418–19. But see Lafontaine & Rondinelli, *supra* note 4 (noting that the Ontario Court of Appeal “will not hesitate to intervene” when a joint sentencing submission would result in an excessively high sentence at 115).

<sup>29</sup> For a comprehensive discussion of how “settlement privilege” applies to plea bargaining, see *R v Delchev*, 2015 ONCA 381, 126 OR (3d) 267.

<sup>30</sup> See *Krieger*, *supra* note 26 at para 31; *Anderson*, *supra* note 26 at para 46.

<sup>31</sup> *Krieger*, *supra* note 26 at para 32, citing *Re Hoem and Law Society of British Columbia* (1985), 20 CCC (3d) 239 at 254, 20 DLR (4th) 433 (BCCA). See also *Anderson*, *supra* note 26 at para 46.

<sup>32</sup> See *Anderson*, *supra* note 26 at para 37, citing *Miazga v Kvello Estate*, 2009 SCC 51 at para 47, [2009] 3 SCR 339 [*Miazga*].

<sup>33</sup> Berger, “Abiding Presence of Conscience”, *supra* note 26 at 611.

without fear of judicial or political interference, thus fulfilling their quasi-judicial role as ‘ministers of justice’.”<sup>34</sup>

Of course, wide discretion may be necessary to ensure that Crowns fulfill their ethical mandate, but it is hardly sufficient. To satisfy that mandate, Crowns must also have an articulated understanding of its demands. This latter condition is vexing because while the ethical mandate is in some respects decisive, it remains open to competing interpretations.

### ***B. Prosecutorial Ethics and Plea Bargaining***

Crown prosecutors, as explained above, are governed by an overarching ethical obligation to seek justice, or to act as ministers of justice.<sup>35</sup> Without further elaboration, this obligation provides precious little guidance to Crown prosecutors because it “implies ... ‘justice’ has some independent meaning” when, in fact, justice is an open-textured concept.<sup>36</sup> Accordingly, a group of prosecutors, each of whom conscientiously tries to achieve justice, may treat similarly situated offenders differently to the extent that those prosecutors have diverse understandings of what justice requires. Imagine, for example, two university students who, in separate but very similar incidents, participate in relatively minor assaults while out bar-hopping with friends. Neither has a prior record. Both are prosecuted by conscientious Crown attorneys who seek to denounce and deter this type of antisocial conduct and acknowledge the victim’s experience while also promoting rehabilitation for the offender. One Crown pursues two weeks’ imprisonment, to be served over weekends so as not to interrupt the offender’s studies. The other Crown seeks a conditional discharge with a curfew and a ban on alcohol consumption, plus community service and restitution to the victim. In both cases, the Crown is acting thoughtfully to advance a holistic view of justice; but only one of these similarly-situated offenders would serve jail time or emerge with a criminal record. Such disparate treatment results in unequal criminal justice outcomes, thereby violating the rule of law norm that the laws should be applied equally to all members of society. On its own, then, the seek justice mandate is of limited assistance to Crowns seeking to make ethical decisions in individual cases.

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<sup>34</sup> Anderson, *supra* note 26 at para 37, citing Miazga, *supra* note 32 at para 47.

<sup>35</sup> See Regan, *supra* note 14 at paras 62, 65. See also Jonathan Rogers, “The Role of the Public Prosecutor in Applying and Developing the Substantive Criminal Law” in RA Duff et al, eds, *The Constitution of the Criminal Law* (Oxford: Oxford University Press, 2013) 53 at 56; Woolley, *supra* note 14 at 277.

<sup>36</sup> Stanley Z Fisher, “In Search of the Virtuous Prosecutor: A Conceptual Framework” (1988) 15:3 Am J Crim L 197 at 219.

Crowns do, of course, receive further ethical guidance from other sources, including: policy manuals and practice memoranda promulgated by different offices and ministries; rules of professional conduct set out by provincial law societies; and statutes and precedents. All of these sources govern Crowns' conduct and help to elaborate the broader set of norms and standards that constitute our operating theory of criminal justice.<sup>37</sup> Taken together, these sources provide helpful guidance as to how prosecutors should act, thereby promoting consistency and accountability. They do not, however, eradicate the need for discretionary decision-making at the level of interpretation and implementation. Moreover, provincial ministries and Crown offices across Canada have made different policy choices when elaborating the professional standards and practice protocols that govern prosecutors in their localities.<sup>38</sup> While these variations appropriately reflect different local conditions, they also speak to the ambiguity of the ethical mandate they are meant to expound. Ultimately, that mandate can never be translated into a series of comprehensive, unambiguous, or universal protocols because justice is an indeterminate concept that has been debated for millennia and remains as contested as ever.

The fact that prosecutorial policies leave room for individual interpretation is not only unavoidable, but is also in some respects salutary. Whatever justice requires in the criminal law context, it must be at least somewhat responsive to the circumstances of each individual case. These circumstances can only be interpreted a posteriori on a case-by-case basis—an interpretive task that necessarily involves the exercise of subjective judgment. The Supreme Court is right, therefore, to conclude that the seek justice mandate presumes a minimum degree of prosecutorial discretion.<sup>39</sup> In the final analysis, then, the very conditions that allow for disparate treatment are also essential to achieve justice.

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<sup>37</sup> See Dickie, *supra* note 5 at 138.

<sup>38</sup> Some provincial ministries instruct Crowns to consider, except under “exceptional circumstances”, whether the available evidence supports a given charge by assessing whether there is a “substantial likelihood of conviction.” See e.g. British Columbia, Criminal Justice Branch, Ministry of Justice, “Charge Assessment Guidelines” in *Crown Counsel Policy Manual* (2 October 2009), online: <[www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/cha-1-charge-assessment-guidelines.pdf](http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/cha-1-charge-assessment-guidelines.pdf)>. Other provincial ministries require only a “reasonable prospect of conviction.” See e.g. Ontario, Ministry of Attorney General, “Charge Screening” in *Crown Policy Manual* (21 March 2005), online: <[www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/ChargeScreening.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/ChargeScreening.pdf)>.

<sup>39</sup> See *Anderson*, *supra* note 26 at para 37.

## II. Seeking Justice by Plea

The problem of how to interpret and satisfy the Crown's ethical mandate to seek justice despite its indeterminacy is especially pressing as it relates to plea bargaining. As noted above, plea bargaining enables Crowns to exert tremendous pressure on defendants to accept specific charges and sentencing ranges. Moreover, those charges and sentences are never scrutinized via the traditional adversarial trial process and are usually subject to only cursory judicial oversight.<sup>40</sup> Prosecutorial discretion is therefore even more significant in the plea bargaining context than it is in the traditional trial context. Put simply, if Crowns do not actually seek justice when plea bargaining, then plea bargains are very likely to be unjust.

How, then, should Crowns interpret and fulfill their ethical mandate when plea bargaining? We can make some headway towards answering this question by first noting that Crowns are under a duty to pursue just outcomes through just processes. In other words, they must seek both substantive and procedural justice. We can therefore distinguish two broad questions. First, how should Crowns identify the just outcomes they will pursue through plea bargaining? Second, which processes or negotiation tactics should they use to achieve those outcomes? I will approach these two questions by first unpacking the concept of just outcomes.

For purposes of the criminal law, I understand a just outcome to mean a just conviction or acquittal combined, where applicable, with a just sentence. A just conviction or acquittal has three aspects. The first is bare accuracy, in the sense that a factually guilty person is not acquitted, nor a factually innocent person convicted. The second aspect is the intrinsic justness of the offence charged. We can readily imagine a situation in which a conviction is accurate, in the sense that the offender really did commit the act in question, but where the law criminalizing that act is intrinsically unjust (i.e. it is unjust *in abstracto*). Consider, for example, the historical criminalization of consensual sex between adult men in Anglo-American law.<sup>41</sup> A conviction for this offence would be unjust even if it satisfied the bare accuracy requirement. The final aspect of a just conviction is the fit between the offence charged and the circumstances of the case.

In some cases, the accused is factually guilty, and the crime in question is intrinsically just, but the conviction is problematic because it fails

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<sup>40</sup> See *supra* notes 24–28 and accompanying text.

<sup>41</sup> Canadian laws against “buggery” and “gross indecency” were largely abolished by legislative amendment in 1969. See generally David Kimmel & Daniel J Robinson, “Sex, Crime, Pathology: Homosexuality and Criminal Code Reform in Canada, 1959–1969” (2001) 16:1 CJLS 147.

to reflect the accused's normative guilt or innocence. Josh Bowers uses the term "normative innocence" to describe the status of people who are technically guilty, but whom there is no compelling moral or policy reason to punish because their crimes are very minor, or their personal circumstances are highly sympathetic, or both.<sup>42</sup> Following Bowers, a conviction is unjust to the extent that it fails to reflect the accused's individual normative guilt. Consider, for example, the case of a teenager charged with assault with a weapon after he fired a pellet gun and hit someone's boot, but caused no injury.<sup>43</sup> Or consider the case of an inebriated concertgoer who put his arms around an usher and danced with her briefly as she tried to direct him back to his seat, and who was subsequently charged with assault.<sup>44</sup> A conviction in either of these cases would arguably be unjust, even if it were factually accurate, given the gap between the accused's true normative guilt and the level of blameworthiness suggested by the charges in question.

On the flip side, there are cases in which the accused is factually guilty of a particular offence, and where that offence is intrinsically just, but where the conviction understates the accused's normative guilt. Imagine, for example, a case in which an accused is factually guilty of sexual assault, but the Crown accepts a guilty plea to the lesser included offence of assault.<sup>45</sup> The conviction in this case would be accurate since the offender did, in fact, commit the crime of assault. Moreover, the crime of assault is intrinsically just. Yet, the result would be unjust insofar as it would fail to reflect the nature and severity of the offender's true actions.<sup>46</sup> Here, as in the two cases discussed above, there is a disaccord between the accused's actual blameworthiness and that implied by the charge. This sort of disaccord creates misleading criminal records, inculcates cynicism towards the justice system, and triggers disproportionate sentences.<sup>47</sup>

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<sup>42</sup> Josh Bowers, "Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute" (2010) 110:7 Colum L Rev 1655 at 1658.

<sup>43</sup> See *R v Clarke*, 2013 CanLII 8728 (NL PC), [2013] NJ No 78 (QL). In the actual case on which the scenario is based, the defendant was charged with two counts of assault with a weapon: one for the shot that struck the boot, and one for a shot that struck another teenager's leg, wounding him. The defendant was acquitted of both counts on the basis that there was reasonable doubt about whether he had the requisite intent.

<sup>44</sup> See *R v Murphy*, 2010 NBPC 40 at para 11, 367 NBR (2d) 133.

<sup>45</sup> See *Criminal Code*, RSC 1985, c C-46, ss 265(1), 271.

<sup>46</sup> See Natasha Novac, "Waiver: A Feminist Analysis of Charge Bargaining in Sexual Assault Prosecution" (2018) 76 UT Fac L Rev [forthcoming April 2018].

<sup>47</sup> See John H Langbein, "Torture and Plea Bargaining" (1978) 46:3 U Chicago L Rev 3 at 16–17.



So far, I have identified three aspects of a just conviction or acquittal: bare accuracy; the intrinsic justness of the offence; and its fit with the accused's normative guilt or innocence. I have also proposed that a just outcome in a criminal case encompasses both a just conviction or acquittal and, where applicable, a just sentence. The just sentence requirement is, perhaps, the most elusive because reasonable people hold starkly different views about the goals and commitments that should guide sentencing decisions, and even those who subscribe to the same penological theory may take very different positions on the appropriate sentence in a given case. I will return to this problem below in Part II(A).

First, I want to acknowledge a further challenge. In practice, even if Crowns could agree on the just outcome in a given case, that outcome would not necessarily be achievable using just processes. In other words, there could well be a tension between a Crown's objective of achieving a just outcome and her obligation to promote procedural justice. Consider, for example, a case wherein the Crown drops the charges against a factually guilty accused person because key evidence is likely inadmissible due to police misconduct. In such a case, the Crown sacrifices a just outcome, as defined above, in service of a competing procedural justice consideration. Viewed holistically, the Crown's seek justice mandate requires her to strike a principled, yet pragmatic, balance between substantive and procedural justice considerations.

How can Crowns strike such a balance? In broad and abstract terms, the appropriate course of action is perhaps quite obvious. Indeed, it is likely already being practised by many Crowns. Very broadly, a Crown should approach an individual case by first identifying the just outcome she will ideally seek, taking into account bare accuracy, the intrinsic justness of the relevant criminal offence(s), the accused's normative guilt or innocence, and the appropriate sentence. The Crown should then assess whether this ideal outcome is, in fact, attainable using just processes. This assessment is informed by a variety of procedural, evidentiary, and strategic factors, such as the admissibility of evidence, resource availability, and so forth. Throughout the duration of her work on the file, the Crown must remain responsive to case developments that might alter her assessment of the just outcome and just processes; her analysis must be iterative and ongoing, and not merely a prelude to negotiation or litigation. Additionally, any pragmatic considerations about the attainability of just outcomes must always be assessed in light of the Crown's overarching duty to seek justice. Some pragmatic considerations are compatible with that duty and can be properly factored into the analysis. For example, in some circumstances, a strategic decision to accept a lenient sentence in order to secure crucial testimony against a more culpable co-defendant could arguably promote justice in the aggregate, and therefore could properly be entertained. Some other considerations, such as a desire to

minimize one's workload, are incompatible with the Crown's ethical duty and must be discounted.<sup>48</sup>

The foregoing approach to the proper exercise of prosecutorial discretion is likely uncontroversial, but only because it remains highly abstract. Presumably, many would agree that Crowns should exercise their discretion by first identifying the substantively just outcomes they hope to seek, and then considering how to advance those outcomes in a procedurally just manner. The difficulty comes, of course, with translating this general structure into concrete terms. To make a start at this translation, I have suggested that we should understand a substantively just outcome in a criminal case to include the bare accuracy of the conviction or the acquittal, the intrinsic justness of the offences charged, the accordance between those offences and the accused's normative guilt, and the justness of the sentence. Admittedly, however, this analysis raises as many questions as it answers. For example, the accuracy requirement raises questions about how best to promote the criminal justice system's truth-seeking function in the plea bargaining context. The requirement that criminal law be intrinsically just raises perennial philosophical questions about which kinds of acts and omissions ought to be criminalized. The requirement of a fitting charge raises questions about how to evaluate a person's normative guilt. As I have already noted, the just sentencing requirement triggers longstanding philosophical and sociological debates about penal theory. There are also questions about what procedural justice entails, and about which plea bargaining strategies are compatible with its requirements. Finally, there is the pressing question of how to convert the various components of *justice* listed above into a workable strategy that Crown prosecutors can follow when making material decisions in individual cases.

For purposes of this article, I will set aside the question of what makes criminal laws intrinsically just.<sup>49</sup> In most cases, the inherent justness of the applicable laws is uncontroversial. Rather, the pressing question is whether a particular individual should be prosecuted under those laws. There are exceptions, of course. Sometimes Crowns must decide whether to enforce controversial or constitutionally suspect laws.<sup>50</sup> While those de-

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<sup>48</sup> See Stephen J Schulhofer, "Plea Bargaining as Disaster" (1992) 101:8 Yale LJ 1979 at 1987–88.

<sup>49</sup> For a classic debate on this issue, see e.g. HLA Hart, *Law, Liberty, and Morality* (Stanford: Stanford University Press, 1963); Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965).

<sup>50</sup> See e.g. John Ivison, "Provinces Could Kill New Prostitution Law by Refusing to Enforce it", *National Post* (8 December 2014), online: <[nationalpost.com/opinion/john-ivison-provinces-could-kill-new-prostitution-law-by-refusing-to-enforce-it](http://nationalpost.com/opinion/john-ivison-provinces-could-kill-new-prostitution-law-by-refusing-to-enforce-it)>, archived at <https://perma.cc/4VM3-9KUU> (discussing the question of whether Canadian provincial

cisions are crucial, however, they are hardly the meat and potatoes of prosecutorial discretion. The everyday challenges for Crown prosecutors—the ones on which I focus in this article—are deciding which charges, if any, to pursue from among a number of intrinsically just, but potentially inapposite offences, and identifying fit sentences and just procedures.

The remaining questions can be clustered around the concepts of substantive and procedural justice. Questions about how Crowns ought to evaluate a person's normative guilt and match it with a suitable charge, and questions about how Crown's should identify just criminal sentences, go to substantive justice and boil down to the same essential problem: what makes for a just criminal case outcome? Both sets of questions go to substantive justice and boil down to the same essential problem: what makes for a just criminal case outcome? Questions about the justness of particular plea bargaining strategies of course go to procedural justice. Procedural justice also relates to the bare accuracy requirement: if, as our adversarial system presumes, procedural safeguards support truth seeking, then identifying just plea bargaining procedures will allow Crowns to promote accurate outcomes and just processes alike.<sup>51</sup> In this sense, substantive and procedural justice should be regarded as very much interconnected—though in what follows, I distinguish them for the sake of analytic simplicity. I do not pretend to offer a complete analysis of either concept. Rather, I use the scaffolding they provide to build out my analysis and to develop a series of concrete recommendations for Crowns engaged in plea bargaining.

I begin by addressing the question of how Crowns can identify substantively just outcomes in individual cases. To this end, I canvass the various analytic aids that are available to Crowns, such as the established principles of sentencing. I then home in on two specific and controversial issues. First, should Crowns accept less accurate charges in order to achieve their preferred sentencing outcomes? Put differently, how should Crowns manage trade-offs between charging accuracy and sentencing proportionality? Second, should Crowns ever engage in overcharging to facilitate charge bargaining?

After I address these two questions, I turn to procedural justice. I argue that Crowns should adopt a number of plea bargaining practices in-

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authorities might decline to prosecute individuals under recently enacted, constitutionally suspect criminal laws regulating prostitution).

<sup>51</sup> For a helpful discussion of the theory of adversarial legalism, including the role of procedural justice in promoting substantive justice, see Robert A Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, Mass: Harvard University Press, 2001) at 9–14; David M Paciocco, “Understanding the Accusatorial System” (2010) 14:3 Can Crim L Rev 307.

cluding, most significantly, engaging in thorough, individuated negotiations rather than seeking to resolve cases on the basis of superficial, indiscriminate assessments of the “going rate” for a given offence. This suggestion is provocative because it discounts the importance of efficient case processing, which is an objective that has become increasingly central to the operations of our criminal justice system, and which is in fact the most common—and perhaps the most compelling—justification for the institution of plea bargaining itself.<sup>52</sup> I will argue below that efficiency concerns must be subjugated to other justice considerations—which, once again, for present purposes, I delineate in terms of *just outcomes* and *just procedures*. First, I will dig deeper into what ‘just outcomes’ and ‘just processes’ mean in the plea bargaining context.

### A. *Just Outcomes*

How should a Crown identify the just outcome she will pursue through plea bargaining? Specifically, how can she identify the charge that most accurately reflects an accused’s factual and normative guilt, together with the most appropriate accompanying sentence? These questions are closely related given the tight nexus between prosecutors’ charging decisions and sentence outcomes.

To some extent, of course, the Crown can simply apply the law. Statutes and precedents are important sources of knowledge about what counts as “just” in our society, and their consistent enforcement promotes transparency and accountability, while limiting disparities among cases. While legislation and precedent are helpful, neither is self-executing: both must invariably be applied to individual cases through the prism of subjective judgment. Moreover, given the overlapping and even redundant nature of many criminal offences, an examination of statutes and precedents will often yield a range of potential charges and justifiable sentences for any given scenario. Crowns therefore need further resources if they are to make sound, consistent decisions.<sup>53</sup>

Crown policies, including those set by provincial law societies, ministries, and individual Crown offices, are one such resource. Such policies have the potential to respond to local concerns and priorities while en-

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<sup>52</sup> See Lafontaine & Rondinelli, *supra* note 4 (observing that “[t]he criminal justice system’s financial viability hinges upon a rate of resolution of charges that could only possibly be accomplished by the active encouragement of plea bargaining to obtain increased rates of guilty plea resolutions” at 108).

<sup>53</sup> To offer but one example among many, a person who steals something in a violent incident could be prosecuted under the *Criminal Code* (*supra* note 45) for theft (s 322(1)), assault (s 265(1)), or robbery (s 343); and, if the thing taken in a motor vehicle, for motor vehicle theft (s 331.1), or for taking a motor vehicle without consent (s 335).

couraging principled discretionary decision-making. To the extent that governing policies and protocols are the product of consultation and collegial discussion, they are more likely to reflect a broad consensus about the demands of justice, particularly if those engaged in policy making have diverse backgrounds and perspectives.<sup>54</sup> As noted above, however, Crown policies, while helpful, are not a decisive source of guidance: they require interpretation and elaboration.

Another key resource for Crowns is the purpose and principles that govern sentencing. Sentencing goals such as deterrence and rehabilitation, together with sentencing principles like parity, parsimony, and proportionality, are set out in the *Criminal Code* and elaborated in case law.<sup>55</sup> The purpose and principles of sentencing are important sources of information about what our society considers to be the essential features of a just criminal sentence. Crowns can rely on the purpose and principles of sentencing when exercising their discretion by undertaking the same basic analysis as would a sentencing judge. Judges approach sentencing by: canvassing the legislation and case law to establish the applicable sentencing range for a given offence; considering the particulars of the case, including details about the offender's conduct, its consequences, and the circumstances of both the offence and the offender; weighing aggravating and mitigating factors, including those identified in the *Criminal Code* and in case law; and, where applicable, taking the *Gladue* factors<sup>56</sup> into account.<sup>57</sup> By following this same protocol, Crowns can identify the sentencing range that a neutral arbiter would deem appropriate. Crowns are already well versed in this type of analysis because they engage in it when developing sentencing submissions in an adversarial context. In this setting, however, they do so in their capacity as committed advocates with an eye to underscoring the salient aggravating factors while leaving the defence to highlight mitigating factors.<sup>58</sup> In the plea bargaining context, where Crowns have a decisive influence on case outcomes, they must take a more neutral and balanced approach.

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<sup>54</sup> See Kate Stith, "Daniel Freed" (2009) 21:4 Federal Sentencing Reporter 244. For an instructive analysis of how diversity can increase perceptions of legitimacy within the judiciary—an analysis that is, I think, largely applicable to prosecutors' offices—see Kevin R Johnson & Luis Fuentes-Rohwer, "A Principled Approach to the Quest for Racial Diversity on the Judiciary" (2004) 10:5 Mich J Race & L 5.

<sup>55</sup> *Criminal Code*, *supra* note 45, ss 718–718.2.

<sup>56</sup> See *R v Gladue*, [1999] 1 SCR 688 at para 66ff, 171 DLR (4th) 385; *R v Ipeelee*, 2012 SCC 3, [2012] 1 SCR 433.

<sup>57</sup> See *R v Arcand*, 2010 ABCA 264 CCC (3d) 134 [Arcand].

<sup>58</sup> See Julian V Roberts, "Victim Impact Statements and the Sentencing Process: Recent Developments and Research Findings" (2003) 47:3 Crim LQ 365 at 377.

There is, of course, a crucial difference between Crowns and judges with respect to sentencing. While judges' sentencing decisions are guided and constrained by the criminal charges at issue, Crowns have the power to determine the charges in the first place. Crowns' initial charging decisions, and their subsequent willingness to engage in charge bargaining, largely determine the charges for which offenders may be convicted, and for which they may be sentenced. Thus, in addition to determining whether case outcomes achieve the goals of bare accuracy and of an appropriate fit with the accused's normative guilt, Crowns' charging decisions have a decisive impact on criminal sentences.<sup>59</sup>

In recent decades, Canada's criminal justice system has shifted towards stricter, more determinate sentencing.<sup>60</sup> Mandatory minimums, in particular, operate to make Crowns' charging decision a key determinant of sentencing outcomes: when Crown prosecutors choose which charges to pursue, they thereby fix the range of penalties that an accused person may face if convicted.<sup>61</sup> Other statutory and common law sentencing rang-

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<sup>59</sup> Recall the example from *supra* note 53, in which the same incident could result in a prosecution for theft, assault, or robbery, depending on the Crown attorney's charging decision. A conviction for theft carries a sentence of up to two years or ten years in the *Criminal Code* (*supra* note 45), depending on the value of the stolen property (s 334); a conviction for assault carries a sentence of up to five years (s 266); and a conviction for robbery carries the possibility of life imprisonment (s 344).

<sup>60</sup> See e.g. Debra Parkes, "From *Smith* to *Smickle*: The Charter's Minimal Impact on Mandatory Minimum Sentences" (2012) 57 SCLR (2d) 149 at 149–50; Benjamin L Berger, "A More Lasting Comfort? The Politics of Minimum Sentences, the Rule of Law and *R v Ferguson*" (2009) 47 SCLR (2d) 101 at 105–06; Anthony N Doob & Carla Cesaroni, "The Political Attractiveness of Mandatory Minimum Sentences" (2001) 39:2&3 Osgoode Hall LJ 287 at 289–91.

<sup>61</sup> For a definition of mandatory minimums, see Elizabeth Sheehy, "Mandatory Minimum Sentences: Law and Policy" (2001) 39:2&3 Osgoode Hall LJ 261. Sheehy defines mandatory minimums as

sentences that are dictated by legislation as either an absolute mandatory sentence, for example life imprisonment for an individual convicted of murder in Canada, or as a minimum sentence below which a judge cannot descend in considering sentencing options for a given offence. When framed as a minimum sentence, the judge's only discretion is to sentence above the minimum threshold up to the legislated maximum (*ibid* at 261).

As of this writing, the current federal government has indicated its intention to reduce the number of mandatory minimum sentences in the *Criminal Code*, but it has not yet done so. See Alison Crawford, "Liberals Looking to Eliminate Many Mandatory Minimum Sentences, Justice Minister Says", *CBC News* (11 February 2017), archived at <https://perma.cc/2ZJE-87LM>; Ian Burns, "Toronto Legal Clinic Launches Challenge to Mandatory Minimum Sentence", *The Lawyer's Daily* (21 September 2017), online: <[www.thelawyersdaily.ca/articles/4691/toronto-legal-clinic-launches-challenge-to-mandatory-minimum-sentence](http://www.thelawyersdaily.ca/articles/4691/toronto-legal-clinic-launches-challenge-to-mandatory-minimum-sentence)>, archived at <https://perma.cc/F2RD-3ZFD>.

es have a similar, albeit less decisive, effect.<sup>62</sup> The purpose of these sentencing structures is, of course, to promote consistency and reduce arbitrariness by constraining judicial sentencing discretion. The sentencing structures have this desired effect, but they also have the effect of increasing the power of prosecutors to shape case outcomes. Crucially, this dynamic is what makes charge bargaining effective: defendants are motivated to plead guilty to lesser offences because those offences are highly likely, or even guaranteed, to result in more lenient sentences than the sentences that would be entailed by the original charges. As noted above, this bargaining strategy places tremendous pressure on defendants.<sup>63</sup>

While the nexus between charges and sentences gives Crowns more power, it also creates a conundrum. In some cases, the charges that most accurately describe the accused's factual and normative guilt may entail a disproportionate sentence. In other words, it may not be possible to achieve an outcome that satisfies the requirements of bare accuracy, appropriate fit between the charge and the accused's normative guilt, *and* a just sentence.<sup>64</sup> It falls to the Crown to decide how to prioritize among these requirements. What should Crowns do in these circumstances?

Before I tackle this question, I first want to acknowledge a possible objection to its underlying premise. Some might argue that, in fact, determinate sentencing does not generate a tension between charging accuracy and sentencing fairness because legislators are good arbiters of appropri-

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<sup>62</sup> See Robert L Misner, "Recasting Prosecutorial Discretion" (1996) 86:3 J Crim L & Criminology 717 at 742; *Arcand*, *supra* note 57 at paras 120–25.

<sup>63</sup> See *R v Smith (Edward Dewey)*, [1987] 1 SCR 1045 at 1081, 40 DLR (4th) 435 [Smith]. See also Misner, *supra* note 62 at 742; Ely Aharonson, "Determinate Sentencing and American Exceptionalism: The Underpinnings and Effects of Cross-National Differences in Regulation of Sentencing Discretion" (2013) 76:1 Law & Contemp Probs 161 at 168–69.

<sup>64</sup> Imagine an individual is pulled over for driving erratically and is subsequently charged with operating a motor vehicle while impaired contrary to Criminal Code, *supra* note 45 at s 253(1). It emerges that she had been taking a prescription medication for several weeks and was under strict orders not to mix it with alcohol. She had been obeying those orders but had decided to make an exception and drink a flute of champagne at her daughter's engagement party, unreasonably assuming that the champagne would be more potent than usual when combined with the medication but would not cause her to become impaired. Imagine, further, that the individual in question is a self-employed landscaper who cannot operate her business without driving her pickup truck. If the Crown were to proceed with the original charge of impaired driving and she were convicted, she would face a mandatory one-year driving ban per s 259(1), which would effectively destroy her livelihood. The Crown could instead pursue a conviction for dangerous operation of a motor vehicle (s 249), thereby circumventing the mandatory driving ban and achieving what is arguably a more appropriate sentence in light of the accused's normative guilt; but this alternative charge would be less accurate than the original.

ate sentencing outcomes, and hence the sentences required by determinate sentences should be regarded as fair. Arguably, inasmuch as legislated sentencing ranges represent a democratic consensus, they are as good a measure of justice and proportionality as any. If this is the case, then the offence that best captures the accused's factual guilt will also reflect her normative guilt, and will entail a just sentence.

I am not convinced by this objection. Stuntz has persuasively argued that criminal codes tend to reflect various pathologies in institutional design that lead to irrational and unjustly harsh sentences.<sup>65</sup> Legislators may try to appeal to voters by enacting simplistic, snappy rules like mandatory minimum sentencing regimes, and by creating redundant laws in order to take popular symbolic stands.<sup>66</sup> Joshua Dressler captures this point starkly: “[t]ypically, lawmakers apply *no* theory of punishment at all in setting penalties. They apply the ‘What do I need to get re-elected?’ principle. And it is always easier to appear to be tough on crime than to develop sensible penalties.”<sup>67</sup> Although Stuntz and Dressler both write in the American context, their analyses resonate in Canada, where the dynamics are broadly similar, albeit less dramatic.<sup>68</sup> From all this, it follows that legislative guidance about appropriate sentencing outcomes may be helpful, but it should hardly be treated as sacrosanct.

In light of the foregoing, how should a Crown make her charging decisions? She should begin by looking for charges that promote bare accuracy and which are properly supported by the evidence. Sometimes, the *Criminal Code* and related statutes will include a number of plausible charges.<sup>69</sup> In these situations, the prescribed sentencing ranges for the available charges can serve as helpful indicators for the Crown: the Crown can select whichever charges carry the sentencing range that seems the fairest and most proportionate, given her assessment of the accused's normative guilt. In other cases, the range of plausible charges will be very small indeed, and a single charge or set of charges may quickly emerge as the most fitting. In these circumstances, the Crown should, as a general rule, pursue the charge (or charges) that clearly does the best job of describing the defendant's wrongful conduct. This expectation accords with rule of law values like transparency and consistency.

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<sup>65</sup> See generally Stuntz, “Pathological Politics”, *supra* note 23.

<sup>66</sup> *Ibid* at 509–10.

<sup>67</sup> Joshua Dressler, “The Wisdom and Morality of Present-Day Criminal Sentencing” (2005) 38:4 Akron L Rev 853 at 855 [emphasis in original].

<sup>68</sup> See Doob & Cesaroni, *supra* note 60 at 297, 300.

<sup>69</sup> See examples set out *supra* note 53.



But, what if the Crown believes the charge that fits best with the evidence carries a disproportionate penalty? Even where it is clear which charge best captures the accused's factual and normative guilt vis-à-vis a particular wrongful act or omission, there will almost invariably be some alternative charge available that is plausibly supported by the evidence. In practice, the evidence can be finessed to support an alternative charge that fits the conduct somewhat awkwardly. Fact bargaining—an oft-criticized species of plea bargaining—occurs when the parties to a criminal case try to finagle or justify a particular outcome by cherry picking, framing, or even misstating the evidence.<sup>70</sup> Whether through creative framing or outright misstatement, Crowns have the power to bring charges that do not fit the evidence as well as other possible charges, but that entail more proportionate sentencing ranges.<sup>71</sup> The crucial question is therefore whether they should exercise this power. Though I have some reservations, my answer to this question is yes. As I will explain below, I am of the view that a Crown's ethical mandate demands she privilege just sentences over accurate charges.

To be clear, in taking this position, I am not endorsing the most aggressive fact bargaining strategies whereby attorneys misstate evidence or otherwise expressly lie to the court. These strategies — in contrast with the more common practices of framing evidence carefully, or of refraining from presenting potentially salient facts in order to support a charge bargain or a sentence bargain — are plainly unethical.<sup>72</sup> Nor do I discount the fundamental importance of accurate charges, which I have identified as an important component of substantive justice. Accurate charges serve the law's communicative function—that is, its ability to denounce antisocial behaviour, to avow our collective morality, to affirm victims' experiences, and to create a meaningful dialogue with the offender about her actions. The criminal law's communicative function has been explained and defended by a number of scholars, most notably Antony Duff. Duff argues that the criminal law ought to be viewed as a “communicative enterprise” that seeks to elicit defendants' understanding, acceptance, and eventually, their repentance.<sup>73</sup> To this end, the criminal jus-

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<sup>70</sup> See Nancy J King, “Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment” (2005) 58:1 *Stan L Rev* 293 at 295; William J Stuntz, “Plea Bargaining and Criminal Law's Disappearing Shadow” (2004) 117:8 *Harv L Rev* 2548 at 2556–57. But see Felicia Sarner, “Fact Bargaining Under the Sentencing Guidelines: The Role of the Probation Department” (1996) 8:6 *Federal Sentencing Reporter* 328 at 328 (suggesting that fact bargaining promotes fair plea bargains).

<sup>71</sup> See examples set out *supra* note 64.

<sup>72</sup> See *Anthony-Cook*, *supra* note 5 at para 44.

<sup>73</sup> RA Duff, *Trials and Punishments* (Cambridge, UK: Cambridge University Press, 1986) at 232–38.

tice process must appeal to defendants as rational individuals by offering them genuine and compelling analyses of why their behaviour was wrong. The endeavour cannot succeed if Crown prosecutors skirt the facts and mischaracterize defendants' behaviour in order to manipulate criminal sentences.

While I am sympathetic to this argument, I think it is important to underscore that the criminal law's communicative function depends in part on proportionate punishments. Criminal sentences send important signals about the relative severity of different offences, and about the blameworthiness of individual offenders. Indeed, Duff himself remarks that a criminal sentence must be "proportionate in its severity to the seriousness of [the] offence: only then can it communicate to [the offender] an adequate understanding of the moral character of his offence, and serve as an appropriate penance for that offence."<sup>74</sup> To the extent that the law mandates disproportionate punishment, Crowns are therefore faced with an unpalatable choice: undermine the law's communicative function by pursuing an inaccurate charge, or undermine its communicative function by pursuing a disproportionate penalty.

Our best course of action is to eliminate this problem altogether by improving our institutional dynamics and reforming our criminal laws in order to promote coherent and proportionate penalty ranges. As Judge John Gleeson has remarked, criticizing fact bargaining:

lying to a court, or deceiving it by withholding relevant facts, is wrong, period, and there is never a valid justification for it. But beyond that obvious point is an equally important one: If a set of legal rules causes otherwise law-abiding attorneys to engage in systemic deception in order to achieve what they believe is a just result, attention ought to be paid to the rules themselves, and to whether they should be modified.<sup>75</sup>

Until the requisite modifications occur, however, Crowns are stuck with the choice between distorted charges and disproportionate penalties.

What about the argument that, by charging individuals with crimes that do not capture their factual and normative guilt, Crowns might actually disincentivize necessary reform? Writing in a different context, Jeffrey Reiman has argued that police officers should not decline to enforce the law, even bad law, in part because, "it is the people's law, and they will never make better laws if they can leave it to the police to clean up

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<sup>74</sup> *Ibid* at 278.

<sup>75</sup> John Gleeson, "Sentence Bargaining Under the Guidelines" (1996) 8:6 Federal Sentencing Reporter 314 at 314.

their poor lawmaking.”<sup>76</sup> When Crowns avoid straightforward application of the law in order to achieve what they take to be better results, they hinder the ability of both legislators and the general public to assess how well the law is working, thereby impeding reform.

I am not convinced by this argument. For one thing, experience suggests that the widespread imposition of disproportionately harsh penalties will not register as a problem for legislators or voters until it reaches truly epic proportions.<sup>77</sup> In the meantime, I am not as sanguine as Reiman about the fates of the individual defendants who would actually have to serve disproportionate sentences in order to show us the fallacy of our laws. My most fundamental objection, however, is my strong commitment to the principle that, for both ethical and institutional reasons, prosecutors should never pursue case outcomes that they understand to be disproportionately harsh.

In my view, the pursuit of excessively harsh sentences is uniquely incompatible with the Crown’s ministerial role. To understand why this is so, we must consider the origins of that role. All prosecutions are conducted on behalf of the sovereign—hence “Crown attorney”. The sovereign enjoys the prerogative power of mercy or grace; that is, the power to exempt individuals from lawful criminal punishment. Crown prosecutors enjoy a parallel power of declination, whereby they may, at their discretion, decline to prosecute an individual to the full extent of the law. Berger elucidates the connection between these two powers:

In Canada, prosecutions are brought in the name of the Queen. In this, prosecutorial discretion is made of the same stuff as the royal prerogative of mercy. The sovereign may choose to pardon; the sovereign may choose not to prosecute. ... so, too, the sovereign ... represented by the prosecutor, may exercise discretion in the enforcement of the law.<sup>78</sup>

Crucially, whereas Crown attorneys and the sovereign whom they represent are both empowered to grant lenient outcomes, neither may extract unduly harsh ones. Disproportionately harsh punishments are, by definition, unjust and unjustifiable in our system.<sup>79</sup> As a matter of prac-

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<sup>76</sup> Jeffrey Reiman, “Against Police Discretion: Reply to John Kleinig” (1998) 29:1 J Social Philosophy 132 at 136.

<sup>77</sup> See Julian V Roberts, “Public Opinion, Crime, and Criminal Justice” (1992) 16 Crime & Justice 99 at 112–13.

<sup>78</sup> Berger, “Abiding Presence of Conscience”, *supra* note 26 at 612.

<sup>79</sup> See *Smith*, *supra* note 56 at 1081; *Canadian Charter of Rights and Freedoms*, s 12, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (guaranteeing “the right not to be subjected to any cruel and unusual treatment or punishment”) [*Charter*].

tice, Crowns can certainly choose to exercise their discretion in a manner that results in disproportionately harsh penalties, but they cannot justify that choice in terms of prevailing political or legal theory, nor can they reconcile it with their core ethical duty to seek justice. By contrast, Crowns' power to accept disproportionately lenient case outcomes is perfectly consistent with their historical and constitutional role. This asymmetry accords with our system's overarching preference for undue leniency over undue harshness, a preference that is expressed by the sentencing principle of parsimony<sup>80</sup> and by Blackstone's famous maxim that it is "better that ten guilty persons escape, than that one innocent suffer."<sup>81</sup> It follows that Crowns are permitted to pursue charges that understate or minimize a defendant's true factual and normative guilt. Even if this course of action is not desirable, it is legitimate. In contrast, the pursuit of excessively harsh penalties is not legitimate.

For present purposes, the Crown's prerogative to accept overly lenient outcomes, but not overly harsh ones, has three key implications. First, it suggests that, when faced with a choice between an inapposite charge and an excessively harsh penalty, Crowns should favour the former. Second, it suggests that, to the extent Crowns are uncertain about what would constitute a substantively just outcome in a given case, they should err on the side of leniency. Quite simply, a disproportionately lenient sentence does not maximize substantive justice, but neither is it wholly incompatible with the Crown's ethical mandate. On the other hand, a disproportionately harsh sentence is both unjust and illegitimate.

Third, the prerogative to accept overly lenient outcomes, but not overly harsh ones, suggests that Crowns ought not to overcharge defendants in order to establish strong bargaining positions. As Arthur Rosett observes, the practice of overcharging invariably leads to disproportionately harsh sentences for those defendants who resist the pressure to plead and then lose at trial:

An ironic result of the over-reliance on [plea bargaining] is that, however compassionate its intent, the need to gain [the defendant's] acquiescence leads officials to

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<sup>80</sup> *Criminal Code*, *supra* note 45, ss 718.2(c)–(e). See also Julian V Roberts & Andrew Von Hirsh, "Legislating the Purpose and Principles of Sentencing" in Julian V Roberts & David P Cole, eds, *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) 48 (noting that the principle of restraint or parsimony "has been endorsed by several important commissions of inquiry" in Canada, at 57).

<sup>81</sup> William Blackstone, *Commentaries on the Laws of England*, vol 4 (Oxford: Clarendon Press, 1769) at 352. See also Alexander Volokh, "n Guilty Men" (1997) 146:1 U Pa L Rev 173 at 174–77.

place a heavy price in the form of enhanced severity on those who invoke the formal process but do not succeed in avoiding punishment.<sup>82</sup>

This “enhanced severity” is, once again, entirely incompatible with the Crown’s ethical duty and must be avoided. It follows that Crowns should work to identify and pursue the charges that they believe are more just in light of all the foregoing considerations, without regard for whether those charges will give them plea bargaining leverage down the line.<sup>83</sup>

In sum, Crowns should make their initial charging decisions with the aim of accurately reflecting defendants’ factual and normative guilt while enabling just, proportionate sentences. Where these goals are in tension, Crowns should favour sentencing proportionality over accuracy. To the extent that Crowns are uncertain about what would constitute a just charge or a proportionate sentence after considering the various reference points outlined above (i.e. statutes, precedents, sentencing principles, etc.), they should err on the side of leniency. Finally, they should not overcharge defendants to establish a bargaining position.

I recognize that, by urging Crowns to deviate from legislative guidance in order to promote their preferred sentencing outcomes, I am courting the risk of arbitrariness and abuse. To the extent that Crowns feel at liberty to circumvent legislation, they increase their *de facto* discretionary power, thereby increasing the risk of discrimination and arbitrariness while further entrenching the very dynamics that enable coercive plea bargaining in the first place. Again, I fully agree with Judge Gleeson that our ultimate aim should be to minimize the tension between accuracy and sentencing fairness by embracing rational and humane sentencing policies.<sup>84</sup> Doing so would promote substantive justice and would redistribute discretionary power more evenly between prosecutors and sentencing judges. In the interim, however, our current sentencing regime and

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<sup>82</sup> Arthur Rosett, “Discretion, Severity and Legality in Criminal Justice” (1972) 46:1 S Cal L Rev 12 at 26.

<sup>83</sup> It is worth noting that, while bringing numerous charges is one means of overcharging to establish bargaining leverage, in some circumstances it will of course be perfectly appropriate for the Crown to charge the accused with multiple offences. Where the accused has committed a series of wrongful acts or omissions that are not properly captured by any single offence, multiple charges can promote both accuracy and fairness. The Crown should not, however, charge the accused with redundant offences, nor should the Crown charge the accused with multiple offences for tactical reasons, in order to establish more leverage for purposes of plea negotiations.

<sup>84</sup> See Gleeson, *supra* note 75. Gleeson suggests that prosecutors and defence attorneys should be allowed, and even encouraged, to negotiate specific guideline ranges in sentencing, noting that, “[p]rosecutors and defense attorneys who otherwise might be inclined to ‘manipulate’ facts to protect plea bargains ought to use these agreements, which will produce fairer and more honest plea bargaining practices than are currently in place” (*ibid* at 317).

“pathological politics” necessitate disappointing trade-offs and difficult choices. The tenets of prosecutorial ethics suggest that, when faced with these tough choices, Crowns should be less tough.

### *B. Just Processes*

One final aspect of justice remains to be considered: procedural justice. Procedural justice is tremendously important. The criminal justice system operates on behalf of the community and denotes our shared values. It should therefore represent our collective best selves by modelling even handedness, conscientiousness, and restraint. A system that demonstrates fair mindedness reinforces positive narratives about how we, as a society, should treat one another.<sup>85</sup> A system that is rash, bullying, or capricious, reflects poorly on us all. It also weakens social stability by engendering distrust and antipathy towards the state, thereby dampening people’s willingness to participate in criminal justice processes as witnesses or jurors, while discouraging compliance with the law.<sup>86</sup> According to Tom Tyler, “[s]tudies of decision acceptance suggest that it is usually procedural justice that is especially important in shaping people’s willingness to defer to the decisions made by legal authorities.”<sup>87</sup> In the remainder of this section, I refer to Tyler’s scholarship to identify the factors that increase procedural justice, and I consider how Crown prosecutors can best promote those factors during plea bargaining.<sup>88</sup>

Tyler identifies four key principles that influence whether people tend to regard decision-making processes as legitimate. The first is “voice” or “participation”, which can be understood as the participant’s ability to tell her story. The second is “neutrality”, or the perception that the decision maker is unbiased and neutral—a perception that, as Tyler notes, is enhanced by transparent decision-making. The third is “respect”, or the impression that the decision maker is courteous, polite, and concerned with upholding the participant’s rights. The fourth is “trust”, or the belief that

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<sup>85</sup> See Kyle McLean & Scott E Wolfe, “A Sense of Injustice Loosens the Moral Bind of Law: Specifying Links Between Procedural Justice, Neutralizations, and Offending” (2016) 43:1 Criminal Justice & Behavior 27 at 28–29.

<sup>86</sup> See Jeffrey Fagan, “Legitimacy and Criminal Justice” (2008) 6:1 Ohio State J Criminal L 123 at 124.

<sup>87</sup> Tom R Tyler, “Procedural Justice, Legitimacy, and the Effective Rule of Law” (2003) 30 Crime & Justice 283 at 292 [Tyler, “Procedural Justice”].

<sup>88</sup> See e.g. Tom R Tyler, *Why People Obey the Law* (Princeton: Princeton University Press, 2006); Tyler, “Procedural Justice”, *supra* note 87 at 350; Tom R Tyler & Hulda Thorisdottir, “A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund” (2003) 53:2 DePaul L Rev 355 at 380–82.

the decision maker is caring and sincere.<sup>89</sup> These four principles are inter-related: a person who is given the opportunity to tell her story is more likely to believe the decision maker is unbiased, while a person who is treated courteously is more likely to regard the decision maker as caring, and so forth. Taken together, these principles advance procedural justice. We can therefore make some progress on the question of how to engage in procedurally just plea bargaining by assessing how Crowns can best promote Tyler's principles when negotiating plea deals.

In response to this very question, Michael O'Hear has suggested that prosecutors engaged in plea bargaining should promote Tyler's principles by assessing whether the accused has had a meaningful opportunity to tell her story before making plea offers; by explaining the reasons for their decisions; by basing their decisions on objective criteria; by expressly addressing the accused's claims; and by acting courteously towards accused persons and acknowledging their rights.<sup>90</sup> I agree with O'Hear's suggestions. I also think that Tyler's principles point to an additional, more concrete practice that Crowns should adopt: they should eschew "going-rate" plea bargains—deals that are negotiated rapidly with minimal regard for the facts of individual cases—in favour of more informed and carefully tailored pleas. I will elaborate what I mean by going-rate plea bargains before explaining why they are incompatible with procedural justice.

Some plea deals are reached through protracted negotiations that delve into the specific facts and circumstances of the case. We might call these "negotiated" plea deals. Others are reached through cursory exchanges based on superficial accounts of the facts that are drawn largely from occurrence reports and from the accused's criminal record. These are referred to as going-rate plea bargains because they tend to reflect the so-called "going rate" for the charges at issue.<sup>91</sup> The going rate is the sentence that would typically follow a guilty plea for those charges. It is, in essence, a standard price point known to repeat players in the criminal justice system.<sup>92</sup> Going-rate plea bargains are used to dispose of charges "quickly, with little or no haggling, shortly before or during a routine, preliminary court appearance."<sup>93</sup> Negotiated plea deals and going-rate plea bargains are best understood as two ends of a spectrum; individual plea negotiations may fall at different points along the spectrum, depending on

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<sup>89</sup> See Tyler, "Procedural Justice", *supra* note 87 at 350–51.

<sup>90</sup> O'Hear, *supra* note 11 at 426–31.

<sup>91</sup> Uviller, *supra* note 18 at 1700–01.

<sup>92</sup> Malcolm M Feeley, "Pleading Guilty in Lower Courts" (1979) 13:2 Law & Soc'y Rev 461 at 462–63.

<sup>93</sup> O'Hear, *supra* note 11 at 415.

the time and resources invested by the parties. Plea bargains that fall towards the going rate end of the spectrum are a preferred means of dealing with low-level charges, which, from the perspective of many repeat players like Crowns, do not merit significant investments of time.<sup>94</sup>

Going-rate plea bargains undermine Tyler's principle of voice by preventing the accused from telling her story. They are inconsistent with the principle of neutrality since plea offers made without a meaningful review of the evidence smack of arbitrariness and suggest a prejudgment of guilt. They also undermine the principle of respect by treating the accused as nothing more than the contents of her charge sheet and criminal record, disregarding her personal circumstances and glossing over the details of her actions. Finally, going-rate plea bargains treat the accused's constitutional trial right as fodder for rapid and off-the-cuff trades, not as an important right that should only be waived after careful consideration. In so doing, they leave the accused with the impression that criminal justice decision makers are largely unconcerned with her constitutional rights, thereby undermining Tyler's principle of trust.

In addition, because going-rate plea bargains bypass procedural safeguards and are largely insensitive to the evidence, they cannot be trusted to generate accurate convictions or fair sentences.<sup>95</sup> As Judge Rothwax notes, "[i]n order for plea bargaining to be meaningful, there has to be a relationship between the seriousness of the charge, the strength of the charge, and the sentence that is imposed. If you don't properly evaluate those factors, there's no point to the exercise."<sup>96</sup> Going-rate plea bargains do little to evaluate the strength of the charge, and the relationship between an accused's normative guilt and the bargained-for sentence they produce is approximate at best. In this light, it seems the only "point to the exercise" is efficiency. While efficiency is doubtlessly important, it cannot be our singular goal or value—a point that I elaborate in the next section. Crowns' offices should therefore initiate a moratorium on going-rate plea bargains. Quite simply, these bargains are incompatible with procedural justice and hence with the Crown's ethical duty to seek justice. Given the aforementioned spectrum running from negotiated pleas to going-rate pleas, Crowns will, of course, need to use their judgment to decide when a plea bargain tips over the line into the prohibited zone—a determination that requires good faith and a context-sensitive analysis informed by Tyler's principles.

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<sup>94</sup> See Di Luca, *supra* note 4 at 21; Alexandra Natapoff, "Misdemeanors" (2012) 85:5 S Cal L Rev 1313 at 1317.

<sup>95</sup> See Di Luca, *supra* note 4 at 36–37.

<sup>96</sup> Judge Harold J Rothwax, *Guilty: The Collapse of Criminal Justice* (New York: Random House, 1996) at 164.



My suggestion that Crowns should avoid going-rate plea bargains may be met with a couple of objections. The first is that going-rate plea bargains operate in much the same manner as sentencing precedents, promoting consistency, transparency, and equality. On this argument, “going rates” are in effect precedents that have developed over time through past plea bargaining practices which operate to ensure that future plea bargains are relatively consistent and predictable.<sup>97</sup> The basic normative principle underlying this argument is unassailable: consistency and predictability are important values that must factor into sentencing decisions, including Crown decisions about which sentences to pursue through plea bargaining. The problem with the argument, however, is that going-rate plea bargains do not actually resemble sentencing precedents.

Sentencing precedents are intended to ensure that like offenders are treated alike.<sup>98</sup> In other words, they ensure that courts impose similar penalties on offenders who commit similar acts and who display similar degrees of moral blameworthiness, taking into account all the relevant aggravating and mitigating factors. If we value consistency in plea bargaining, as indeed we should, then we ought to favour similar plea deals for offenders who commit similar acts and who display similar degrees of moral blameworthiness. To effectively compare the actions and the moral blameworthiness of two offenders, however, we need to dig into the details of their respective cases. That level of engagement is precluded by going-rate plea bargaining, which is liable to result in plea bargains that are superficially consistent, but which overlook important facts about individual offences and offenders. By contrast, if the parties engage in a more involved and contemplative negotiation process, they can thereby arrive at a fulsome and shared understanding of the mitigating and aggravating factors of the case, which is a precondition to achieving fair and consistent negotiated case outcomes.

A second objection to my argument is that the process it contemplates is simply too resource intensive to be realistic, particularly given the contemporary Canadian criminal justice system’s emphasis on efficiency. This objection is a serious one that deserves careful consideration. I turn to it now.

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<sup>97</sup> See Josh Bowers, “Grassroots Plea Bargaining” (2007) 91:1 Marq L Rev 85 at 86; Milton Heumann, *Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys* (Chicago: University of Chicago Press, 1978) at 120–21.

<sup>98</sup> See *Criminal Code*, *supra* note 45, s 718.2(b); *R v Lacasse*, 2015 SCC 64 at paras 56–60, [2015] 3 SCR 1089; *R v Stone* [1999] 2 SCR 290 at 411, 173 DLR (4th) 66.

### III. Plea Bargaining and Efficiency

I have argued in favour of a more contemplative approach to plea bargaining. This approach is characterized by careful engagement with the evidence and with the defence perspective, both at the initial charging phase and throughout plea negotiations. It requires greater engagement with individual case files than is typical under current plea bargaining practices. This level of engagement is necessary to promote procedural justice. It is also necessary to promote substantively just outcomes—those that do the best possible job of reflecting the accused’s factual and normative guilt through accurate charges and well-calibrated, proportionate sentences.<sup>99</sup> At the same time, the level of engagement I am prescribing is more time-consuming and resource intensive than the status quo.

In an ideal world, the increased strain on prosecutorial resources would not pose a problem: we would be both willing and able to invest the resources needed to enforce our criminal laws without compromising procedural justice norms. We do not live in an ideal world, however. To quote Stephanos Bibas, we cannot expect to ascend to “an adversarial nirvana with limitless time, money, and experienced counsel and support staff.”<sup>100</sup> A rule against going-rate plea bargains would therefore require Crowns to allocate their limited resources more carefully, possibly resulting in the dismissal of meritorious cases that would otherwise have been handled via going-rate plea deals.

This concern is particularly significant in the contemporary Canadian context, where the Supreme Court’s 2016 *R. v. Jordan* decision has increased the need for efficient case management by creating stricter standards for the section 11(b) *Charter* right to be tried within a reasonable period of time.<sup>101</sup> The *Jordan* Court expressly and unequivocally stated that all participants in the criminal justice system share an obligation to reduce trial delay.<sup>102</sup> This message was reiterated more recently in *R. v. Cody*, wherein a unanimous Court stressed, “as the Court did in *Jordan*, that every actor in the justice system has a responsibility to ensure that criminal proceedings are carried out in a manner that is consistent with

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<sup>99</sup> As discussed in the previous section, accurate charges and proportionate sentences may be more or less compatible; but to achieve either, and to balance both, Crowns require a finely-textured understanding of the case before them.

<sup>100</sup> Stephanos Bibas, “Bulk Misdemeanor Justice” (2012) 85:5 S Cal L Rev Post-script 73 at 76.

<sup>101</sup> See *Jordan*, *supra* note 15 at para 105 (summarizing the new framework for reasonable delay under s 11(b) of the *Charter*); *Charter*, *supra* note 68, s 11(b) (guaranteeing the right “to be tried within a reasonable time”).

<sup>102</sup> See *Jordan*, *supra* note 15 at paras 135–41.

an accused person's right to a trial within a reasonable time.”<sup>103</sup> The *Jordan* Court offered specific suggestions as to how various actors could reduce trial delay. Addressing Crowns, the Court remarked, *inter alia*, upon the importance of “making reasonable and responsible decisions regarding who to prosecute and for what.”<sup>104</sup> It added: “[Reducing delay] may also require enhanced Crown discretion for resolving individual cases.”<sup>105</sup> In other words, Crowns may need to address their backlog and avoid delay by making even greater use of charge screening and plea bargaining. This message is consistent with the Court's recent statement in *Anthony-Cook* that resolution discussions, including plea bargains, are “essential” and “permit the system to function smoothly and efficiently.”<sup>106</sup>

The Court's suggestion that Crowns redouble their efforts to minimize delay, including through the use of efficient plea bargaining strategies, appears to be in tension with my recommendation that they eschew hyper-efficient going-rate plea bargains in favour of a more time-consuming, contemplative approach. Nevertheless, I maintain that Crowns in the post-*Jordan* era should make informed and thoughtful charging decisions, even at the cost of efficiency.

First and foremost, efficiency simply cannot be our only or even our primary goal. It is an instrumental goal; we want to do *something* efficiently. We must therefore ask, what *is* that something? What are the goals of our criminal justice system? Without wading too far into murky waters, we can posit, as I have done here, that our criminal justice system should aim to achieve just results through just processes. In some respects, efficiency serves these related aims. As the *Jordan* Court observed, quoting D. Geoffrey Cowper, Q.C., “[T]he widely perceived conflict between justice and efficiency goals is not based in reason or sound analysis. The real experience of the system is that both must be pursued in order for each to be realized: they are, in practice, interdependent.”<sup>107</sup> A criminal case that drags on for years, depriving the accused of her constitutional right to a trial within a reasonable time, is evidently incompatible with the demands of procedural justice. It is also unlikely to promote an accurate, substantively just outcome inasmuch as evidence deteriorates over time.

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<sup>103</sup> 2017 SCC 31 at para 1, [2017] 1 SCR 659.

<sup>104</sup> *Jordan*, *supra* note 15 at para 138.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Supra* note 5 at para 1.

<sup>107</sup> *Jordan*, *supra* note 15 at para 27, citing BC Justice Reform Initiative, *A Criminal Justice System for the 21<sup>st</sup> Century: Final Report to the Minister of Justice and Attorney General Honourable Shirley Bond*, by D Geoffrey Cowper (Victoria: BC Justice Reform Initiative, 2012) at 75.

While a reasonable degree of efficiency is necessary for justice, a singular focus on efficiency can work against the interests of justice. By using aggressive plea bargaining to cajole defendants into accepting plea deals, prosecutors may achieve just results swiftly in some cases, but at the intolerable cost of extracting excessively harsh penalties in other cases while sacrificing procedural justice across the board.<sup>108</sup> It follows that efficiency must be balanced with other justice concerns. Indeed, a careful reading of *Jordan* confirms that the Court would by no means endorse unjust practices in the name of efficiency. The Court wrote that, “[t]he ability to provide *fair* trials within a reasonable time is an indicator of the health and proper functioning of the system itself.”<sup>109</sup> Given the Court’s endorsement of plea bargaining as an essential feature of the criminal justice system, we might expand this edict to include the system’s ability to provide *fair* plea bargains. Unfair plea bargains, like unfair trials, do not become just—or justifiable—simply because they are efficient, and therefore they must be avoided.

What does this mean, concretely, for Crown prosecutors engaged in plea bargaining? It means that they should work to resolve cases efficiently, including through plea bargaining, while confining themselves to charging and negotiation practises that are consistent with substantive and procedural justice. I have already argued that certain efficiency-maximizing practices are unjust—in particular, overcharging to establish a strong bargaining position and going-rate plea bargaining.

The foregoing is a principled argument for avoiding going-rate plea bargaining, even as the demand for efficiency increases. There is a further argument to be addressed. Although an individuated, contemplative approach to charging and bargaining would be more time-consuming on a case-by-case basis, it is hardly incompatible with systemic efficiency. In fact, efficiency and other justice goals can be simultaneously advanced through sound charge screening and bargaining practices. I will discuss each in turn.

### A. *Better Screening*

Darryl Brown has observed that efficient case processing does not necessarily reduce pressure on the criminal justice system; it may simply result in the system taking on more cases.<sup>110</sup> He notes that, when the cost of prosecution drops and the capacity of prosecutors’ offices increases, legis-

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<sup>108</sup> See Rosett, *supra* note 80 at 6–17.

<sup>109</sup> *Jordan*, *supra* note 15 at para 3 [emphasis added].

<sup>110</sup> Darryl K Brown, “The Perverse Effects of Efficiency in Criminal Process” (2014) 100:1 Va L Rev 183 at 207–08.

lators may simply expand the scope of criminal law while police may round up more potential defendants.<sup>111</sup> Brown explains this phenomenon in market terms: lower costs tend to increase demand.<sup>112</sup> We can frame the same basic observation in terms of Max Weber's theory whereby bureaucracies, like police departments, have an interest in self-preservation that they realize by perpetuating the actual or perceived demand for their services.<sup>113</sup> The basic take-away on both accounts is that legislators and law enforcement officials will continue to introduce as many new criminal cases into the system as the system can handle. If this view is correct, then quicker case processing may result, not in reduced pressure on the system, but in more behaviours and incidents being characterized as crimes and therefore requiring attention from criminal justice actors. The latter result would not increase overall systemic efficiency, nor would it promote justice. On the contrary, our justice system is already much criticized for excessive criminalization.<sup>114</sup> That problem could be exacerbated by increased efficiency given the supply and demand dynamic that Brown describes.

One implication of Brown's analysis is that resource constraints within the criminal justice system can force more careful decision-making about which conduct to prosecute and punish. This notion is borne out by experience. In 1975, Alaska's Attorney General banned plea bargaining in that state. In so doing, he identified better charge screening as a key strategy for implementing the ban.<sup>115</sup> The success of Alaska's ban is disputed: research indicates that plea bargaining persisted while the ban was in place, albeit more informally.<sup>116</sup> There is, however, evidence to suggest that plea bargaining rates dropped under the ban, while trial

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<sup>111</sup> *Ibid* at 206.

<sup>112</sup> *Ibid* at 186.

<sup>113</sup> See Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed by Guenther Roth & Claus Wittich (New York: Bedminster Press, 1968) vol 2, ch 11. See also Ahmad Sadri, *Max Weber's Sociology of Intellectuals*, (New York: Oxford University Press, 1992) at 87.

<sup>114</sup> See e.g. Hughes, *supra* note 23 at 125.

<sup>115</sup> See Teresa White Carns & John A Kruse, "Alaska's Ban on Plea Bargaining Reevaluated" (1992) 75:6 *Judicature* 310 at 316, n 35 [White Carns & Kruse, "Alaska's Ban"].

<sup>116</sup> See *ibid* at 310, 314; Teresa White Carns & John Kruse, "A Re-evaluation of Alaska's Plea Bargaining Ban" (1991) 8:1 *Alaska L Rev* 27 at 33, 38–39. See generally Stephen J Schulhofer, "Is Plea Bargaining Inevitable?" (1984) 97:5 *Harv L Rev* 1037 at 1045–46 [Schulhofer, "Inevitable"] (concluding that studies on plea bargaining bans, including Alaska's, do not necessarily support the conclusion that such bans are workable).

rates increased somewhat.<sup>117</sup> In order to accomplish this shift, prosecutors had to follow the Attorney General's edict about better charge screening. Notably, two scholars who have studied Alaska's ban concluded that "[t]he screening portion of the policy resulted in better police investigations and stronger cases."<sup>118</sup>

The Alaskan experience offers us two important lessons. First, it suggests that—as many scholars have argued<sup>119</sup>—plea bargaining is likely ineradicable, and that an outright ban would simply push it deeper into the shadows of the criminal justice system. This result is not desirable. To the extent that plea bargaining is practised, it ought to be transparent and subject to reasonable oversight. Second, the Alaskan experience suggests that reducing our systemic reliance on plea bargaining can prompt better charge screening, especially when prosecutors are assisted by clear and robust charge screening policies.<sup>120</sup> While we do not want to see serious, meritorious cases falter due to resource constraints, declination and diversion<sup>121</sup> are intrinsically desirable to the extent that they can prevent the prosecution of individuals who are normatively innocent, or for whom standard criminal punishment would be counterproductive (for example, those with untreated drug dependencies who stand accused of relatively minor offences).<sup>122</sup> Crowns are already seasoned experts when it comes to managing their workloads by screening cases to identify good candidates for declination and diversion. They should be encouraged to do so even more vigorously.

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<sup>117</sup> See White Carns & Kruse, "Alaska's Ban", *supra* note 115 at 311; Michael L Rubinstein & Teresa J White, "Alaska's Ban on Plea Bargaining" (1979) 13:2 Law & Soc'y Rev 367 at 370, 375.

<sup>118</sup> White Carns & Kruse, "Alaska's Ban", *supra* note 115 at 317.

<sup>119</sup> See Schulhofer, "Inevitable", *supra* note 116 and accompanying text.

<sup>120</sup> See Ronald Wright & Marc Miller, "The Screening/Bargaining Tradeoff" (2002) 55:1 Stan L Rev 29 at 31–32 (proposing a prosecutorial screening system and suggesting that better screening can lead to fewer plea bargains without substantively increasing the number of criminal trials).

<sup>121</sup> "Declination" refers to the decision not to prosecute a case after initial charges have been laid. "Diversion" refers to the practice of allowing the accused to avoid prosecution by meeting conditions such as completion of a rehabilitative program or making reparations to the victim.

<sup>122</sup> For a balanced assessment of the potential of restorative and diversionary programs, see Patricia Hughes & Mary Jane Mossman, "Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs and Responses" (2002) 13 Windsor Rev Legal Soc Issues 1. For an analysis of diversion and informal measures as applied to young offenders, see Nicholas Bala, "Diversion, Conferencing, and Extrajudicial Measures for Adolescent Offenders" (2003) 40:4 Alta L Rev 991.

Prosecutors' offices across Canada already provide institutional support in the form of guidelines that regulate the use of charging discretion and assist Crowns with the process of selecting and framing their cases.<sup>123</sup> These policies should be made as precise and robust as possible. Improved screening policies are already being adopted in response to *Jordan*, which has increased pressure on Crowns to manage their caseloads efficiently.<sup>124</sup> The Alberta Crown Prosecution Service, for example, has issued a public-facing practice protocol outlining various criteria and considerations that Crowns in that jurisdiction should weigh when "triaging" potential cases.<sup>125</sup> Protocols like these are tremendously helpful: they can encourage efficiency; reduce reliance on plea bargaining; and discourage unjust or unproductive punishment by increasing the use of declination and diversion in appropriate cases, all while improving the consistency and transparency of Crowns' discretionary decision-making.

Returning, for a moment, to the Alaskan experience of the 1970s, the charge screening improvements instituted by the Attorney General in that case are notable in that they included a declaration that prosecutors would need to avoid moving forward with cases that "might be 'bargained' under the existing system, but which could not be won at trial."<sup>126</sup> At present, Canadian prosecutors may dispose of weak cases by offering lenient plea deals. Richard Lippke has termed this practice "half-loaf" plea bargaining because it reflects the prosecutor's attitude that a lenient punishment is better than a dismissal or an acquittal—a half loaf is better than none.<sup>127</sup> Cases that might otherwise result in half-loaf plea bargains could be treated as low-hanging fruit for prosecutors wanting to drop a larger percentage of their cases in order to save resources. If a prosecutor were willing to offer, say, a conditional discharge to the accused in exchange for a plea, then she should probably be prepared to withdraw the charges altogether instead. By withdrawing charges instead of pursuing half-loaf plea deals, as was the mandated practice in Alaska during that state's plea-bargaining ban, Crowns could better conserve their resources. They could also reduce the number of wrongful convictions by plea, which

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<sup>123</sup> See David Layton, "The Prosecutorial Charging Decision" (2002) 46:3&4 Crim LQ 447 at 448.

<sup>124</sup> See *Jordan*, *supra* note 15 at para 138 (for a discussion on solutions that Crown prosecutors could adopt to reduce trial delays).

<sup>125</sup> See Alberta, Alberta Justice and Solicitor General, "Prosecution Service Practice Protocol: Triage" (Edmonton: Alberta Justice and Solicitor General, 27 February 2017), online: <[justice.alberta.ca/programs\\_services/criminal\\_pros/Documents/TriageProtocol.pdf](http://justice.alberta.ca/programs_services/criminal_pros/Documents/TriageProtocol.pdf)>.

<sup>126</sup> White Carns & Kruse, "Alaska's Ban", *supra* note 115 at 316, n 35.

<sup>127</sup> Richard L Lippke, *The Ethics of Plea Bargaining* (Oxford: Oxford University Press, 2011) at ch 8.

are more likely to occur when Crowns offer lenient plea deals in cases where they have reason to anticipate an acquittal at trial.<sup>128</sup>

Under our current system, Crowns faced with cases in which there is sound evidence of factual guilt, but very compelling mitigating factors and relatively minor charges, may be inclined to offer extremely lenient plea bargains. While going-rate plea bargaining makes this a low cost proposition for Crowns, it also puts pressure on defendants to accept criminal punishments that, while relatively lenient, may still be disproportionately harsh, counterproductive, or both. By simply dropping these cases instead, Crowns could save more resources, while reducing the risk of unjustified and unproductive criminal punishment.

The suggestion that Crowns should reduce their reliance on plea bargaining by screening their cases more effectively is hardly novel, but it is absolutely crucial.<sup>129</sup> Plea bargaining is often justified by concerns that, if more defendants plead not guilty and go to trial, the criminal justice system will collapse under the weight of its massive caseloads.<sup>130</sup> An alternative—or a complement—to processing cases more effectively is to process fewer cases in the first place. The best and most obvious strategy for processing fewer cases, while pursuing the most serious and well-supported charges, is better charge screening. In the post-*Jordan* era, this strategy is more important than ever.

### ***B. Better Bargaining***

Once a Crown has completed her charge screening, how should she approach negotiations? I have argued that she should eschew going-rate plea bargains in favour of negotiated deals. But, how can negotiated bargains be structured to optimize the trade-off between efficiency and other procedural justice values, such as informed, transparent decision-making, courteous treatment, and meaningful participation by the accused?

In my view, the best possible approach to plea bargaining is what I call the “fixed offer” approach. Under this approach, a Crown identifies the just case result she would ideally like to obtain, then exercises her initial charging discretion accordingly. This process requires her to review the evidence in light of Crown policies, statutes, case law, and the purpose

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<sup>128</sup> See Sherrin, *supra* note 16 at 2. See also Linds, *supra* note 12 at 321–23. In these cases, the heightened possibility of an acquittal at trial may reflect a higher likelihood of factual innocence, while the very lenient plea offer may incentivize a risk-adverse, factually innocent defendant to forfeit the possibility of an acquittal in order to eliminate the prospect of a conviction.

<sup>129</sup> See e.g. Lafontaine & Rondinelli, *supra* note 4 at 110–11.

<sup>130</sup> *Ibid* at 108.



and principles of sentencing, as outlined above. It also requires her to make appropriate disclosures to the defence and to solicit and consider the defence's perspective. Indeed, the "negotiation" part of the process mostly occurs at this initial charging phase, when the Crown engages carefully and actively with the defence's position while forming her own view of the case. Where possible, the process may be facilitated by a judicial pretrial.<sup>131</sup> Having identified the appropriate charges and her preferred sentencing outcome, the Crown then communicates these to the defence and offers the accused the opportunity to plead guilty in exchange for a standardized, modest sentencing discount indexed to the Crown's preferred result. Notably, the Crown treats this plea offer as final, barring any new information that would properly cause her to re-evaluate her charging decision or her preferred sentencing outcome. It is not an opening gambit, but a genuine and straightforward statement of the Crown's position. The accused is then given sufficient time to contemplate the offer, which he may either accept or decline in favour of a trial. If the accused goes to trial, then the Crown pursues the charges and sentencing outcome that she staked out during negotiations, again, barring any new information that properly causes her to re-evaluate her assessment of the case.

The fixed offer approach is a version of what some scholars have called the "fixed discount" approach to sentencing.<sup>132</sup> Under the latter approach, accused persons who plead guilty ought to be rewarded with modest, standardized sentencing reductions from whatever sentence they would presumably receive if convicted at trial.<sup>133</sup> The standardized reduction can be achieved through plea bargaining, but it can also be prescribed by statute. The American Federal Sentencing Guidelines, for example, fix a standard sentencing reduction for a defendant who "clearly demonstrates acceptance of responsibility for his offense" by, *inter alia*, pleading guilty in a timely fashion.<sup>134</sup> In a similar vein, Ontario's Reduced Suspension with Ignition Interlock Conduct Review Program allows some offenders

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<sup>131</sup> Judicial pretrials are already practised in some cases and can be used to facilitate plea negotiations. For an analysis of judicial pretrials as they relate to plea bargaining see Dickie, *supra* note 5 at 136–38.

<sup>132</sup> See Lippke, *supra* note 127 at 77ff; James Vorenberg, "Decent Restraint of Prosecutorial Power" (1981) 94:7 Harv L Rev 1521 at 1560–61; Albert W Alschuler, "The Trial Judge's Role in Plea Bargaining, Part 1" (1976) 76:7 Colum L Rev 1059 at 1061–99 (discussing possible variations of the fixed discount approach).

<sup>133</sup> See Lippke, *supra* note 127 at 77ff; Alschuler, *supra* note 132 at 1124; Vorenberg, *supra* note 132 at 1560–61; Ronald F Wright "Trial Distortion and the End of Innocence in Federal Criminal Justice" (2005) 154:1 U Pa L Rev 79 at 112.

<sup>134</sup> US, United States Sentencing Commission, *Guidelines Manual*, §3E1.1 (Washington, DC: Government Printing Office, 2016) at 389–90.

who are charged with alcohol-impaired driving offences under the *Criminal Code* to reduce the period of their licence suspension if they fulfil certain criteria, including a timely guilty plea.<sup>135</sup> In both cases, the discount is predictable and is not subject to protracted negotiations. It is therefore more likely to be applied in a consistent and non-arbitrary fashion.

The fixed offer approach that I am advocating for here assumes that the discount is achieved through plea negotiations.<sup>136</sup> Those negotiations can take the form of sentence bargaining, charge bargaining, or a combination thereof. As a general rule, sentence bargaining is preferable to charge bargaining. I have suggested that, from the outset, Crowns should pursue charges that do the best possible job of reflecting the defendant's factual and normative guilt while allowing for proportionate sentences. Having identified such charges, it is preferable that Crowns not deviate from them. In practice, however, it may be necessary for Crowns to reduce the charges in order to offer modest sentencing discounts, particularly when initial charges strictly limit the available sentencing outcomes.

The fixed offer approach assumes a modest sentencing discount from what is already regarded as an appropriate sentencing range. There are two reasons for favouring a modest discount. First, it ensures that the bargained-for sentence is within the range of proportionate sentencing outcomes. To be sure, this sentence will be somewhat below what the Crown initially identifies as her preferred sentencing outcome; but this benefit to the accused is precisely what incentivizes him to take the deal. An alternative approach that ought to incentivize pleas without sacrificing the Crown's ideal sentencing outcome would require the Crown to overcharge the accused at the outset, or to state her intention to pursue a disproportionately high sentence at trial or both, thereby enabling the Crown to bargain down to her preferred outcome. The problem with this approach, as noted by Rosett, is that it requires Crowns to pursue disproportionately high sentences for defendants who exercise their trial rights—an unacceptable result for the reasons explained above.<sup>137</sup>

The second reason for preferring a modest sentencing discount is that it serves to limit the sentencing differential. It thereby reduces the pressure on accused persons to plead guilty. As a result, the fixed offer approach would likely increase the number of cases that went to trial, but it

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<sup>135</sup> Ontario, Ministry of Transportation, "Reduced Suspension with Ignition Interlock Conduct Review Program" (29 January 2016), online: <[www.mto.gov.on.ca/english/safety/ignition-interlock-conduct-review-program.shtml](http://www.mto.gov.on.ca/english/safety/ignition-interlock-conduct-review-program.shtml)>, archived at <https://perma.cc/BKQ4-CE27>.

<sup>136</sup> I am not necessarily opposed to legislated fixed discounts, but they are not my focus here.

<sup>137</sup> Rosett, *supra* note 82 at 26.

would also improve their composition. By engaging in informed, straightforward discussions with the defence, Crowns could help accused persons assess their likelihood of being convicted. By offering modest fixed discounts, indexed to properly calibrated sentencing outcomes, they could incentivize guilty pleas from those who would likely be convicted, without creating excessive or irresistible pressure to plead across the board.<sup>138</sup> Fixed offer plea bargains would be less likely to involve the grossly distorted charges and sentences that are often associated with plea bargaining as it is currently practised.<sup>139</sup>

Lastly, the fixed offer approach advances Tyler's principles of voice, neutrality, trust, and respect. By engaging in a good faith exchange with the defence before identifying her preferred outcome, the Crown would ensure that the accused is given a voice in the proceedings, and would demonstrate respect towards him and better engender his trust. The Crown would also position herself to make a more informed, balanced, and hence more neutral decision about which charges and sentences to pursue. At the same time, by presenting each plea deal as a well-reasoned option for the accused to accept or decline, and not as an opening gambit, the Crown would make plea bargaining more transparent, less fickle, and less arbitrary. By avoiding protracted negotiations, she would also promote efficiency while remaining within the boundaries staked out by the norms of procedural fairness. Finally, the fixed offer approach would promote both equality and transparency: it would communicate to the accused and to the general public alike that the sentence actually tracks the evidence and that the plea offer is based on a consistently applied policy.<sup>140</sup>

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<sup>138</sup> See Alschuler, *supra* note 132 at 1127.

<sup>139</sup> There is an important caveat to this point. Mandatory sentencing regimes could make it impossible to achieve both accurate charges and modest discounts. If a Crown prosecutor charges an individual with a crime carrying a mandatory minimum sentence, then she cannot offer a plea deal below that minimum. If the minimum is equal to or below the sentence that the Crown would ideally seek at trial, then there is likely no problem; the Crown can probably achieve both an accurate charge and a modest sentencing discount in exchange for a guilty plea. If the minimum is higher than the sentence that the Crown would prefer to seek, however, then the Crown will be unable to achieve both an accurate charge and a modest sentencing discount. Quite apart from plea bargaining calculations, mandatory minimums can force Crowns to choose between pursuing disproportionate sentencing outcomes and bringing inaccurate charges to avoid such outcomes. In my view, this conundrum is one of many cogent arguments against mandatory minimums.

<sup>140</sup> See Wright, *supra* note 133 at 96–97 (describing how the public interest in transparency and accountability is served by the fixed discount approach. The analysis also applies to fixed offer approaches).

## Conclusion

As it is currently practised, plea bargaining is subject to strong criticism, and rightly so. Plea negotiations are often conducted rapidly and aggressively on the basis of scant information and analysis, resulting in case outcomes that only loosely reflect the accused's factual and normative guilt—or, worse still, which constitute full-blown wrongful convictions. Those who seek to improve plea bargaining practices often focus their attention on the Crown prosecutors who play an outsized role in shaping plea bargains. In this article, I have sought to contribute to ongoing discussions about the role of the Crown prosecutor in plea bargaining by querying how Crowns ought to interpret and fulfill their ethical mandate to seek justice in that context.

I have proposed a number of practices that would allow Crowns to promote both procedural and substantive justice through plea bargaining. These include making principled, nuanced decisions about which charges and sentencing outcomes to pursue and taking into account statutes, precedents, governing policies, and the broader purpose and principles of sentencing. Other proposed practices include privileging sentencing proportionality over charging accuracy, erring on the side of leniency, and eschewing going-rate plea bargains. In order to enable these practices without unduly sacrificing efficiency, Crown offices should redouble their efforts to promote careful charge screening and should adopt a “fixed offer” approach to plea bargaining.

In developing these suggestions, I have attempted to concretize the Crown's seek justice mandate in the plea bargaining context. In the end, however, my analysis leaves considerable space for interpretation and dispute. Even if Crowns were to adopt the proposed practices, they would still have to struggle with ambiguity and disagreement about the just outcome in individual cases. Ultimately, justice is an indeterminate concept: it is too ambitious, complex, and contested to be reduced to a formula. Crown prosecutors contemplating their ethical mandate to seek justice would therefore do well to embrace the concept's inherent complexity and to avoid simplification—what Molly Peacock describes as “the lessening of experience in order to smooth out the complicated contrariness of its elements.”<sup>141</sup> Crowns should eschew swift, simplified approaches to charge screening and plea bargaining and should instead commit themselves to a

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<sup>141</sup> Molly Peacock, *Passion Flowers in Winter*, in David Foster Wallace & Robert Atwan, eds, *The Best American Essays 2007* (Boston: Houghton Mifflin, 2007) 174 at 188. Peacock is describing the artist Mary Delaney's cut-paper “mosaics”—intricate images of flowers that Delaney made by cutting and pasting thousands of tiny slivers of coloured paper. Delaney made accurate portraits of her botanical subjects by embracing their complexity. Peacock adopts Delaney's dedication to complexity as a general mantra.

more contemplative, textured, and ultimately less tidy approach. It is by digging into the messy, idiosyncratic, deeply human experiences that animate each individual criminal case and engaging earnestly with the defence's perspective that Crowns can best promote substantive and procedural justice. To the extent that ambiguity and uncertainty persist, as they inevitably will, Crowns should remember their role and should err on the side of leniency. In this way, Crown prosecutors can better satisfy their duty to act as ministers of justice, and can, perhaps, make plea bargains more just.

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