THE JUDICIAL ROLE IN CRIMINAL CHARGING AND PLEA BARGAINING

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I. INTRODUCTION

The standard answer to the question of what role judges have in determining the appropriateness of criminal charges is "virtually none." On the one hand, it is "the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions."[1] On the other, at least with respect to the fairness of charges that are the basis of prosecutions, the scope of judicial authority is quite limited, because prosecutorial charging discretion is "almost limitless"[2] and "[g]overnmental investigation and prosecution of crimes is a quintessentially executive function."[3] Most state justice systems follow the federal constitutional model, under which "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."[4] It could hardly be otherwise, the U.S. Supreme Court has suggested, because decisions to prosecute are "ill-suited to judicial review."[5] With only modest qualifications, much the same is said about the judicial role in plea bargaining. Plea agreements are closely bound up with charging decisions—they often involve dismissing some charges or substituting

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1. United States v. Nixon, 418 U.S. 683, 707 (1974).
2. State v. Kenyon, 270 N.W.2d 160, 164 (Wis. 1978).
3. Morrison v. Olson, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting).
4. Greenlaw v. United States, 554 U.S. 237, 246 (2008) (quoting *Nixon*, 418 U.S. at 693).
5. Wayte v. United States, 470 U.S. 598, 607-08 (1985); *see also* United States v. Giannattasio, 979 F.2d 98, 100 (7th Cir. 1992) ("Prosecutorial discretion resides in the executive, not in the judicial, branch, and that discretion, though subject of course to judicial review to protect constitutional rights, is not reviewable for a simple abuse of discretion."). Commentators have long made the same point. *See, e.g.*, Newman F. Baker, *The Prosecuting Attorney: Legal Aspects of the Office*, 26 J. AM. INST. CRIM. L. & CRIMINOLOGY 647, 647-48 (1936) ("[T]he initiation of criminal prosecution is a matter resting in the uncontrolled discretion of the prosecuting attorney . . . [and] not subject to legal control except in the extreme instances of official misconduct."); Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 18 (1940) ("The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous."); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1525 (1981).

one charge for another, and partly for that reason the judges' role often remains largely "passive."[6] The parties negotiate terms for a criminal judgment that they then present to the judge, whose role is confined to confirming a factual basis for the plea, the knowing voluntariness of the defendant's plea, and (depending on the sentencing law and the terms of the parties' agreement) exercising some discretion in dictating the sentence.[7]

But this standard story misleads and omits nearly as much as it accurately conveys. It is true only in a narrow sense. Courts and lawyers have been misled because they construe this account of prosecutorial authority and judicial impotence too broadly, and because many overlook that state law sometimes departs significantly from the federal model in this area. With regard to federal constitutional law that governs both state and federal criminal justice, it is true that the judiciary has only a very limited mandate under due process doctrine to intervene in decisions to prosecute (much less decisions not to prosecute) and over party negotiations about guilty pleas.[8] But courts are not barred from exercising some oversight of criminal charging—or charge adjustments and dispositions in plea negotiations—as a requirement of separation of powers jurisprudence, which means that Congress could grant federal judges a greater supervisory role and provide statutory criteria on which they could meaningfully do so.[9] The same seems to be true under most state constitutions.[10] Beyond that, as a matter of law and policy, the executive has not always had exclusive authority over charging, or over negotiating charges to reach a plea bargain, in every state.[11] Nor are courts excluded from having a hand in any aspect of charging and negotiating about charges under current law in some states.[12] It is true, however, that as a general description of state criminal justice policy, prosecutors have by far the largest role and judges usually play a very modest role in supervising them.[13] This is largely due to legislatures in many states choosing not to establish greater checks and balances over

6. ABRAHAM S. GOLDSTEIN, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA 51 (1981).

7. *Id.* at 47.

8. *See infra* Part III.A.

9. *See infra* Parts II–III.

10. For an unusual state court holding that separation of powers bars a legislature from giving courts discretion that infringes on prosecutorial charging authority, see *Padget v. Padget*, 678 P.2d 870, 873 (Wyo. 1984) ("[T]he charging decision is properly within the scope of duty of the executive branch . . . ."). For a similar view, see *State v. Krotzer*, 548 N.W.2d 252, 256 (Minn. 1996) (Coyne, J., dissenting).

11. *See infra* Parts II–III.

12. *See infra* Part III.B.

13. *See infra* Parts II–III.

criminal charges by authorizing and encouraging courts to play a greater role, and because courts have generally chosen not to exercise—or to use only modestly and rarely—what authority they do have under existing statutes, rules, and doctrines.[14] And it is especially misleading with respect to state criminal justice systems, where the vast majority of prosecutions occur and some of which depart in notable ways from the judge's role in the federal criminal justice system.

This Article's primary goal is to provide a compact synthesis of the law that authorizes, defines, and regulates judicial authority regarding decisions whether to file criminal charges, which charges to file, and how charges might be adjusted in the plea bargaining process. Part II focuses on judicial power with respect to initial charging and non-charging decisions.[15] Whether judges have a role with respect to criminal charging depends on which aspect of charging one is concerned about—or put differently, what problem or risk in prosecutorial decisions judges could be called upon to address.[16] Where it is granted by statute, judges have clear authority to assure that prosecutions do not proceed if charges are not grounded on a minimally sufficient factual basis.[17] Judges in approximately one-third of state justice systems have the additional power to dismiss factually well-grounded charges if they conclude doing so is "in the interest of justice."[18] By contrast, judges have no power in many state or federal courts to address prosecutors' decisions *not* to charge a suspect with a specific offense, although there are notable exceptions—a few states *do* grant judges some power in this context.[19] This power is closely tied to rules about whether judges have the power to *initiate* criminal charges independently of prosecutors.[20] In some states, under the right circumstances, they do.[21] Additionally, judges have clear, albeit functionally very weak, authority to address the problem of *biased* prosecutions, that is, charges filed by prosecutors for improper reasons.[22] Part III considers judicial power over charging in the plea negotiation context, that is, once charges have been filed.[23] Judicial power can be significant with respect to assuring that particular charges lead to a just outcome that is appropriate on the facts of the case,

14. *See infra* Part II.B.
15. *See infra* Part II.
16. *See infra* Part II.
17. *See infra* Part II.A.1.
18. *See infra* Part II.A.4.
19. *See infra* Part II.B.
20. *See infra* Part II.B.1.
21. *See infra* Part II.B.
22. *See infra* Part II.A.2.
23. *See infra* Part III.

although judicial authority varies here depending on the nature of the problems judges might seek to address.[24] Judges certainly can reject proposed plea bargains if they conclude the disposition is either too lenient or too harsh.[25] Their power to fashion a just outcome can be constrained, however, by sentencing laws and by limits on their ability to compel more severe charges or accept guilty pleas to lesser ones. The power of some state judges to dismiss charges sua sponte in the interest of justice extends to this stage as well.[26] From this survey of existing law and practice, two basic themes emerge. The first belies much of the standard story about the judicial powerlessness over criminal charging, at least in some states, as a matter of constitutional law.[27] The second identifies the sources of law that make that standard story a largely accurate one in the many jurisdictions.[28] Where that is so, it is due predominantly to judges' own reluctance about—or aversion to—exercising greater authority over charging, and in some places, to legislative policy constraining that authority, rather than to any limitations from constitutional law or from the common law and adversarial process traditions.[29]

II. JUDICIAL AUTHORITY OVER CRIMINAL CHARGING

A. Judicial Authority to Dismiss Criminal Charges

As a first step in understanding judicial authority over "criminal charges," it is useful to distinguish the power to *initiate*, *alter*, and *stay or dismiss* charges. Possessing only one of these powers can give an actor a considerable, if not determinative, role in criminal charging. And in fact, states allocate these powers between judges and prosecutors in different and overlapping ways. Overwhelmingly, police and prosecutors control the filing of criminal charges in state criminal justice systems,[30] as they do in common law systems worldwide (and indeed, in most European civil law justice systems as well).[31] But judges also have some power to approve private requests for criminal charges in many states

24. *See infra* Part III.B.1.
25. *See infra* Part III.B.1.
26. *See infra* Parts II–III.
27. *See infra* Parts II.A.1–2, III.A.
28. *See infra* Parts II.A.3–II.B, III.B.
29. *See infra* notes 64-70 and accompanying text.
30. *See* Baker, *supra* note 5, at 647-48; Vorenberg, *supra* note 5, at 1525. For brevity, I will not distinguish charges filed by police from those filed by prosecutors, because both are charging decisions by executive branch law enforcement agencies.
31. *See* Baker, *supra* note 5, at 669.

independently of any action by public prosecutors.[32] Likewise, both prosecutors and judges have power to dismiss previously filed charges, sometimes—depending on the state—independently of the other's approval.[33] And both have functionally similar powers to stay (or halt, temporarily or indefinitely) a prosecution from proceeding.[34] In this Subpart, I map the diversity and scope of judicial power with respect to criminal charging.[35] Related judicial power over charging in the context of plea negotiations is reserved for Part III.[36]

1. Dismissing Charges Due to Factual Insufficiency

One limited check judges provide on prosecutors' decisions to file charges is review of the factual bases for the prosecutors' allegations.[37] Judges must confirm that the government has sufficient evidence to support a finding of probable cause or to make out a prima facie case.[38] But this role for judges is a modest and limited one. The evidentiary standard is low, so prosecutors are rarely unable to meet it.[39] Moreover, federal constitutional law does not require a judicial determination of factual sufficiency for criminal charges in state courts, and the law in many states does not either. While defendants who are arrested on a warrant or detained after a warrantless arrest have the federal constitutional right to a judicial determination of probable cause,[40] the Constitution does not require that criminal charges in state courts be screened by either a grand jury or a judge at a preliminary hearing.[41]

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32. *See infra* Part II.B.1.

33. *See infra* Part II.B.

34. *See, e.g.*, MINN. STAT. § 609.135 (2017) (stating that "any court may stay imposition or execution of sentence" and impose intermediate sanctions); N.D. CENT. CODE § 29-01-17 (2017) ("If a party injured appears before the court in which a trial for the commission of a public offense is to be had, at any time before the trial, and acknowledges that the party injured has received satisfaction for the injury, the court, on payment of the costs incurred, may order all proceedings to be stayed upon the prosecution and the defendant to be discharged therefrom . . . ."); State v. Lattimer, 624 N.W.2d 284, 286 (Minn. Ct. App. 2001) (stating that a stay of adjudication is a sentence for which prosecutor consent is not required).

35. *See infra* Part II.A.1.

36. *See infra* Part III.

37. *See* Gerstein v. Pugh, 420 U.S. 103, 111-19 (1975).

38. *See id.*

39. *See* Alafair S. Burke, *Prosecutorial Agnosticism*, 8 OHIO ST. J. CRIM. L. 79, 83 (2010).

40. *Gerstein*, 420 U.S. at 114 ("[T]he Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.").

41. *See id.* at 118-19 (holding that the Federal Constitution does not entitle an accused "to judicial oversight or review of the decision to prosecute" and that "a judicial hearing is not prerequisite to prosecution by information" in state court); *see also* Beck v. Washington, 369 U.S. 541, 545 (1962) (same); Woon v. Oregon, 229 U.S. 586, 590 (1913) ("[T]he 'due process of law' clause does not require the State to adopt the institution and procedure of a grand jury . . . ."); Hurtado v. California, 110 U.S. 516, 534-35 (1884) (holding that the Fifth Amendment does not

However, eighteen states require grand jury screening of felony charges, as does the Fifth Amendment for felony charges in federal courts.[42] Those jurisdictions also give defendants a post-arrest right to a preliminary hearing, although that right is mooted by a grand jury indictment, since it amounts to a finding of probable cause independent of the prosecutor.[43] The remaining majority of states do not require grand jury indictments (except for capital charges in some), but state constitutions or rules generally provide for a post-arrest preliminary hearing.[44] In many of these states, however, prosecutors can preempt this form of judicial oversight by filing charges with the court before the hearing.[45] At least two states have abolished the preliminary hearing altogether and thus permit prosecutors to directly file charges without judicial oversight;[46] although these states and a few others that allow direct indictments without preliminary hearings allow defendants to move for dismissal if discovery fails to support the prosecution's prima facie case.[47] In sum, while judges in some circumstances can dismiss criminal charges for lack of a sufficient factual basis, this is a modest, reactive power relevant only in relatively unusual instances.

2. Dismissing Charges Due to Impermissible Charging Motives

Judges have much clearer nominal authority under the Federal Constitution to dismiss criminal charges based on improper prosecutor motivations for filing charges, but the restrictive standards for these doctrines leave judges with very little *meaningful* authority, arguably negligible power in practical terms. Formally, equal protection and due process doctrines empower (and require) judges to provide a remedy for charges motivated by improper prosecutorial *bias*. Judges should dismiss

require grand jury indictments in state courts).

42. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 750-51 (5th ed. 2009).

43. *Id.* at 751.

44. *Id.* at 752-53; *see, e.g.*, ARIZ. CONST. art. II, § 30; HAW. CONST. art. I, § 10; ILL. CONST. art. I, § 7; N.M. CONST. art. II, § 14; OKLA. CONST. art. II, § 17.

45. LAFAVE ET AL., *supra* note 42, at 752; *see, e.g.*, FLA. R. CRIM. P. 3.133(b)(1) (stating that a criminal defendant has a post-arrest right to preliminary hearing within twenty-one days if not charged); IOWA R. CRIM. P. 2.2(4) (stating that a defendant has a right to preliminary hearing unless charged by information or grand jury indictment); MONT. CODE ANN. § 46-10-105 (2017) (requiring court approval); WASH. CRIM. R. CT. LTD. 3.2.1(g)(1) ("When a felony complaint is filed, the court may conduct a preliminary hearing to determine whether there is probable cause to believe that the accused has committed a felony unless an information or indictment is filed in superior court prior to the time set for the preliminary hearing.").

46. *See, e.g.*, VT. R. CRIM. P. 12(d)(1) (allowing defendant to move for dismissal if discovery shows prosecution lacks prima facie case); State v. Florence, 239 N.W.2d 892, 895 (Minn. 1976).

47. *See* LAFAVE ET AL., *supra* note 42, at 753; *see also* FLA. R. CRIM. P. 3.190(c)(4); VT. R. CRIM. P. 12(d)(1); State v. Case, 412 N.W.2d 1, 5 (Minn. Ct. App. 1987); State v. Knapstad, 729 P.2d 48, 51-52 (Wash. 1986) (en banc).

charges motivated by vindictiveness,[48] retaliation for exercising First Amendment or other fundamental rights,[49] or racial bias.[50]

The U.S. Supreme Court, however, has defined exceedingly high standards for finding any of these improper purposes for a prosecutor's charging decision.[51] Successful claims of racially biased charging in violation of the Equal Protection Clause appear to be nonexistent; successful claims for charges motivated by vindictiveness or in retaliation for exercising constitutional rights are exceedingly rare.[52] One reason for crafting the due process doctrines so deferentially to prosecutors is that more restrictive limitations on charging decisions could restrict plea bargaining practice. The core mechanism of plea bargaining, after all, is that prosecutors adjust charges depending on whether defendants exercise or waive their constitutional right to trial.[53] More generally, both the equal protection and due process branches of this anti-bias principle are constrained by the judiciary's consistent—and arguably excessive—deference to executive branch control of the reasons for and substance of criminal charging.

3. Dismissing Charges Due to Other Prosecutorial Misconduct

Judges also have authority to dismiss charges for egregious prosecutorial misconduct.[54] Generally, this takes the form of defendants showing that a prosecutor reneged on a promise not to prosecute and thereby induced the defendant to divulge incriminating information pursuant to what the defendant took to be an immunity or non-prosecution agreement.[55] This authority, however, is a means to address

48. *See* Blackledge v. Perry, 417 U.S. 21, 25-26 (1974). *But see* United States v. Goodwin, 457 U.S. 368, 376-81 (1982) (imposing a stringent "actual vindictiveness" requirement for prosecutorial vindictiveness claims); Bordenkircher v. Hayes, 434 U.S. 357, 364-65 (1978) (holding that there is no constitutional violation when prosecutor increases charge severity after defendant declines a plea bargain offer).

49. *See* Wayte v. United States, 470 U.S. 598, 608 (1985).

50. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996).

51. *See id.* at 463-66.

52. *See, e.g.*, *Wayte*, 470 U.S. at 610; *Goodwin*, 457 U.S. at 384; *Bordenkircher*, 434 U.S. at 365.

53. *See, e.g.*, *Goodwin*, 457 U.S. at 382; *Bordenkircher*, 434 U.S. at 364-65. In both, *Goodwin* and *Bordenkircher*, the U.S. Supreme Court is clearly cognizant and protective of prosecutors' desire to drop charges when defendants agree to plead guilty and add charges (or decline to drop some) when defendants exercise trial rights. *See Goodwin*, 457 U.S. at 382; *Bordenkircher*, 434 U.S. at 364-65.

54. *See, e.g.*, United States v. Kearns, 5 F.3d 1251, 1253 (9th Cir. 1993). Federal courts have inherent supervisory power to dismiss, at least if "no lesser remedial action is available." *See* United States v. Chapman, 524 F.3d 1073, 1087 (9th Cir. 2008) (quoting United States v. Barrera-Moreno, 951 F.2d 1089, 1092 (9th Cir. 1991)).

55. *See, e.g.*, United States v. Johnson, 622 F. App'x 626, 627 (9th Cir. 2015) (affirming dismissal of indictment issued after government entered non-prosecution agreement with

prosecutor misconduct, rather than the substance, justness, or appropriateness of the criminal charge.

4. Dismissing Charges in the Interest of Justice

At common law, judges had no independent power to dismiss criminal charges; the power of *nolle prosequi* rested exclusively with the prosecutor.[56] But fairly early on, state legislatures rejected this traditional rule and replaced it with statutes that gave judges various degrees of authority over dismissals.[57] Most jurisdictions now require the trial judge to approve a prosecutor's request to dismiss a criminal charge. New York may have been the first state to adopt this approach when it granted courts authority over *nolle pros* in 1829.[58] A substantial minority have gone further. In eighteen states, judges have some power to *dismiss* criminal prosecutions on their own initiative—that is, absent a prosecutor's request or despite her opposition.[59] Fourteen states, including California and New York, permit judges to dismiss charges on their own initiative if they conclude doing so is in the interest of justice.[60] Four additional states, following the Model Penal Code,[61]

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defendant); United States v. Mark, 795 F.3d 1102, 1103, 1106 (9th Cir. 2015) (dismissing indictment after government failed to prove defendant breached earlier immunity agreement); *see also* LAFAVE ET AL., *supra* note 42, at 728-29 (discussing remedies when government reneges on a promise to the defendant). The prosecutor's breach or bad faith is critical. A legal violation such as an illegal arrest is not grounds for dismissing a prosecution or overturning a conviction. *See, e.g.*, Frisbie v. Collins, 342 U.S. 519, 520, 523 (1952).

56. *Power of Court to Enter* Nolle Prosequi *or Dismiss Prosecution*, 69 A.L.R. 240 (1930), Westlaw (database updated 2017).

57. *Id.*

58. *See* MIKE MCCONVILLE & CHESTER L. MIRSKY, JURY TRIALS AND PLEA BARGAINING: A TRUE HISTORY 35 (2005) (nothing that in 1829, New York still used private and judicially appointed prosecutors). *See generally Power of Court to Enter* Nolle Prosequi *or Dismiss Prosecution*, *supra* note 56 (providing a broad overview of state *nolle pros* laws). Federal practice also requires judges to approve prosecutors' motions to dismiss charges. *See* FED. R. CRIM. P. 48(a).

59. *See infra* notes 60-62 and accompanying text.

60. *See, e.g.*, ALASKA R. CRIM. P. 43(c); ARIZ. R. CRIM. P. 16.6(b), (d); CAL. PENAL CODE § 1385(a), (c)(1) (West 2015); CONN. GEN. STAT. §§ 54–56 (2017); IDAHO CRIM. R. 48(a)(2); IDAHO CODE § 19-3504 (2017); IOWA R. CIV. P. 2.33(1); MINN. STAT. § 631.21 (2017); MONT. CODE ANN. § 46-13-401(1) (2015); N.Y. CRIM. PROC. LAW §§ 170.40, 210.40 (McKinney 2017); OKLA. STAT. tit. 22, § 815 (2017); OR. REV. STAT. § 135.755 (c), (d) (2015); UTAH R. CRIM. P. 25(d), (a); VT. R. CRIM. P. 48(b)(2); WASH. CRIM. R. CT. LTD. J. 8.3; *see also* P.R. LAWS ANN. tit. 34a, § 247(b) (2017).

61. The Model Penal Code provides the following:

> The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:
>
> (1) was within a customary license or tolerance, neither expressly negatived by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense; or

permit judges to do the same on the perhaps more limited ground that the defendant's conduct constituted only a de minimus violation of a criminal offense.[62] In a few more states, case law recognizes an inherent judicial power to dismiss charges without statutory authorization.[63]

It is fair to say, however, that courts have collectively rejected—or deprived themselves—of the authority and responsibility that these statutes can be plausibly understood to give to them. Most state courts have interpreted their power under these statutes exceedingly narrowly, so that they overwhelmingly defer to prosecutorial preferences about whether cases should proceed or be dismissed.[64] New York's statute is somewhat more restrictive of judicial power than analogous laws in other states. It provides that charges "may be dismissed in the interest of justice . . . when . . . required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant . . . would constitute or result in injustice."[65] Courts have concluded that this power must be "'exercised sparingly'. . . that is, only in rare cases."[66]

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(2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or

(3) presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.

The Court shall not dismiss a prosecution under Subsection (3) of this Section without filing a written statement of its reasons.

MODEL PENAL CODE § 2.12 (AM. LAW INST. 1962).

62. *See, e.g.*, HAW. REV. STAT. § 702-236 (2016); ME. REV. STAT. tit. 17-A, § 12 (2017); N.J. REV. STAT. § 2C:2-11 (2017); 18 PA. CONS. STAT. § 312 (2017); *see also* 9 GUAM CODE ANN. § 7.67 (2017); State v. Fitzpatrick, 772 A.2d 1093, 1096-97 (Vt. 2001) (holding that "seriousness of the charges" does not preclude an "in furtherance" dismissal).

63. *See, e.g.*, People v. Thomas, 54 Cal. Rptr. 409, 414-15 (Dist. Ct. App. 1966); People v. Lenz, 703 N.E.2d 971, 972 (Ill. App. Ct. 1998); State v. Boehmer, 203 P.3d 1274, 1277 (Kan. Ct. App. 2009); State v. Odom, 993 So. 2d 663, 677-78 (La. Ct. App. 2008); Commonwealth v. Thurston, 642 N.E.2d 1024, 1026 (Mass. 1994); State v. Witt, 572 S.W.2d 913, 917 (Tenn. 1978). But the majority view among state courts seem to be that courts lack this inherent authority. *See, e.g.*, People v. Stewart, 217 N.W.2d 894, 897-900 (Mich. Ct. App. 1974) (stating that there is no inherent judicial power to dismiss charges).

64. Valena E. Beety, *Judicial Dismissal in the Interest of Justice*, 80 MO. L. REV. 629, 652-59 (2015) (surveying laws in several states, notably New York, that narrowly construe judicial power to dismiss charges on interest-of-justice grounds); Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. (forthcoming Dec. 2017) (same).

65. N.Y. CRIM. PROC. LAW § 170.40(1) (McKinney 2017) (applying to information or misdemeanor complaints); *see also id.* § 210.40(1) (applying to felony charges by indictment).

66. People v. May, 953 N.Y.S.2d 767, 770 (App. Div. 2012) (quoting People v. Quadrozzi, 863 N.Y.S.2d 455, 463 (App. Div. 2008)). For examples of narrow applications, see *People v. Marshall*, 961 N.Y.S.2d 447, 453-54 (App. Div. 2013) (holding that dismissal is not justified by defendant's age, likelihood of death in prison, or prior military and public service); *People v. Schellenbach*, 888 N.Y.S.2d 153, 154 (App. Div. 2009) (holding that dismissal based on

The choice to construe this statutory power narrowly—and thereby effectively rejecting much of their capacity to assure justice through making independent dismissal decisions—carries across many states. The language of these interest-of-justice statutes varies; some permit dismissal for "good cause"[67] or "substantial cause."[68] Washington's statute is now confined to dismissals for "governmental misconduct" or prejudice to a defendant's rights that undermine the possibility of a fair trial.[69] Even when rules clearly provide courts with broad discretionary power to dismiss, however, courts often reject that power, in effect, by interpreting their authority to dismiss exceedingly narrowly.[70]

California is a notable exception. Courts there have embraced a stronger conception of the judiciary's statutory power to dismiss charges in the interest of justice. The California Supreme Court has stressed that "[t]he judicial power must be independent" of prosecutors in making decisions about dismissals on those grounds.[71] Notably, California courts use this power to strike allegations of prior convictions in "furtherance of justice" so as to avoid having to impose unjustly harsh mandatory sentences under the state's three-strike laws.[72] In the main, however, judicial response to the grant of authority that these statutes represent is disappointing. Few other bodies of law or patterns of decision making demonstrate so clearly the collective avoidance by U.S. judges of an

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prosecution misconduct must be reserved for "exceptionally serious misconduct" (quoting N.Y. CRIM. PROC. LAW § 210.40(1)(e))); *People v. Sherman*, 825 N.Y.S.2d 770, 771 (App. Div. 2006) (holding that dismissal is not justified by defendant's serious health problems); *People v. Miller*, 963 N.Y.S.2d 552, 553 (Yates Cty. Ct. 2013); *People v. Vurckio*, 619 N.Y.S.2d 510, 512-13 (Crim. Ct. 1994) (citation omitted) ("[A] motion to dismiss in the interest of justice should be granted only when a miscarriage of justice would result from strict adherence to the letter of the law."); and *People v. Stern*, 372 N.Y.S.2d 932, 936 (Crim. Ct. 1975) (stating that dismissals in the interest of justice should be granted only when an "overriding moral issue" is present). Federal courts have construed their power under FED. R. CRIM. P. 48(a) narrowly as well. *See, e.g.*, United States v. Smith, 55 F.3d 157, 159 (4th Cir. 1995); United States v. Perate, 719 F.2d 706, 710-11 (4th Cir. 1983); Dawsey v. Virgin Islands, 931 F. Supp. 397, 401-02 (D.V.I. 1996). A key rationale for deference is that, if judges declined a request to dismiss, they would effectively be ordering prosecutors to litigate charges that they no longer wish to prosecute.

67. *See, e.g.*, MONT. CODE ANN. § 46-13-401(1) (2015).

68. *See, e.g.*, UTAH R. CRIM. P. 25(a).

69. WASH. SUPER. CT. CRIM. R. 8.3(b); *see, e.g.*, State v. Michielli, 937 P.2d 587, 592-96 (Wash. 1997) (holding that the interests of justice warranted dismissal of trafficking charges, which were added to original theft charge only three business days before trial).

70. The original language of WASH. SUPER. CT. CRIM. R. 8.3(b) gave courts wide authority to dismiss, authorizing dismissals simply on the court's "own motion in the furtherance of justice," as long as the judge gave written reasons. *Michielli*, 937 P.2d at 592. But Washington courts construed this power very restrictively in a series of cases, and rule drafters subsequently amended the rule to incorporate the limitations created by case law. *See* Roberts, *supra* note 64.

71. People v. Clancey, 299 P.3d 131, 142 (Cal. 2013).

72. *See* Beety, *supra* note 64, at 647-48 (citing CAL. PENAL CODE § 1385 (West 2015)).

active role, consonant with separation of powers principles—the value of checks and balances between branches—in assuring just criminal law enforcement and punishment.

B. Judicial Power to Initiate Criminal Charges

What about judicial power when prosecutors do not file criminal charges? The issue can arise in two distinct contexts. The first occurs when private individuals seek to file a criminal complaint directly, perhaps without prosecutors ever having considered the allegation and made a decision about whether criminal charges are merited.[73] The second arises when prosecutors consider evidence of a crime but decline for some reason to file charges.[74] In the first scenario, courts might approve a private citizen's criminal complaint.[75] In the second, courts might review the public prosecutor's declination decision, typically at the request of an alleged victim.[76] If judges in either scenario rule that charges should be filed, the problem arises of whether a judge can either order a public prosecutor to press the case or authorize someone else to prosecute it.

1. Judicial Initiation of Charges

Many states give judges the authority to approve criminal complaints (as well as warrant requests) filed by private citizens.[77] Given that judicial approval of charges is not required to commence a prosecution in most jurisdictions, this process represents a modest version of judicial power to initiate a criminal case independently of the prosecutor's office. This is surely a remnant of procedures, common in the nineteenth century in some states, in which judges approved private prosecutions handled by victims' private attorneys.[78] In most states, it is

73. *See infra* Part II.B.1.

74. *See infra* Part II.B.2.

75. *See infra* Part II.B.1.

76. *See infra* Part II.B.2.

77. *See, e.g.*, N.C. GEN. STAT. §§ 15A-303, 15A-304 (2016) (stating the requirements from criminal summons and arrest warrants); OHIO R. CRIM. P. 4(A)(1), 7(A) (providing that a judge can make a probable cause finding on a private complaint, but a felony charge can issue only from a grand jury).

78. For accounts of private prosecutions in the first half the nineteenth century in which judges played an active supervisory role, see MCCONVILLE & MIRSKY, *supra* note 58, at 28-40 (describing New York courts with private prosecutors and, prior to 1847, judicial or gubernatorial appointments of public prosecutors); ALLEN STEINBERG, THE TRANSFORMATION OF AMERICAN CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880, at 24-69, 152-57 (1989) (describing private prosecutions, screened by aldermen acting as magistrates, and creation of elected district attorney's office in 1850); Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568, 571-72

solely up to the prosecutor's office whether to file charges or otherwise allow private criminal complaints to proceed. If they choose not to, prosecutors can request or dictate their dismissal.[79]

In a few states, however, legislatures have granted judges review over prosecutors' decisions to press charges.[80] Colorado, Michigan, Nebraska, and Pennsylvania all have similar statutes that authorize judges to review public prosecutors' decisions not to charge based on private criminal complaints.[81] Each state requires prosecutors to provide reasons for declining to prosecute in certain kinds of cases.[82] State law empowers trial judges to assess prosecutors' discretionary declination decisions, and those explanations provide a basis for judicial review of prosecutorial decision-making. If judges find the decision unmerited, they can *order* that the prosecution proceed, either by compelling the public prosecutor to litigate it or by appointing a special prosecutor.[83]

(1984) (stating that private prosecutions predominated in the colonies); and see also *Stewart v. Sonneborn*, 98 U.S. 187, 198 (1878) (Bradley, J., dissenting) ("[E]very man in the community, if he has probable cause for prosecuting another, has a perfect right, by law, to institute such prosecution, subject only, in the case of private prosecutions, to the penalty of paying the costs if he fails in his suit."); and *State v. Unnamed Defendant*, 441 N.W.2d 696, 700-01 (Wis. 1989) (describing the history of courts having sole power under state law to initiate charges until 1945, after which judges and prosecutors shared that power).

79. Nearly every state has abolished private prosecutions, meaning privately initiated criminal complaints prosecuted by a victim's private lawyer without a public prosecutor's involvement. *See, e.g.*, Meister v. People, 31 Mich. 99, 101-07 (1875) (holding that there is no longer a right to private prosecution); State *ex rel.* Wild v. Otis, 257 N.W.2d 361, 365 (Minn. 1977) (same); State v. Harrington 534 S.W.2d 44, 49-50 (Mo. 1976) (en banc) (same); People v. Calderone, 573 N.Y.S.2d 1005, 1007 (Crim. Ct. 1991) (same). But some states continue to permit privately paid attorneys to be the lead or secondary prosecutor if the public prosecutor approves. *See, e.g.*, N.J. CT. R. 3:23–9(d), 7:8–7(b); State v. Harton, 296 S.E.2d 112, 113 (Ga. Ct. App. 1982) (stating that a private party is allowed to prosecute only with the state's approval); State v. Moose, 313 S.E.2d 507, 512-13 (N.C. 1984) (stating that public prosecutor must remain in continuous control of the case); State v. Best, 186 S.E.2d 1, 3-4 (N.C. 1972) (same); Cantrell v. Commonwealth, 329 S.E.2d 22, 24-27 (Va. 1985) (holding that private attorneys may assist prosecution with permission of the court and the commonwealth attorney); *see also* 63C AM. JUR. 2D *Prosecuting Attorneys* § 12 (2017) (discussing state authority permitting private attorneys to assist public prosecutors); *cf.* Erikson v. Pawnee Cty. Bd. of Cty. Comm'rs, 263 F.3d 1151, 1154 (10th Cir. 2001), *cert. denied*, 535 U.S. 971 (2002) (holding that there was no due process violation because the private attorney assisting the prosecution did not "control . . . critical prosecutorial decisions").

80. *See* Samuel Becker, *Judicial Scrutiny of Prosecutorial Discretion in the Decision Not to File a Complaint*, 71 MARQ. L. REV. 749, 753-56 (1988).

81. *See infra* note 83 and accompanying text.

82. *See infra* note 83 and accompanying text.

83. *See, e.g.*, COLO. REV. STAT. § 16-5-209 (2017) ("The judge of a court having jurisdiction of the alleged offense, upon affidavit filed with the judge alleging the commission of a crime and the unjustified refusal of the prosecuting attorney to prosecute any person for the crime, may require the prosecuting attorney to appear before the judge and explain the refusal. If . . . the judge finds that the refusal of the prosecuting attorney to prosecute was arbitrary or capricious and without reasonable excuse, the judge may order the prosecuting attorney to file an information and prosecute the case or may appoint a special prosecutor to do so."); MICH. COMP. LAWS § 767.41 (2017) ("[I]f,

In one sense, this procedure looks familiar. It is a classic structure of checks and balances on the government's decision about a criminal charge—a decision in which alleged victims have a direct, substantial interest, in addition to the generic public interest in criminal law enforcement. On the other hand, this scheme is radical, because U.S. judges and legislatures normally grant extreme deference to prosecutors.[84] And judging from appellate reports, it seems that courts may have continued that tradition under these statutes. There is little published evidence of courts using this statutory power to overrule prosecutors. It may be that they are presented with few plausible challenges to prosecutors' declination decisions. But it is also the case that, as they do in the context of dismissals in the interest of courts, appellate courts direct trial judges to give great deference to prosecutors when exercising this power to second-guess non-charging decisions.[85]

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upon examination, the court is not satisfied with the [prosecution's] statement, the prosecuting attorney shall be directed by the court to file the proper information and bring the case to trial."); NEB. REV. STAT. § 29-1606 (2017) ("[I]f, upon such examination, the court shall not be satisfied with the [prosecution's] statement, the county attorney shall be directed by the court to file the proper information and bring the case to trial."); PA. R. CRIM. P. 506(B)(2) (requiring prosecutors to give reasons for declining to prosecute a criminal complaint filed by a private party and permitting "the affiant [to] petition the court of common pleas for review of the decision"); *see also* State *ex rel.* Clyde v. Lauder, 90 N.W. 564, 569 (N.D. 1902) ("[T]he more modern rule, and that adopted in this state, is the reverse of that at common law. In this state, while the prosecutor may file with the court his reasons for not filing an information . . . it is the province of the court to determine the ultimate question whether the case shall be prosecuted or dismissed."); *cf.* Olsen v. Koppy, 593 N.W.2d 762, 765-67 (N.D. 1999) (citing *Lauder* 90 N.W. 564 with approval). *See generally* Becker, *supra* note 80 (discussing Wisconsin law). By contrast, under federal separation of powers doctrine, courts cannot compel prosecutors to prosecute a case. *See* United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n, 228 F. Supp. 483, 489-90 (S.D.N.Y. 1964) ("Even were leave of Court to the dismissal of the indictment denied, the Attorney General would still have the right to . . . in the exercise of his discretion, decline to move the case for trial. The Court in that circumstance would be without power to issue a mandamus or other order to compel prosecution of the indictment, since such a direction would invade the traditional separation of powers doctrine.").

84. Generally victims have no standing to challenge non-prosecution decisions. *See* Linda R.S. v. Richard D., 410 U.S. 614, 616-19 (1973) (rejecting private plaintiff's challenge on federal equal protection grounds to state policy of prosecuting only married men for failures to pay child support, and concluding that "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another"); *see also* Leeke v. Timmerman, 454 U.S. 83, 86-87 (1981) (extending *Linda R.S.* to hold that private citizens have no "cognizable interest" in process by which magistrates decide whether to issue warrants on criminal complaints); *cf.* Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379-83 (2d Cir. 1973) (rejecting purported crime victims' request that court order prosecutors to charge); Malley v. Lane, 115 A. 674, 676 (Conn. 1921) (stating that prosecution is controlled exclusively by public officials and victims have no standing to challenge); State v. Krotzer, 548 N.W.2d 252, 254-55 (Minn. 1996) (holding that absent evidence of selective or discriminatory intent or abuse of prosecutorial discretion, the judiciary has no power to interfere with prosecutorial charging authority).

85. *See* Genesee Cty. Prosecutor v. Genesee Circuit Judge, 215 N.W.2d 145, 147 (Mich. 1974) (implying that judges should defer to prosecutor requests to dismiss absent clear reasons not to); *see also* People v. Morrow, 542 N.W.2d 324, 326-28 (Mich. Ct. App. 1995) (holding that the

2. Indirect Supervision when Prosecutors Decline to Charge

Aside from the handful of states that authorize judicial review of prosecutors' decisions not to charge, courts in other states have some capacity to respond to prosecutors' decisions not to charge through bar discipline or similar supervisory authority. Problematic prosecutorial conduct tends to take two forms—either a prosecutor consistently refuses to enforce certain types of offenses, or a prosecutor refuses to charge in specific cases for reasons that appear plainly unfounded. In either scenario, state law sometimes empowers courts to suspend a local prosecutor from his position or remove him from office altogether.[86] In the wake of such cases, judges may also be able to appoint a substitute attorney to prosecute specific criminal charges.[87] Elsewhere, the governor or attorney general can take over a case from a local prosecutor.[88] A separate strategy is that state judges can use professional disciplinary rules as a basis for looking into and responding to prosecutorial abuse of charging discretion.[89]

III. PLEA BARGAINING AND JUDICIAL AUTHORITY TO ASSURE JUST CRIMINAL JUDGMENTS

Reviewing prosecutors' decisions to charge or not to charge in light of public policies and resources is only one aspect of criminal prosecution. The judicial role is on stronger legal footing after the

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decision whether to dismiss rape charge after complainant recanted is in prosecutor's discretion).

86. *See, e.g.*, State *ex rel.* Johnston v. Foster, 3 P. 534, 537 (Kan. 1884) (stating that public prosecutor who neglects to perform his duties can be removed from office); State *ex rel.* McKittrick v. Graves, 144 S.W.2d 91, 97-98 (Mo. 1940) (removing elected local prosecutor from office for failing to prosecute certain offenses and noting that "a prosecuting attorney may not close his eyes to notorious law violations"); State *ex rel.* McKittrick v. Wymore, 132 S.W.2d 979, 988 (Mo. 1939) (removing elected local prosecutor from office for failing to prosecute certain offenses); *In re* Voss, 90 N.W. 15, 19-22 (N.D. 1902) (suspending local attorney for declining to enforce gambling offenses and noting that "the state's attorney's failure to act in such cases is not excused on the ground that public sentiment is hostile to the enforcement of the law, or that convictions are difficult to obtain on account of such sentiment").

87. *See, e.g.*, N.D. CENT. CODE § 11-16-06 (2017) (stating that when "the state's attorney has refused or neglected to perform any of the duties prescribed in [the code] . . . . the judge shall . . . [a]ppoint an attorney to take charge of such prosecution").

88. In New York, the governor has discretion to order the State Attorney General to take over a prosecution from a locally elected prosecutor. *See* Johnson v. Pataki, 691 N.E.2d 1002, 1013-15 (N.Y. 1997) (citing N.Y. CONST. art. IV, § 3; and then citing N.Y. EXEC. LAW § 63(2) (McKinney 2017)).

89. *See* Samuel J. Levine, *The Potential Utility of Disciplinary Regulation as a Remedy for Abuses of Prosecutorial Discretion*, DUKE J. CONST. L. & PUB. POL'Y, Dec. 2016, at 1, 7-11. *See generally* Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143 (2016).

prosecutor's charging document has been filed and the court thus has jurisdiction.[90] Holding aside the trial process that is relevant to only a small percentage of criminal cases and in which juries often have the primary decision-making role, the question is how judges carry out their responsibility "to do justice in criminal prosecutions"[91] that are resolved by party-negotiated dispositions. The short answer is that judges have relatively little legal basis for policing the fairness of party *negotiation* tactics—in particular, prosecutors' tactical conduct—in the plea bargaining process. The U.S. Supreme Court has sharply constrained any basis in federal constitutional law for active judicial oversight of attorney behavior in plea bargaining, and the law in many states is little different.[92] But judges retain the final word on whether to accept plea bargains proposals offered by the parties.[93] They can reject those proposals as unjust or inconsistent with the public interest.[94] They also have responsibility for assuring a proper legal and factual basis for a judgment based on a guilty plea, although judicial inquiry into those grounds is often in practice more modest than it could be.[95] The remainder of this Part fleshes out this basic picture.[96]

A. Constitutional Bases for Judicial Oversight of Plea Negotiations and Agreements

One might think that constitutional due process doctrine gives courts a basis for actively scrutinizing the fairness of plea agreements as well as prosecutors' bargaining tactics employed to reach those agreements. Nominally, it does. In *Santobello v. New York*, the U.S. Supreme Court concluded that there were constitutional limits on plea bargaining practice.[97] Negotiated guilty pleas are constitutionally permissible, but due process principles "presuppose fairness in securing agreement between an accused and a prosecutor."[98] Courts must ensure that plea bargains are "attended by safeguards to insure the defendant what is reasonably due in the circumstances."[99] Courts should "vacate a

90. Once trial begins, judges have unreviewable power—as a matter of double jeopardy doctrine—to *acquit* defendants of some or all charges even before the prosecution has presented all of its evidence. *See* Fong Foo v. United States, 369 U.S. 141, 143 (1962).

91. United States v. Nixon, 418 U.S. 683, 707 (1974).

92. *See infra* Part III.A.

93. *See infra* Part III.B.

94. *See infra* Part III.B.

95. *See infra* Part III.B.

96. *See infra* Part III.A–B.

97. Santobello v. New York, 404 U.S. 257, 260-63 (1971).

98. *Id.* at 261.

99. *Id.* at 262.

plea of guilty shown to have been unfairly obtained."[100] *Santobello* strongly suggested that judges have an affirmative obligation to ensure the fairness of plea bargaining.[101]

Following *Santobello*, federal courts began to define due process requirements in this context more specifically, "both to protect the plea bargaining defendant from overreaching by the prosecutor and to insure the integrity of the plea bargaining process."[102] Courts examined prosecutorial conduct to ensure that they met the "most meticulous standards of both promise and performance . . . in plea bargaining."[103] Some required prosecutors to create records of their discretionary decisions in order to give courts a basis for review. For example, when prosecutors promised that they would consider mitigating factors before making their sentencing recommendation, the Seventh Circuit required that "the Government's evaluation of the specified mitigating factors must be set forth in the record at the time of sentencing" even though that "evaluative function [is] normally performed internally within the office of the prosecutor."[104] Other courts supervised prosecutors' performance in similar ways, such as requiring supporting arguments from prosecutors on sentencing recommendations in an effort to ensure promises were not fulfilled only pro forma or half-heartedly.[105] Courts needed prosecutorial decision making to be on the record so judges could confirm the government fulfilled its promises.[106]

Courts also took *Santobello*'s statement that guilty pleas must be fairly obtained to mean that prosecutors should be held to higher standards in plea bargaining than private parties are in ordinary contract

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100. *Id.* at 264 (Douglas, J., concurring) (quoting Kercheval v. United States, 274 U.S. 220, 224 (1927)).

101. *Id.* at 262-63.

102. *See* United States v. Bowler, 585 F.2d 851, 854 (7th Cir. 1978).

103. *Id.* (quoting Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973)); *see also* Palermo v. Warden, 545 F.2d 286, 296 (2d Cir. 1976) ("[F]undamental fairness and public confidence in government officials require that prosecutors be held to 'meticulous standards of both promise and performance.'" (quoting *Correale*, 479 F.2d at 947)).

104. *Bowler*, 585 F.2d at 854.

105. *See* Geisser v. United States, 513 F.2d 862, 870-72 (5th Cir. 1975) (ordering prosecutors to make strong recommendations to the Parole Board as well as to the Department of State against a defendant's extradition to fulfill promises made in a plea bargain); United States v. Brown, 500 F.2d 375, 377-78 (4th Cir. 1974) (holding that when the prosecutor promised to recommend a particular sentence, the mere half-hearted recitation of the recommended sentence without reasons for supporting it breached the plea agreement); *Correale*, 479 F.2d at 947 ("[T]he most meticulous standards of both promise and performance must be met by prosecutors engaging in plea bargaining.").

106. *Bowler*, 585 F.2d at 854-55 (holding that judges must be able "to ascertain whether or not the Government had in fact performed the promised evaluation and it is not the privilege of the Government to make the determination as to whether or not it has honored its promise").

negotiations.[107] While offers are not ordinarily enforceable before acceptance in ordinary contract settings, some courts concluded that due process required that prosecutors could not withdraw a clear plea bargain offer before a defendant had a fair chance to accept it.[108] Even more importantly, courts specified fairness requirements for the prosecutorial practice at the heart of plea bargaining: charge manipulation. The Sixth Circuit Court of Appeals, for example, required prosecutors to give reasons justifying new charges they added after a defendant rejected a proposed guilty plea agreement.[109]

The U.S. Supreme Court eventually shut down the Federal Constitution as a basis for many of these ways that judges could oversee the fairness of plea negotiation practices.[110] It expressly overturned the Sixth Circuit's holding that courts could review prosecutorial reasons for charging in the course of plea negotiations.[111] It tied the constitutional law of plea negotiations closely to the law of private contract negotiations, and it broadly discouraged courts from scrutinizing either prosecutors' motives and justifications or the substantive fairness of plea agreements. Most states seemed to have taken the Supreme Court's lead in the interpretation of their own state constitutions.[112] As a result, constitutional law provides scant basis for judicial oversight of prosecutors' charging decisions or hardball tactics in plea negotiations. Judicial power is clearly greater, however, with respect to the substantive content of proposed plea bargains.

B. Sub-Constitutional Power to Assure Plea Bargains Serve the Public Interest

In accord with their fundamental responsibility to assure justice in criminal prosecutions, judges must approve plea bargains before

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107. *See* Cooper v. United States, 594 F.2d 12, 15-19 (4th Cir. 1979).

108. *Id.* In *Cooper*, the prosecutor offered to dismiss three of four charges in exchange for defendant's guilty plea and cooperation in other cases. *Id.* at 15. The defense counsel quickly met with his client and called to accept the offer four hours after it was extended, but during that time, a supervising prosecutor had vetoed the offer and so the office refused to abide by it. *Id.* The court held that the offer was enforceable. *Id.* at 19. Private contract law generally would not enforce an offer before acceptance, absent defendant's detrimental reliance on the agreement. *Id.* at 15-17. English law has a comparable rule that enforces some prosecution promises to victims to charge, or promises to defendants *not* to charge. *See* ANDREW L-T CHOO, ABUSE OF PROCESS AND JUDICIAL STAYS OF CRIMINAL PROCEEDINGS 64-68 (2d ed. 2008).

109. Hayes v. Cowan, 547 F.2d 42, 44-45 (6th Cir. 1976), *overruled by* Bordenkircher v. Hayes, 434 U.S. 357 (1978).

110. *Bordenkircher*, 434 U.S. at 362-65.

111. *Id.*

112. *See, e.g.*, People v. Rivera, 179 Cal. Rptr. 384, 389-90 (App. 1981); State v. Killam, 122 P.3d 439, 442-43 (Mont. 2005).

entering judgments based upon them. Criminal procedure rules emphasize two prerequisites for judicial acceptance of guilty pleas: the voluntariness of the defendant's plea, and a "factual basis" for the plea.[113] But judges have broader implicit authority to approve or reject party-negotiated guilty pleas based on their independent determination that the proposed disposition is inconsistent with the public interest.[114] This power amounts to a check on prosecutorial charging decisions, but of a distinctly limited sort. Perhaps more importantly, a significant minority of states grant judges the means to exercise informal influence with the parties as they negotiate a proposed non-trial disposition.[115] In recent years, judges in some states have taken up this more active role, which has the clear support of policy advocates and professional organizations such as the American Bar Association.[116]

1. Judicial Power over Charges at the Guilty-Plea Stage

The judicial power to dismiss charges in the interest of justice that exists in one-third of the states extends to the plea bargain or guilty-plea stage.[117] In addition, judges in all jurisdictions have inherent authority to reject guilty pleas as inconsistent with the public interest, although there are practical as well as customary limits on the exercise of this power.[118] As a matter of custom, judges tend to defer to dispositions that both parties endorse.[119] As a practical matter, judges can reject plea bargains and offer reasons for doing so that provide guidance to—and thus influence—the parties on the terms of a disposition that the court would find acceptable.[120] But they generally cannot of their own accord adjust charges to which they will accept a guilty plea.[121] It is no surprise that judges cannot demand or file on their own a more serious charge than those that prosecutors have filed. But judges are also often explicitly

113. *See, e.g.*, FED. R. CRIM. P. 11(b)(2)–(3); MICH. CT. R. 6.302(C)–(D) (2017).

114. *See, e.g.*, United States v. Walker, 2:17-cr-00010, 2017 WL 2766452, at *1, *11-13 (S.D. W. Va. June 26, 2017) ("It is the court's function to prevent the transfer of criminal adjudications from the public arena to the prosecutor's office for the purpose of expediency at the price of confidence in and effectiveness of the criminal justice system. . . . Because I FIND that the plea agreement proffered in this case is not in the public interest, I REJECT it."); State v. Conger, 797 N.W.2d 341, 352-57 (Wis. 2010) (rejecting a proffered plea bargain as not consistent with the public interest and noting various factors courts consider in that decision).

115. *See infra* notes 129-50 and accompanying text.

116. *See infra* notes 129-50 and accompanying text.

117. *See infra* Part II.B.2.

118. *See infra* Part II.B.2.

119. *See* Albert W. Altschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1064-66 (1976).

120. *See infra* notes 141-47 and accompanying text.

121. *See infra* notes 141-47 and accompanying text.

barred in the other direction as well—state law may prohibit judges from achieving a more lenient outcome without prosecutors' consent by accepting a guilty plea for lesser-included charges.[122]

This limitation is one contribution to the more general *asymmetrical* structure of judicial power over charges in this setting. Aside from the judicial power in some states to dismiss a charge in the interest of justice, judges have more discretion to reject charges in proposed plea bargains on public-interest grounds because they are too *lenient* than because they are too *harsh*. This is because prosecutors' initial charging decisions set an implicit baseline for judicial authority regarding guilty pleas (they set no such baseline for prosecutors themselves, who are generally free to file additional charges). Judges can and do reject plea bargains because the parties have proposed to dismiss too many charges (or the wrong charges) as part of a negotiated plea deal.[123] That is, they can rule that the bargain is too lenient for the court to approve, judged against the initial charging document and the evidence in support of it. But judges are on much thinner ground if they want to reject bargains as against the public interest because a defendant has agreed to plead guilty to all filed charges, even if the judge views those as too severe in light of the defendant's conduct.[124] To describe the law of judicial authority in this context differently, judges' power over plea bargains is generally structured more as a check against prosecutors departing from their initial charging decision in the direction of leniency than as a check against unduly severe charging and plea bargain decisions by prosecutors.[125]

Again, state laws vary on this point, but Michigan provides a fairly strong example of this model. Michigan is not among the states that give judges discretion to dismiss charges in the interest of justice, so judges lack that tool for preventing overly severe outcomes.[126] Michigan judges are also barred from accepting guilty pleas to lesser offenses than those

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122. *See, e.g.*, MICH. CT. R. 6.301(D) ("The court may not accept a plea to an offense other than the one charged without the consent of the prosecutor.").

123. *See infra* notes 125-28 and accompanying text.

124. Judicial power over *sentencing* is different. Depending on the specifics of sentencing law, judges may or may not have discretion to determine the sentence. At least where discretion exists for the charge, judges can reject a plea bargain with specific sentencing term because it is either too severe or too lenient.

125. The one qualification to that view is that judges also lack a means to respond to cases in which they think prosecutors filed excessively lenient charges in the first place to which a defendant has agreed to plead guilty. That amounts to a limit on judges' power to prevent an excessively lenient disposition, although it is a limit that really relates to initial charging stage, discussed in Part II, rather than the guilty plea stage.

126. *See* People v. Stewart, 217 N.W.2d 894, 897 (Mich. Ct. App. 1974) (stating that there is no inherent judicial power to dismiss charges).

charged without the prosecutor's agreement.[127] On the other hand, Michigan is one of the small number of states that gives judges a more intrusive form of authority over prosecutorial discretion: judges have the power to order prosecutors to bring a case to trial if the judge is not satisfied with the prosecutor's reasons for deciding not to prosecute.[128] Together, then, this suggests that Michigan policymakers are not averse to judges playing a substantive role in charging. Instead, they are averse to the risk of undue leniency from either judges or prosecutors. To guard against that, they have designed a system in which the interaction of executive and judicial power operates as a check against one branch opting for unduly lenient charging options.

2. Informal Judicial Influence over Charge Adjustments in Plea Bargains

In the guilty-plea stage, judges' formal power over charges tends to be quite limited in most states.[129] But one avenue for informal judicial power seems be growing, at least moderately. A significant number of states (including Michigan) have given judges a means to participate in the plea bargaining process that permits them to influence the justice of negotiated outcomes.[130] The traditional rule bars judicial involvement in the parties' plea negotiation process, and many states continue to adhere to that policy.[131] But a notable number of states have now abandoned that rule in favor of granting judges explicit authority to play an active role in the bargaining stage.[132]

State law varies on the precise terms of judicial intervention. In Arizona, "[a]t the request of either party, or sua sponte, the court may, in its sole discretion, participate in settlement discussions."[133] A similar North Carolina statute provides that "[t]he trial judge may participate in the discussions."[134] Oregon law grants judges statutory comparable authority to "participate in plea discussions . . . . [w]ith the consent of the parties and upon receipt of a written waiver executed by the

127. MICH. CT. R. 6.301(D).

128. MICH. COMP. LAWS § 767.41 (2017).

129. *See* Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 OHIO ST. L.J. 565, 573-77.

130. *See id.* at 594-95.

131. *See id.* at 573-77.

132. *See id.* at 578.

133. ARIZ. R. CRIM. P. 17.4(a) ("The trial judge shall only participate in settlement discussions with the consent of the parties. In all other cases, the discussions shall be before another judge or a settlement division.").

134. N.C. GEN. STAT. § 15A-1021(a) (2016).

defendant," as well as to comment on the parties' proposed bargains.[135] Rules in Idaho, Massachusetts, Minnesota, Montana, and Vermont are much the same.[136] Other states, such as Missouri, expand the judicial role a bit more modestly.[137] Judges remain excluded from participating in the parties' plea *discussions*, but once the parties reach a consensus the judge "may discuss the agreement with the attorneys including any alternative that would be acceptable."[138] California and Maryland law are similar.[139]

Evidence suggests that judges in some jurisdictions have taken up this opportunity in ways that allow them to meaningfully shape case outcomes. Nancy King and Ron Wright recently conducted an extensive survey of judicial practice in several states that authorize judicial involvement in the pretrial and plea negotiation process.[140] They found that many judges mandate that parties meet early in the pretrial process to discuss discovery and possible plea agreements, and in many cases, judges were actively involved in discussing settlement options.[141] Perhaps the primary utility of this judicial survey was to improve the "efficiency" of the adjudication process, generally measured by how quickly cases were resolved and cleared from court dockets. But lawyers and judges reported that judges "add[ed] new charging and sentencing ideas" that influenced prosecutors to adjust charges and otherwise shaped the substantive terms of plea agreements and case outcomes.[142] Many judges have recognized that "in talking with the parties, they would suggest dispositions or conditions of probation that neither party

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135. OR. REV. STAT. § 135.432(1)(a), (2), (5) (2015). The parties can also request participation of a judge other than the one who would preside at trial. *Id.* § 135.432(1)(b).

136. *Compare* IDAHO CRIM. R. 11(f)(1), *and* MASS. R. CRIM. P. 12(b)(2) ("The judge may participate in plea discussions at the request of one or both of the parties if the discussion are recorded and made part of the record."), *with* MINN. R. CRIM. P. 15.04(3), *and* MONT. CODE ANN. § 46-12-211(2) (2015), *with* VT. R. CRIM. P. 11(e)(1) (allowing the court to participate in plea discussions if such "proceedings are taken down by a court reporter or recording equipment").

137. *See* MO. R. CRIM. P. 24.02(d).

138. *Id.* One might question that this is a distinction with little difference once the parties present *some* proposed disposition. After that point, the judge is free to discuss "any alternative." *See id.*

139. *See* People v. Clancey, 299 P.3d 131, 138-40 (Cal. 2013) (implying that trial judges should wait until the parties have negotiated a proposed bargain before offering a view about the appropriate sentence based on current information); *see also* MD. CODE ANN., CRIM. PROC. § 4-243(c)(1) ("If a plea agreement has been reached . . . the defense counsel and the State's Attorney shall advise the judge of the terms of the agreement when the defendant pleads. The judge may then accept or reject the plea . . . .").

140. Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 337-56 (2016).

141. *Id.* at 338-43.

142. *Id.* at 329, 364, 366-68.

had thought about, but that they believed were appropriate for the particular case."[143] In some localities, judges met with the parties together or separately to facilitate negotiations.[144] When they deemed it necessary to achieve a just plea agreement, the judge's aim would include "trying to move the DA's position" or convincing the state to drop a charged sentence "enhancement or substitut[e] a charge that would permit the desired disposition."[145] Prosecutors reported that judges played a useful role in identifying weaknesses in the prosecution's case that led them to adjust charges or other plea bargain terms.[146] Judges themselves "noted that their involvement can help to reach a more just resolution when they are concerned that inexperienced defense attorneys are going astray."[147]

This kind and degree of judicial involvement in plea bargaining appears still to be the minority approach across state criminal justice systems.[148] But the American Bar Association recommends rules that give judges a more active managerial role in the pretrial process, notably by mandating an early-stage conference with the parties,[149] and scholarly commentators are nearly unanimous in endorsing more substantive judicial involvement to improve the accuracy and justice of convictions based on plea agreements.[150] More to the point, this informal mode of influence, through a managerial or facilitative role that addresses the efficiency as well as the justice of adjudicative process, is the approach to judicial activism in criminal charging to which American policymakers—judges, legislators, and rule drafters—are most amenable. The most promising and politically (or culturally) feasible

143. *Id.* at 368.

144. *Id.* at 351-55.

145. *Id.* at 352-53 (citation omitted).

146. *Id.* at 367-68.

147. *Id.* at 367.

148. For a survey and assessment of state law on this point, see Batra, *supra* note 129, at 572-79, 573 nn.53-55, 574 nn.56-64, 575 nn.65-72, 576 nn.73-78, 577 nn.79-85, 578 nn.86-92, 579 nn.93-98, 580 nn.99-100.

149. *See* HOUSE OF DELEGATES, AM. BAR. ASS'N, RECOMMENDATION 102D, at 2 (2010).

150. *See, e.g.*, King & Wright, *supra* note 140, at 392-96; Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2042-52 (2006) (urging revision of federal criminal procedure rules to expand discovery, reduce waivers of procedural rights, and require judges to conduct more rigorous plea hearings); Susan R. Klein, *Monitoring the Plea Process*, 51 DUQ. L. REV. 559, 564-87 (2013) (recommending, inter alia, required pre-plea discovery conferences); Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 459-61 (2008) (doubting whether judicial practices fully address procedural unfairness in the context of plea bargaining); Sandra Guerra Thompson, Daubert *Gatekeeping for Eyewitness Identification*s, 65 SMU L. REV. 593, 640-45 (2012) (urging that judges conduct pretrial hearings on the reliability of certain kinds of evidence); Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. CRIM. L. & CRIMINOLOGY 329, 375-94 (2012) (same).

route to the judiciary providing some degree of meaningful oversight of prosecutorial charging discretion is unlikely to come through direct judicial review of prosecutors' charging decisions, or through judges' substantial exercise of their power—where it exists—to dismiss charges in the interest of justice. As a matter of custom or tradition, most formal judicial authority that responds directly to prosecutorial charging decisions will be sparingly used. On the other hand, both judges and prosecutors (as well as defense attorneys) seem much more willing to accept judges in a facilitative, collaborative role in which they provide information and independent evaluations that persuades prosecutors of the wisdom of adjusting charging decisions.

IV. CONCLUSION

In sum, the judiciary has some authority and capacity to play a supervisory role in criminal charging and plea negotiations. State rules are quite diverse in defining the parameters of judicial supervisory power over charging, but in the main, as a formal matter, that authority is relatively weak. That weakness is in part a function of legislative policymaking, but it is also in good part because courts themselves—the U.S. Supreme Court, state appellate courts, and trial courts—have chosen to make it that way. In the aggregate, U.S. courts have embraced the role of the "passive judiciary"[151] to a greater degree than constitutions or legislation has required, and—for many states, at least—to a greater degree than they did in earlier eras. That tradition and policy preference notwithstanding, judges clearly have the professional and institutional capacity to play a greater role in assuring justice in criminal charging, even if they have collectively contributed to the diminution of their own legal capacity for doing so. But avenues for that greater use of that power remain in the laws of many state criminal justice systems, and the need for judges to take more actively fulfill their "primary constitutional duty . . . to do justice in criminal prosecutions"[152] will endure in all jurisdictions.

151. *See generally* GOLDSTEIN, *supra* note 6 (suggesting that judges should become more involved in the plea bargaining process).

152. *See* United States v. Nixon, 418 U.S. 683, 707 (1974).