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## Fictional Pleas

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# FICTIONAL PLEAS

THEA JOHNSON\*

*A fictional plea is one in which a defendant pleads guilty to a crime he has not committed, with the knowledge of the defense attorney, prosecutor, and judge. With fictional pleas, the plea of conviction is detached from the original factual allegations against the defendant. As criminal justice actors become increasingly troubled by the impact of collateral consequences on defendants, the fictional plea serves as an appealing response to this concern. It allows the parties to achieve parallel aims: the prosecutor holds the defendant accountable in the criminal system, while the defendant avoids devastating noncriminal consequences. In this context, the fictional plea is an offshoot of the “creative plea bargaining” encouraged by Justice Stevens in *Padilla v. Kentucky*. Indeed, where there is no creative option based on the underlying facts of an allegation, attorneys must turn to fiction.*

*The first part of this Article is descriptive, exploring how and why actors in the criminal justice system—including defendants, prosecutors, and judges—use the fictional plea for the purposes of avoiding collateral consequences. This Article proposes that in any individual case, a fictional plea may embody a fair and just result—the ability of a defendant to escape severe collateral consequences and a prosecutor to negotiate a plea with empathy.*

*But this Article is also an examination of how this seemingly empathetic practice is made possible by the nature of the modern adversarial process in which everything is a bargaining chip. What does it mean that all parties in the criminal justice system agree to allow a lie to become fact? What does the fictional plea tell us about the role of truth in our adversarial structure? Faced with the moral quandary of mandatory collateral consequences, the system adjusts by discarding truth and focuses solely on resolution. In this sense, fictional pleas serve as a case study in criminal justice problem solving. The fictional plea lays bare the soul of an institution where everything has become a bargaining chip: not merely collateral consequences, but truth itself. Rather than a grounding principle, truth is nothing more than another factor to negotiate around.*

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## INTRODUCTION

A teenage defendant faces a felony charge for a single instance of unlawful sexual contact with a minor.<sup>1</sup> If convicted, he would be on the sex offender registry for the rest of his life. The defendant is young and without a criminal record. His defense attorney wants to make sure that his record remains clear and that he avoids sex offender registration. There are many reasons the defense attorney wants to avoid registration, but the most important one is that being on the sex offender registry will exclude the defendant from shelters, group homes, and public housing. The defendant, already struggling to find a place to live, will be totally without options if he ends up with a registrable offense. Sex offender registration is the Russian doll of collateral consequences—consequences are nested inside of other consequences.

The prosecutor is sympathetic to these concerns, but she wants to make sure that the defendant faces some real penalties within the criminal system. This is a serious charge with a victim involved. She also wants to make sure that the defendant is monitored in some way by probation. According to the prosecutor, probation can likely link the defendant to services and help him get on his feet.

The prosecutor and defense attorney—both repeat players in the criminal system, who have worked on many cases together beyond this one—sit down to figure out a solution. The solution will take the form of a negotiated plea bargain—one that, hopefully, avoids a felony record and sex offender registration for the defendant, while imposing meaningful sanctions that satisfy the prosecutor’s goals.

They begin by working backwards. What crimes can the defendant plead guilty to without ending up on the sex offender registry? Nearly all the sex crimes in their state are registrable offenses. They contemplate a plea to assault, but the prosecutor

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1. The story told in the Introduction is based on the author’s interview with a defense attorney. The interviewee was promised anonymity. Because of this, I will not identify the interviewee by name or location.

blanches at the “fiction” of claiming that the victim suffered “bodily injury,” which is one of the statutorily required elements of the offense.

They return to the sex offenses. There is a small subset of misdemeanor sex offenses—under the category of unlawful sexual touching—which are formally sex offenses but do not carry any registration requirements. But misdemeanors are punishable only up to a year. To the prosecutor, this hardly seems like sufficient punishment for the crime, nor will it provide the necessary motivation to the defendant to get help for his problems.

But what about several misdemeanor convictions, which would run consecutively? Under this resolution, the defendant would avoid a felony record and lifetime sex offender registration. The prosecutor would extract a significant sentence, involving monitoring by probation. The problem is that there is only one allegation of sexual misconduct involving the defendant and the victim. Separate misdemeanor pleas would involve an admission of guilt to separate factual allegations. This, however, is a “fiction” that both parties can tolerate.

They agree that the defendant will plead to three misdemeanors. Because these are misdemeanors, which have laxer procedural requirements, there is no local rule of criminal procedure that obligates the parties to put a recitation of the factual basis for the plea into the record. Although the judge looks at the deal with some suspicion, he allows the plea to move forward. The defendant pleads guilty to three counts of a misdemeanor sex offense.

The defendant has entered a fictional plea—a plea bargain agreement in which the defendant pleads guilty to a crime he did not commit, with the consent and knowledge of multiple actors in the criminal justice system—to avoid the profound collateral consequences that would flow from a conviction on his initial charge. In courtrooms across the country, defense attorneys, prosecutors, and judges are allowing plea bargains to charges of conviction, which are completely disconnected from any factual allegations against the defendant. Such pleas are not new. Indeed, they have long been used to avoid strict criminal penalties associated with a particular charge.<sup>2</sup> But in the “era of collateral consequences,”<sup>3</sup> these fictional pleas have found new life.

This is the contrast presented here: descriptively, this Article tells the story of individuals—individual prosecutors, defendants, defense attorneys, and judges—who are carefully tailoring decisions to meet the needs of parties in a particular case. But those individual stories explain something important about how the criminal justice system—as an institution—responds to this mass of cases. Although individual defendants may benefit profoundly from the use of a fictional plea, the fictional plea represents the distillation of a system that has become untethered from ideas of accuracy and truthfulness. The use of fictional pleas asks us to confront difficult questions about truth, prosecutorial power, and the legitimacy of the criminal system.

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2. See *infra* Section I.A.

3. Thea Johnson, *Measuring the Creative Plea Bargain*, 92 IND. L.J. 901, 905–908 (2017) (describing this moment as an “era of collateral consequences,” not because collateral consequences are a new phenomenon but because lawyers, judges, legislatures, and the public have become increasingly aware of the impact of such consequences).

But first, what gives the fictional plea new life at this moment? This Article proposes that such pleas provide defendants and prosecutors an opportunity to meet parallel aims that often cannot be achieved without their use. As the scope of collateral consequences expands,<sup>4</sup> it becomes more difficult to negotiate around such consequences in any given case. There are many criminal cases in which the factual allegations against the defendant only support a single charge or a small universe of charges, which may all carry serious collateral consequences. For instance, most drug offenses are deportable offenses,<sup>5</sup> and nearly all sex crimes now carry sex offender registration requirements.<sup>6</sup> In such cases, the range of disposition options based on the facts of the case is limited. The fictional plea can help expand that range to include more potential resolutions that satisfy the needs of all parties to the negotiation. Specifically, fictional pleas allow prosecutors to hold defendants accountable in the criminal system, while not dooming those same defendants to the devastating collateral consequences that flow from many criminal convictions.

The criminal system has become the first, and often only, place where there is any opportunity for individuals to avoid many of the subsequent, noncriminal sanctions that now attach to convictions. Immigration consequences provide the clearest example. The criminal courts are, as Stephen Lee notes, “de facto immigration courts.”<sup>7</sup> Once a defendant has committed a deportable offense in the criminal system, there are very few ways to escape deportation in the immigration system.<sup>8</sup> The criminal system thus becomes the primary space for the noncitizen defendant to attempt to escape deportation. Much of that work is done through the fictional plea.

Fictional pleas—through minor sleights of hand or outright manipulation of facts or law—avoid deportation and other collateral consequences, while allowing the prosecutor to secure a disposition in the criminal case. In this sense, they are an offshoot of the “creative plea bargaining” encouraged by Justice Stevens in *Padilla v. Kentucky*.<sup>9</sup> Such creative bargaining, which involves negotiating around collateral consequences, is common among the players in the criminal system.<sup>10</sup> Parties often use creative bargaining when the field of plea options based on the facts of the case are limited. Sometimes there are no options available based on the underlying facts of the allegation. In these cases, the attorneys must turn to fiction. This turn to fiction leads to a certain level of collusion among prosecutors and defense attorneys, and even judges, who accept pleas on the record that are unsupported by the factual allegations.

But, as this Article proposes, although fictional pleas can be helpful for individual defendants, and even for judges or prosecutors, who are concerned about the creeping

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4. For a state-by-state guide to potential collateral consequences, see *National Inventory of the Collateral Consequences of Conviction*, COUNCIL ST. GOV'T JUST. CTR., <https://nicc.csgjusticecenter.org> [https://perma.cc/9RGT-JA4P].

5. See *infra* Section I.C.2.

6. See *infra* Section I.C.3.

7. Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553 (2013).

8. See Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 671–80 (2015) (discussing the “unforgiving” nature of U.S. immigration law).

9. 559 U.S. 356, 373 (2010).

10. Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1772–75 (2013); see also Johnson, *supra* note 3, at 119–22.

reach of noncriminal consequences into the realm of criminal law, the fictional plea as a trend symbolizes the criminal justice system's abandonment of truth seeking as a function.

This is the paradox. In individual cases, the fictional plea represents a legitimate response to the criminal system's encroachment into other areas of the law, and the role of the prosecutor as "gatekeeper"<sup>11</sup> to the immigration system, as well as the systems that regulate public housing, student aid, and public benefits. A fictional plea can save a defendant from being deported from the country, losing his job, or becoming a lifetime sex offender. And yet, as a trend within the criminal system, the fictional plea exemplifies what Julia Simon-Kerr has termed "systemic lying," coordinated lying among many actors in the criminal justice system when there is a "strong and collective dissonance between moral beliefs and legal prescriptions."<sup>12</sup> Fictional pleas function in this dissonant space.

Fictional pleas have become a necessary protection not only for defendants but also for those prosecutors who resist using criminal law as an enforcement arm in noncriminal arenas. Legislatures have created circumstances in which prosecutors feel compelled to assist defendants in securing "safe" pleas. These deals, like most plea bargains, occur under the radar. But increasingly district attorneys are proclaiming their resistance to punishing defendants twice—once for the criminal case, and another time by collateral consequence. Prosecutors are using their discretion to protect certain defendants as a form of protest against what many see as an unfair discrepancy between the penalties imposed on noncitizens versus citizens<sup>13</sup> and on defendants who will be crippled by noncriminal sanctions.

Part I of this Article describes the fictional plea in practice. In Section I.A, the Article explores the varied uses of fictions in plea bargaining and then defines the specific forms of the fictional plea in the context of collateral consequences. Each subsection of Section I.B then discusses how each party to the plea bargain—defendants, prosecutors, and judges—uses and benefits from the fictional plea. In particular, this Section focuses on the use of fictional pleas by a new sort of progressive district attorney emerging through the country, one who is open to seeking "immigration-safe" pleas for defendants. Section I.C explains how fictional pleas function as a safety valve in three types of cases: misdemeanors, drug cases, and sex offenses. For each, the Article explores why and how the fictional plea has taken hold and what it achieves for the defendant charged in these sorts of cases. Part II turns away from description of the practice and argues that the development of the

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11. Lee, *supra* note 7, at 553 (describing prosecutors as the "gatekeepers" to the immigration courts).

12. Julia Simon-Kerr, *Systemic Lying*, 56 WM. & MARY L. REV. 2175, 2179 (2015).

13. See *infra* Section I.B.2; see also Corinne Ramey, *Some Prosecutors Offer Plea Deals to Avoid Deportation of Noncitizens*, WALL ST. J. (July 7, 2017, 9:53 AM), <https://www.wsj.com/articles/some-prosecutors-offer-plea-deals-to-avoid-deportation-of-noncitizens-1499419802> [<https://perma.cc/SVP5-WNQW>] (noting that Cyrus Vance, District Attorney for Manhattan, justified his new Collateral Consequences Counsel position by proclaiming "I submit today that if two New Yorkers commit the same low-level violation, and the practical consequences for one of the New Yorkers is a ticket or a couple of days in jail, while the consequences for the other New Yorker is to be taken away from her family and shipped off to a foreign country, that is not equal justice under the law").

fictional plea in response to mandatory collateral consequences is the natural end point of a system that has become untethered from its truth-seeking function. Section II.B also explores what these present fictions mean for the future “truths” they create—namely, the creation of a record of conviction—and argues that in avoiding one set of collateral consequences, the parties unwittingly put into play a new set of consequences that may have a similar or worse impact on the defendant. The Article concludes by offering some thoughts on alternative responses—beyond the fictional plea—to the injustices levied by mandatory collateral consequences.

## I. FICTIONAL PLEAS IN PRACTICE

### A. History and Terminology

To define fictional pleas, this Article borrows a definition from a critic of the practice. A fictional plea is:

a guilty plea, a factual admission of the elements of a crime . . . an ‘admission of guilt for the purposes of the case,’ entered by a defendant for an offense that the defendant did not commit, and that all the parties in the case know the defendant did not commit.<sup>14</sup>

Fictional pleas involve fictions of both fact and law. Most fictional pleas require the parties to manipulate or disregard altogether the facts underlying the allegations—this Article refers to these sorts of fictional pleas as “factual fictions.” They start with a factual premise—usually a criminal complaint that is based on police reports, conversations with witnesses, and other evidence of the crime—and they end with a plea that has little to no relation to that initial complaint. In this way, they require the parties to abandon the alleged facts as they search for a resolution to the case.<sup>15</sup> Other types of fictional pleas involve the creation of dispositions that do

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14. This was the definition that Mari Byrne gave to the term “baseless pleas” in her article, *Baseless Pleas: A Mockery of Justice*, 78 FORDHAM L. REV. 2961, 2966 (2010) (footnotes omitted) (citation omitted). Although this Article rejects the term “baseless pleas” in favor of “fictional pleas,” the underlying definition provided by Byrne captures the core of the fictional plea: an agreement by all parties that the defendant will plead to a crime he did not commit. Byrne also uses the term “fictional plea” in her article but defines it instead as “a situation in which a defendant is allowed to plead guilty to a crime that does not exist by criminal statute.” *Id.* at 2967 (footnote omitted). In this Article, such pleas are defined as fictions of law. See *infra* Section I.A.2.

15. It is important to note that this sort of abandonment of the facts is not limited to fictional pleas. Indeed, one sees attorneys ignoring or covering up facts to achieve a particular end, even before the Supreme Court. As Dale Carpenter lays out in his book *Flagrant Conduct*, the real story behind the landmark case of *Lawrence v. Texas* was quite different than the story told by the advocates at the Supreme Court. In fighting against anti-sodomy laws, the lawyers for the petitioners wove a tale of two men in love, sharing a moment of sexual intimacy, which had been interrupted by the state. But as Carpenter discovered, the initial arrest that led to *Lawrence* involved neither love nor sex, but two men who were arrested after a night of drinking and fighting in a small Texas apartment. Fictions surface in the legal system, then, in ways both big and small. DALE CARPENTER, *FLAGRANT CONDUCT: THE STORY OF LAWRENCE*



not actually exist in the law, what this Article refers to as “fictions of law.”<sup>16</sup> These are distinguished from legal fictions, which are operational across the law. Fictions of law serve a one-time purpose: to transform a crime that would carry collateral consequences into one that will not for this defendant, at this moment. Even if fictions of law are used for more than one defendant, they are not transformed into a formal legal fiction.

Examples of each of these types of fictional pleas will be developed in Section I.A.2 below, but to give these bargains context, it is important to understand the antecedents of the practice.

### 1. A Brief Review of Fictions in Plea Bargaining

Fictional pleas are not an invention of the era of collateral consequences, but they are being used in innovative ways to combat the growing reach of collateral consequences. There is both a history and critique of the use of fictions in plea bargaining that began before the increasing awareness of collateral consequences.

There is an argument that plea bargaining itself is a type of fiction. Defendants are often asked at the time they plead guilty to affirm that they were not promised anything in exchange for their plea, even when the plea bargain often *is* a promise of benefits without which the defendant would not agree to plead.<sup>17</sup> In addition, when an innocent person pleads guilty to a crime he did not commit, that plea can rightly be viewed as a fiction.<sup>18</sup> Indeed, Josh Bowers contends that the criminal justice system should categorize the “false plea[]” of an innocent person who nonetheless pleads guilty to a crime as a legal fiction, allowing innocent defendants, like guilty defendants, to make the choice to plead guilty in order to secure the benefits of a plea.<sup>19</sup> Others have argued that plea bargaining in the shadow of mandatory minimums has created an environment in which innocent people regularly plead guilty to crimes they did not commit to avoid the risk of disproportionately long sentences that are required after trial under a mandatory sentencing scheme.<sup>20</sup>

Additionally, many defense advocates condemn prosecutors’ rampant use of low-level violations as a catchall to secure false convictions in weak cases. These violations are seen as a sort of fiction—an easy label to attach to a broad and diverse variety of conduct. In New York, for instance, there has been a long-standing critique of the overuse of pleas to disorderly conduct, a noncriminal violation.<sup>21</sup> Although the

#### V. TEXAS (2012).

16. See *infra* Section I.A.2.

17. Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1170 (2008).

18. *Id.* at 1171–73; see also Anna Roberts, *Conviction by Prior Impeachment*, 98 B.U. L. REV. 1977, 1993–94 (2016) (arguing that “it cannot be taken as a given that a conviction correlates to the commission of a crime” and for that reason it is wrong-headed that witnesses in trials are allowed to be impeached by evidence of prior convictions).

19. *Id.* at 1170.

20. E.g., H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATHOLIC U. L. REV. 63, 75–77 (2011); see also Jed. S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty> [<https://perma.cc/8UN3-SNWR>].

21. Steven Zeidman, *Time to End Violation Pleas*, N.Y.L.J., Apr. 1, 2008, at 2.

disorderly conduct statute covers a range of behaviors, from taking up too much room on the sidewalk to being “unreasonably” loud,<sup>22</sup> it is used as a one-size-fits-all sack for any number of cases to be stuffed into. For example, disorderly conduct is a common plea resolution in cases such as shoplifting and turnstile jumping.<sup>23</sup>

Some might also see echoes of the fictional plea in the process of “fact bargaining,” which allows prosecutors to manipulate the relevant facts of a case to avoid mandatory minimum sentences in a particular case.<sup>24</sup> This practice is typical in federal drug cases where mandatory minimums are triggered by the allegation of certain drug quantities in the indictment.<sup>25</sup> If the parties can agree to change the quantity of drugs listed, they can also change the potential sentence. Of course, that means allowing a defendant who was found with a large amount of cocaine to be formally charged with possessing a much smaller amount. There is an argument that this is not a direct falsehood—if a defendant possessed a hundred grams of cocaine, surely one could say he also possessed ten grams of cocaine. But the practice functions as a maneuver around the law, allowing the parties to tell only part of the

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22. Disorderly conduct is defined in New York as follows:

A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

1. He engages in fighting or in violent, tumultuous or threatening behavior; or
2. He makes unreasonable noise; or
3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or
4. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or
5. He obstructs vehicular or pedestrian traffic; or
6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or
7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.

Disorderly conduct is a violation.

N.Y. PENAL LAW § 240.20 (McKinney 2017).

23. For instance, a local New York City lawyer and former Manhattan prosecutor, who blogs for his law firm’s website, lists a disorderly conduct violation as a typical offer in a shoplifting case involving more than \$100 of goods but less than \$500. Jeremy Saland, *Arrested for Shoplifting (New York Penal Law 155.25 or 165.40): Potential Offers or Deals in Manhattan*, CROTTY SALAND: N.Y. CRIM. LAW. BLOG (Oct. 24, 2010), <https://www.newyorkcriminallawyer-blog.com/2010/10/arrested-for-shoplifting-new-y.html> [https://perma.cc/RTM3-YUWK].

24. Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 120 (2003).

25. This is made clear in a 2013 memo from Attorney General Eric Holder to Assistant U.S. Attorneys that instructed them to decline to charge the quantity of drugs necessary to trigger a mandatory minimum in certain cases where the defendant met a set of stringent criteria. ERIC HOLDER, OFFICE OF ATT’Y GEN., MEMORANDUM TO THE UNITED STATES ATTORNEYS AND ASSISTANT ATTORNEY GENERAL FOR THE CRIMINAL DIVISION 2 (2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf> [https://perma.cc/JU7Z-Z5GL].

full story of the case—the story of ten grams, rather than a hundred. But parties may also swap in and out other facts—agreeing, for instance, to exclude from the formal charges the gun found at the scene or to not find a defendant to be a recidivist, even if he qualifies as one.<sup>26</sup> Fact bargaining has been a regular practice for some time. A study of federal probation officers in 1996 found that “approximately forty percent of probation officers believe that [sentencing] guideline calculations set forth in plea agreements in a majority of cases are not ‘supported by offense facts that accurately and completely reflect all aspects of the case.’”<sup>27</sup>

Understanding the prior usage of fictions in plea bargaining provides some context for the use of fictional pleas, indicating that the term can be read both narrowly and broadly. This Article uses the definition given above—a defendant’s plea of guilty to a crime that all parties agree he did not commit—to discuss this practice.

## 2. Types of Fictional Pleas

This Article will focus on factual fictions. These are pleas in which the defendant pleads guilty to a charge that is not supported by the factual allegations underlying the arrest.<sup>28</sup> The other category, which is found much less frequently, is what I call fictions of law.<sup>29</sup> These are cases where the defendant pleads guilty to a nonexistent

26. See, e.g., *id.* at 2–3 (directing Assistant United States Attorneys to decline to charge the defendant as a recidivist in certain cases).

27. David Yellen, *Probation Officers Look at Plea Bargaining, and Do Not Like What They See*, 8 FED. SENT’G REP. 339, 339 (1996).

28. This Article excludes from this category Alford pleas or pleas of *nolo contendere*, which allow defendants to accept a guilty plea while either actively claiming innocence or not admitting guilt. In these cases, even if the defendant contests his guilt, the initial factual allegations generally support the charge. The *Alford* case itself demonstrates the point. The Supreme Court upheld the plea in *North Carolina v. Alford* because the plea was made knowingly and voluntarily and was supported by a strong factual basis. 400 U.S. 25, 38 (1970); see also *People v. West*, 477 P.2d 409, 419–20 (Cal. 1970) (accepting a plea of *nolo contendere* because “[t]he court may accept a bargained plea of guilty or *nolo contendere* to any lesser offense reasonably related to the offense charged in the accusatory pleading”). In addition, when a defendant enters into an Alford and *nolo contendere* plea, such an agreement is clear from the record. As discussed in greater depth in Section II.B, fictional pleas create a false record for future downstream actors. In this sense, Alford and *nolo contendere* pleas do not fit within the narrow definition of fictional pleas. These pleas have, though, been critiqued for their fictitious nature. See, e.g., Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361 (2003) (arguing that these pleas undermine legal values and community norms); Curtis J. Shipley, *The Alford Plea: A Necessary but Unpredictable Tool for the Criminal Defendant*, 72 IOWA L. REV. 1063 (1987).

29. There are many forms of fictions discussed in this Article. Yet another fiction recently identified by Jessica S. Henry are convictions based on crimes that *never* occurred. Jessica S. Henry, *Smoke but No Fire: When Innocent People are Wrongly Convicted of Crimes That Never Happened*, 55 AM. CRIM. L. REV. 665, 666 (2018) (finding that nearly one-third of exonerations since 1989 involve no-crime convictions). Although this Article will not discuss such fictions here, identifying the many fictional convictions in the criminal system gives some sense of the scope of the issue.

crime, meaning a crime that is not found in the statutes. I call these pleas fictions of law rather than “legal fictions” to denote that they are different from formal legal fictions, a commonly used device within the legal system.<sup>30</sup> Fictions of law are likely more rare because they are both easier for judges to spot and to object to than factual fictions. Even so, fictions of law or pleas to nonexistent crimes can be found in the case law.<sup>31</sup>

The line between factual fictions and fictions of law, however, is flexible. Even given the elasticity of the terms, the definitions here provide a foothold for exploring the nuances of the use of fictions in practice. Because factual fictions are more common—both in practice and in case law—they provide the richest backdrop for study.

So what does a fictional plea look like in the age of collateral consequences? Here is one example recounted by a defense attorney in Washington state<sup>32</sup>: a noncitizen defendant in a criminal case is faced with a marijuana charge. The defendant fears that—beyond any criminal penalty for the charge—the conviction will make him deportable from the United States. After negotiations with the prosecutor, his attorney arranges a plea to an alternative charge of inhaling toxic fumes, which is a charge of equal weight under the local state law, but one that does not carry any potential deportation consequence. He pleads guilty and serves his sentence, the crisis of his potential deportation averted.

By definition, inhaling toxic fumes does not include the use of marijuana.<sup>33</sup> There was, therefore, no factual basis in the law for such a charge. And yet, the defendant,

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30. See *infra* Part II for a discussion of legal fictions in more detail.

31. Some courts have supported the practice. See, e.g., *Downer v. State*, 543 A.2d 309 (Del. 1988) (finding that a defendant may plead guilty to a nonexistent crime where he receives a benefit); *People v. Myrieckes*, 734 N.E.2d 188, 194 (Ill. App. Ct. 2000) (same); *McPherson v. State*, 163 P.3d 1257, 1262–63 (Kan. Ct. App. 2007) (defendant may plead no contest to a nonexistent crime as part of a negotiated plea); *Spencer v. State*, 942 P.2d 646, 649 (Kan. Ct. App. 1997) (holding that a defendant who was charged with a valid crime, attempted aggravated assault, “may, pursuant to a beneficial plea agreement knowingly entered, plead guilty to a nonexistent crime”); *People v. Genes*, 227 N.W.2d 241, 243 (Mich. Ct. App. 1975) (defendant could plead to an attempt crime, even though no conviction on the same charge would be available). But a defendant may not be convicted of a nonexistent crime by a jury. See, e.g., *People v. Martinez*, 611 N.E.2d 277, 278 (N.Y. 1993) (“While we will allow a defendant to plead to a nonexistent crime in satisfaction of an indictment charging a crime with a heavier penalty, . . . [f]or a conviction, a jury must find the defendant guilty of each element of the crime beyond a reasonable doubt, but could not do so here because an element of attempted manslaughter in the first degree as charged is an unintended result that as a matter of law cannot be attempted.” (citations omitted)). Still other courts have found that pleas to nonexistent offenses are not valid. *People v. Stephenson*, 30 P.3d 715, 716–17 (Colo. App. 2000) (finding that the defendant could not be convicted of “attempted felony murder” because such a crime was not recognized as a statutory offense); *In re Personal Restraint of Thompson*, 10 P.3d 380, 385 (Wash. 2000) (holding that since a plea must be knowing and voluntary on the part of the defendant, a plea to a nonexistent crime fails to satisfy the knowledge requirement).

32. This example is taken from an interview with a public defender in Johnson, *supra* note 3, at 925.

33. See WASH. REV. CODE ANN. § 9.47A.010 (West 2010).

defense attorney, prosecutor, and judge all agreed to the plea and entered it into the record. In this case, the fictional plea was used to avoid deportation, which is a noncriminal penalty imposed for conduct covered under the criminal code.

Like the example given in the Introduction, this case demonstrates the nature of the factually fictional plea in a case involving collateral consequences. The purpose of both plea bargains was to avoid a particular noncriminal consequence—deportation in the one case and sex offender registration and a felony record<sup>34</sup> in the other. In both cases, all actors in the system—defense attorney, prosecutor, and judge—were aware that the allegations did not support the conviction, and all parties agreed to allow the plea to proceed.

As one can see in both examples, fictional pleas are an extension of the sort of creative bargaining that attorneys have been doing “around” collateral consequences. For instance, defense attorneys often look for ways to turn an intentional crime into a reckless crime.<sup>35</sup> This is because it is much more likely for a crime with an intentional mens rea component to be considered a deportable offense than a crime that requires a reckless state of mind.<sup>36</sup> Defense attorneys report that this sleight of hand can often be achieved by swapping out one subsection of a particular statute for another.<sup>37</sup> Additionally, even where the parties may not be able to change the statute under which the defendant pleads guilty, there is also a fair amount of negotiation over how to change the facts themselves—scrubbing the record of any facts that may cause trouble in later, noncriminal proceedings.<sup>38</sup> Such scrubbing essentially puts attorneys—defenders, for the most part—in the role of fiction writer, creating a new factual narrative to be read into the record.

Despite the embrace by attorneys of fictional pleas, there are few examples of the practice in case law, particularly in appellate opinions. There are some possible explanations for this. First, it may be that fewer cases involving bargains over collateral consequences are making their way to appeals courts. It is unlikely that defendants in these cases would want to appeal and risk that the conviction might be overturned, putting them back in the same precarious position where they began. For this reason, defense attorneys may counsel against an appeal. There may be other reasons to avoid an appeal. Defense attorneys are repeat players who may gain benefits for many clients by negotiating multiple times with the same prosecutor and office.<sup>39</sup> One imagines that a defense attorney who secures a bargain that avoids collateral consequences through a fictional plea and then challenges the fictional plea

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34. Some defense attorneys consider a criminal record itself a form of collateral consequence since it (1) creates a stigma and (2) may impact any potential arrest or criminal case in the future. Johnson, *supra* note 3, at 907–08 n.30.

35. *Id.* at 924.

36. Amy Wolper, Note, *Unconstitutional and Unnecessary: A Cost/Benefit Analysis of “Crimes Involving Moral Turpitude” in the Immigration and Nationality Act*, 31 CARDOZO L. REV. 1907, 1928–29 (2010) (noting that some courts interpret the “crimes involving moral turpitude” requirement for offenses triggering deportation, found in 8 U.S.C. § 1227(a)(2)(A)(i), to require an “evil intent” that goes beyond mere intent to commit a crime).

37. Johnson, *supra* note 3, at 924–25.

38. *Id.* at 924.

39. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2469 (2004).

may be unlikely to see similar offers in future cases. Additionally, it may also be that judges and lawyers are reluctant to put the nature of the quid pro quo on the record, and therefore the reason behind the bargain never enters the appeal. Indeed, trial judges themselves might not understand the nature of the exchange.

But there are some examples of trial and appellate opinions acknowledging these fictions. For instance, a trial court in Virginia found that a defendant could “knowingly plead guilty to a crime that he factually did not commit” as long as he “fully understands that he could not otherwise be convicted of the . . . crime and asserts that he is entering the plea nonetheless for his own perceived benefit.”<sup>40</sup> In that case, the defendant pleaded guilty to possessing a firearm and a Schedule I or II drug, instead of what he *actually* possessed, which was marijuana.<sup>41</sup> In this way, he escaped the mandatory minimum associated with the crime he did commit and got the benefit of a mandatory minimum for a crime he did not commit.<sup>42</sup> The court deemed this “legal fiction plea[]”<sup>43</sup> totally acceptable.<sup>44</sup> An intermediate appellate court in New York came to a similar conclusion.<sup>45</sup> The court wrote of a defendant challenging his conviction to criminal trespass, “Defendant concedes he wanted to avoid the significant stigma of a conviction on the initial class A misdemeanor charge, an animal cruelty charge, and therefore pleaded guilty to second-degree trespass, also a class A misdemeanor, even though there was no common factual or legal predicate for that charge.”<sup>46</sup> The court expressed no issue with the fact that defendant had pleaded guilty to a crime for which there was no basis, in order to avoid the “stigma”<sup>47</sup> of an animal cruelty charge.<sup>48</sup>

In other instances, courts have taken issue with prosecutors’ attempts to avoid collateral consequences by manipulating pleas. In *Iowa Supreme Court Attorney*

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40. Commonwealth v. Ayala, No. FE-2018-541, 2018 Va. Cir. LEXIS 125, at \*1 (Va. Cir. Ct. July 20, 2018).

41. *Id.* at \*2.

42. *Id.*

43. *Id.* at \*1; see also *Rivera v. State*, 952 A.2d 396, 409–13 (Md. Ct. Spec. App. 2008) (allowing the defendant to plead guilty to a crime he could not have committed for the purpose of obtaining some other benefit); *Rollison v. State*, 552 S.E.2d 290, 292–93 (S.C. 2001) (approving a defendant’s guilty plea to voluntary manslaughter, even though the facts did not support the conviction).

44. Interestingly, the same court strongly disapproved of defendants pleading guilty to nonexistent crimes because “[o]nly the legislature can create a statutory crime or abrogate a common law crime.” *Ayala*, 2018 Va. Cir. LEXIS, at \*8.

45. *People v. Freeman*, 149 A.D.3d 555, 556 (N.Y. App. Div. 2017).

46. *Id.* (rejecting the defendant’s arguments on other grounds).

47. Although stigma is not traditionally viewed as a collateral consequence, there are defense attorneys who consider the stigma of conviction a collateral consequence which should be avoided. See *Johnson*, *supra* note 3, at 907–08 n.30.

48. There are also cases where judges acknowledged the use of factually fictional pleas where collateral consequences were not at issue. See, e.g., *State v. Harrell*, 513 N.W.2d 676, 680 (Wis. Ct. App. 1994) (“[W]hen a plea is pursuant to a plea bargain, the trial court is not required to go to the same length to determine whether the facts would support the charge as it would if there were no plea bargain. This latter rule reflects the reality that often in the context of a plea bargain, a plea is offered to a crime that does not closely match the conduct that the factual basis establishes.” (citation omitted)).

*Disciplinary Board v. Howe*, the Iowa Supreme Court found that a prosecutor had violated the rules of professional ethics by amending traffic citations to charge violations of a cowl-lamp<sup>49</sup> statute that would not add points on defendants' licenses. Although not as devastating as deportation or sex offender registration, the addition of points to one's license is a common collateral consequence that most defendants in traffic cases wish to avoid. The court held that the attorney, Howe, had violated the ethical duties of a prosecutor that barred "institut[ing] . . . charges when the lawyer knows or it is obvious that the charges are not supported by probable cause."<sup>50</sup> Throughout its opinion, the court rejected the attorney's arguments that he had merely been engaged in mutually beneficial plea bargaining. It would not, however, go so far as to reject fictional pleas altogether, noting

whether or not [a] *guilty plea* must be supported by a factual basis is a different question from whether or not the charge must be supported by probable cause. . . . The fact that a defendant may plead guilty to a traffic citation without a court determination that there is a factual basis for the plea simply heightens the duty on the prosecutor to file only those charges that are supported by probable cause.<sup>51</sup>

It seemed then that the objection was to the procedure by which the prosecutor sought the deal with the defendants, rather than the deal itself.<sup>52</sup>

#### *B. Who Uses Fictional Pleas and Why?*

In *Padilla v. Kentucky*, the Supreme Court declared that defense attorneys must inform their clients about the clear deportation consequences of a conviction.<sup>53</sup> In the opinion, Justice Stevens expressed a vision of plea bargaining that involved not just advising the client about potentially harsh immigration consequences but also assisting the client in escaping such consequences. As Justice Stevens noted, "[c]ounsel . . . may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by

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49. Cowl is defined as "the top portion of the front part of an automobile body forward of the two front doors to which are attached the windshield and instrument board." *Cowl*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993).

50. Iowa Supreme Court Att'y Disciplinary Bd. v. Howe, 706 N.W.2d 360, 368 (Iowa 2005).

51. *Id.* at 368–69 (emphasis in original).

52. The Iowa Supreme Court did seem to generally frown on the fictional plea, even if it had been achieved through the normal course of plea bargaining rather than through the prosecutor's charging decisions. *Id.* at 371 ("Oftentimes in a plea bargain situation, probable cause will be supplied by the defendant's admission. In the cases at issue here, however, any admissions by the persons charged were patently and indisputably unbelievable because no motor vehicle has more than two cowl lamps so as to violate the cowl-lamp statute. Probable cause cannot rest on such demonstrably false admissions.").

53. 559 U.S. 356, 369, 374–75 (2010) (deciding on Sixth Amendment grounds that defense counsel had a duty to give correct immigration advice to a noncitizen defendant when the law is clear about deportation consequences and finding that where law is not clear, the defense counsel should give a general warning).

avoiding a conviction for an offense that automatically triggers the removal consequence.”<sup>54</sup>

Although not explicitly stated in *Padilla*, such creative bargaining involves not just the defense attorney and his client but also the prosecutor and the judge who agree to allow the plea to proceed. The Court was and is certainly aware of this. Indeed, in companion cases that followed *Padilla*—*Missouri v. Frye* and *Lafler v. Cooper*—the Court noted the many benefits that plea bargains afford the parties, including the resources saved by the prosecutor and courts.<sup>55</sup> Justice Stevens, then, was not speaking only to defense attorneys in calling for creative bargains; he was also encouraging prosecutors and judges to accept these pleas.

Fictional pleas are an extension of creative plea bargaining. There are times when there is very little overlap between the available options that would avoid a particular collateral consequence and the charges that can be supported by the factual allegations. In these cases, fictional pleas are used to achieve the purposes of the creative bargain. And, like all creative bargains, fictional pleas require agreement among three parties—the defendant, the prosecutor, and the judge overseeing the plea. Such fictions, therefore, have the stamp of approval from each. As this Article explores below, defense attorneys, prosecutors, and judges reap different benefits and face different challenges in using fictional pleas.

### 1. Defendants

The benefit of the fictional plea to defendants is quite clear—the defendant avoids a particular severe collateral consequence that is a priority for him to avoid, which is sometimes a greater priority than avoiding prison time or more serious charges.<sup>56</sup> It is still important to understand, however, that as an offshoot of creative plea bargaining, fictional pleas require a trade-off for the defendant that is sometimes different than the trade-off one sees in a “typical” plea bargain. In the typical plea bargain, the defendant generally accepts a lower charge or lower sentence in exchange for pleading guilty. The prosecutor saves precious resources, and the defendant gets a “better” deal than what he would receive if he went to trial and lost.<sup>57</sup>

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54. *Id.* at 373. This vision expressed by Justice Stevens has been adopted by other courts in explaining the duties of defense counsel when bargaining on behalf of a noncitizen client. *See, e.g.,* *Song v. United States*, No. CV 09-5184 DOC, 2011 U.S. Dist. LEXIS 68465, at \*11–12 (C.D. Cal. June 27, 2011) (“Instead, Mr. Song could have asked Counsel to do what the Supreme Court urged counsel to do in *Padilla*: ‘plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence.’ Given that Mr. Song possessed information helpful to the prosecution at the time of entering into his plea deal, it is reasonably probable to assume that the government would have been willing to work with Mr. Song in order to formulate a plea agreement that did not render him automatically removable.” (citations omitted) (quoting *Padilla*, 559 U.S. at 373)).

55. *Missouri v. Frye*, 566 U.S. 134, 144–45 (2012); *Lafler v. Cooper*, 566 U.S. 156, 169 (2012).

56. *See generally* Johnson, *supra* note 3.

57. *See Frye*, 566 U.S. at 144 (“To note the prevalence of plea bargaining is not to criticize it. The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit



The creative plea bargain, however, involves a different sort of trade-off. The defendant pleads guilty—saving the prosecutor those same resources—but in exchange the defendant accepts *more* punishment or a *higher* charge than is typically offered in the same case or than the defendant may have been offered initially in the case. The purpose of this seemingly bad deal (for the defendant) is that the defendant will be able to avoid a severe collateral consequence, which is a concern for him.<sup>58</sup>

The calculus behind the fictional plea is similar for the defendant. The defendant agrees to plead guilty to a crime he did not commit—creating a record of conduct he never performed—to sidestep some collateral consequence. His primary goal is averting the collateral consequences of the criminal charge, and he is willing to make trades to achieve that goal. Because the benefits to the defendant seem so clear, it is important to explore the potential downsides to this sort of plea bargaining for defendants. A positive outcome in any individual case may have many unintended consequences down the road. Again, one sees the profound paradox of the fictional plea: the immediacy (and often, profundity) of the payoff masks other hidden issues with pleading guilty to a fictional charge.

Let's return to the example that began this piece—the defendant who pleads to three misdemeanor sex offenses, rather than one felony sex offense. That defendant has gained a lot. It makes sense why his lawyer sought such a plea—the defendant has avoided a felony record, he has avoided lifetime sex offender registration, and he managed also to secure a shorter sentence. These three payoffs are likely worth the fiction he agreed to present to the court. But he should be mindful that now, instead of a single charge, the defendant has admitted to unlawful sexual touching on three occasions. What might this mean for his ability to secure bail in a future case? What might it mean if he is rearrested? Will he be seen as someone who has already committed three offenses and does not, therefore, deserve a “fourth” chance? This defendant now will walk through life with a false record of his conduct. This may be better than walking through life with an accurate record that results in sex offense registration. But, as this Article explores later, what might this false record mean for individual defendants and for the system at large?

In addition, innocent defendants may take advantage of the fictional plea in an effort to avoid a collateral consequence they should never have been subjected to in the first place because they are indeed innocent. This is, of course, a critique of plea bargaining more generally. Innocent defendants plead to get out of prison, to end long and costly litigation, or for any number of other reasons.<sup>59</sup> But the fictional plea now creates yet another tool by which the prosecutor can tempt an innocent defendant into pleading guilty and thereby avoid some other serious, noncriminal consequence. While this piece explores the broader downsides of the fictional plea in a later Section, it is worth noting the specific downsides to individual defendants, who appear to be the beneficiaries of the fictional plea.

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both parties.”).

58. *See id.*

59. NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> [<https://perma.cc/CJ93-8LPX>], provides dozens of examples of innocent defendants who pleaded guilty and were later exonerated. To search for cases that ended with a plea bargain, go to “Detailed View” and search under “Tags” by “P” by guilty plea.

## 2. Prosecutors

Defense attorneys, of course, must negotiate fictional pleas with their counterparts across the aisle. Unlike the typical creative plea bargain, the fictional plea requires a certain level of collusion among defense attorneys and prosecutors. Prosecutors—aware that the charge does not match the factual allegations—must be prepared to defend their decision to offer the plea in the first place. A fictional plea can be a tricky bargain to strike.

Although there is little direct evidence of prosecutors openly embracing fictional pleas, there is a great deal of circumstantial evidence about the use of fictional pleas by prosecutors to assist defendants in avoiding collateral consequences. As this Section explains, as a group of progressive prosecutors begins to draw national attention, there is a growing acceptance, among a certain group of prosecutors, that prosecutors should negotiate pleas that hold the defendant accountable *in* the criminal justice system, while not subjecting him to, what they see as, extreme punishment *outside* of the system.

Prosecutors are accustomed to exercising their discretion freely and in ways that align with their judgment of “doing justice.” This involves, at times, not enforcing laws that do not align with their priorities.<sup>60</sup> The regular use of plea bargains in a range of cases is part of this exercise of discretion. As William Stuntz noted, plea bargaining has little to do with the substantive law at issue in any given case and much more to do with a range of factors outside of the law, including, most critically, the preferences of the prosecutor.<sup>61</sup> The practice of fictional pleas is, therefore, very much in the prosecutor’s wheelhouse.

In the case of fictional pleas, prosecutors are using their discretion to shape false narratives. They are lying on the record—either overtly or impliedly—with full knowledge of their false account. This is not to say that defense counsel and prosecutors always agree as to what constitutes the “facts” of a case. Indeed, there are many cases where there are legitimate disagreements about the answer to the question, “what happened?” and, relatedly, should the defendant be held responsible. But what happens in cases involving fictional pleas is that the parties essentially agree to the underlying facts, but then collude to find a plea that does not, in fact, relate to those facts.

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60. Marijuana enforcement at both the local and state level is an example of this exercise of discretion. Some state prosecutors have committed to decreasing marijuana prosecutions, even where police officers continue to make arrests. Brandon E. Patterson, *Philadelphia’s New DA Found an Innovative Way to Legalize Pot—and Other Cities Should Pay Attention*, MOTHER JONES (Mar. 21, 2018, 2:27 AM), <https://www.motherjones.com/crime-justice/2018/03/philadelphias-new-da-found-an-innovative-way-to-legalize-pot-and-other-cities-should-pay-attention> [<https://perma.cc/2TM8-7C8W>]. Under the Obama administration, the Justice Department pursued a policy of limited enforcement of federal marijuana laws. That policy has now been reversed by the Trump administration. Corky Siemaszko, *Sessions To End Legal Marijuana Policy from Obama Era*, NBC NEWS (Jan. 4, 2018, 10:26 AM), <https://www.nbcnews.com/storyline/legal-pot/sessions-end-obama-era-policy-legalized-marijuana-n834591> [<https://perma.cc/GCN7-GCMH>].

61. William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2548–50 (2004).

## i. The “New” District Attorney

As David Sklansky has documented, progressive prosecutors have been elected across the United States.<sup>62</sup> These are prosecutors who made campaign promises to reduce incarceration<sup>63</sup> and take police violence seriously.<sup>64</sup> As this Section discusses, they are also seemingly committed to mitigating the punitive effects of certain collateral consequences.

Even before this broader trend toward progressivism,<sup>65</sup> many district attorneys’ offices had policies—either formal or informal—that allowed them to take into consideration collateral consequences during plea bargaining negotiations. Several local offices in California instituted policies to account for the impact of collateral consequences, especially on noncitizen defendants.<sup>66</sup> In Los Angeles, for instance, prosecutors have had, for many years, a written policy that “explicitly allow[s them] to consider the adverse immigration consequences of deportation in arriving at an appropriate case disposition.”<sup>67</sup> Additionally, the office has shown an openness to mitigating other collateral consequences outside of deportation. As one Los Angeles assistant district attorney noted, the office “weigh[s] collateral consequences on a ‘sort of sliding scale’” in making decisions about how to proceed with cases.<sup>68</sup>

But in recent years, and certainly since the election of an administration obsessively focused on “criminal aliens,”<sup>69</sup> an increasing number of district attorneys’

62. David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647 (2017) [hereinafter Sklansky, *The Changing Political Landscape*]; David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 30 U.C. DAVIS L. REV. ONLINE 25 (2017) [hereinafter Sklansky, *The Handbook*]. There are, however, critics of the term—“progressive prosecutor”—who see it as public relations mechanism, more than a true statement of a particular district attorneys’ values. *E.g.*, Josie Duffy Rice, Opinion, *Cyrus Vance and the Myth of the Progressive Prosecutor*, N.Y. TIMES (Oct. 16, 2017), [https://www.nytimes.com/2017/10/16/opinion/cy-vance-progressive-prosecutor.html?\\_r=0](https://www.nytimes.com/2017/10/16/opinion/cy-vance-progressive-prosecutor.html?_r=0) [https://perma.cc/P6CF-GY4P] (criticizing several prosecutors who make claims about their progressivism but do little to end mass incarceration).

63. Sklansky, *The Changing Political Landscape*, *supra* note 62, at 647–48.

64. *Id.*

65. As this Section makes clear, popular media has been particularly focused on the role of the “progressive prosecutor.” *See, e.g.*, Christie Thompson, *Prosecutors Are Quietly Helping Protect Immigrants from Trump*, VICE (May 18, 2017, 12:00 AM), [https://www.vice.com/en\\_us/article/pg7wvn/prosecutors-are-quietly-helping-protect-immigrants-from-trump](https://www.vice.com/en_us/article/pg7wvn/prosecutors-are-quietly-helping-protect-immigrants-from-trump) [https://perma.cc/JEV8-XKFK].

66. Ingrid Eagly documented these policies in her piece, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245 (2016) [hereinafter Eagly, *Immigrant Protective Policies*]. She also compiled a library of these formal policies. Ingrid V. Eagly, *Immigration Enforcement and Criminal Adjudication: Introduction*, UCLA SCH. L., <http://libguides.law.ucla.edu/immigrationandcriminaladjudication> [https://perma.cc/37DW-2PWE] (last updated May 10, 2018).

67. Eagly, *Immigrant Protective Policies*, *supra* note 66, at 266 (footnote omitted).

68. Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1164 (2013) (quoting an interview with a high-ranking prosecutor in the Los Angeles County District Attorney’s Office).

69. As an example, President Trump has put in place an office to assist “victims of crimes committed by criminal aliens.” Press Release, U.S. Dep’t Homeland Sec., DHS Announces

offices have announced new policies regarding noncitizen defendants.<sup>70</sup> In Brooklyn, the District Attorney has instituted a policy to limit immigration consequences for defendants facing low-level offenses.<sup>71</sup> District Attorney Eric Gonzalez took over for Ken Thompson, who died unexpectedly in October of 2016 and was himself considered to be a “progressive prosecutor.”<sup>72</sup> Gonzalez has been vocal that his office is specifically working to reach “immigration-neutral” dispositions.<sup>73</sup> As an example, he cites his office’s willingness to allow a defendant in a shoplifting case to plead guilty to a disorderly conduct violation rather than petit larceny, which is a “crime of moral turpitude” under immigration law.<sup>74</sup> But such a policy indicates that the formal directive from the office is that a line prosecutor should offer (or, at least, contemplate offering) disorderly conduct—a charge that does not include any theft

Launch of New Office for Victims of Illegal Immigrant Crime (Apr. 26, 2017), <https://www.dhs.gov/news/2017/04/26/dhs-announces-launch-new-office-victims-illegal-immigrant-crime> [<https://perma.cc/UFG6-3KX6>].

70. It is beyond the scope of this Article but worth noting that in California it is now the law that both prosecutors and defense attorneys take into consideration the impact on the defendant of any immigration consequences that stem from the criminal charge. The new law, which went into effect on January 1, 2016, reads:

Immigration consequences; duties of counsel

(a) Defense counsel shall provide accurate and affirmative advice about the immigration consequences of a proposed disposition, and when consistent with the goals of and with the informed consent of the defendant, and consistent with professional standards, defend against those consequences.

(b) The prosecution, in the interests of justice, and in furtherance of the findings and declarations of Section 1016.2, shall consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution.

(c) This code section shall not be interpreted to change the requirements of Section 1016.5, including the requirement that no defendant shall be required to disclose his or her immigration status to the court.

CAL. PENAL CODE § 1016.3 (West 2018). For a full discussion of changes to California that implicate many of these issues, including new rules regulating the negotiating of plea bargains see Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L. REV. 12 (2017).

71. Andrew Denney, *Brooklyn DA Aiming to Limit Immigration Impact for Low-Level Offenders*, N.Y.L.J. (Apr. 24, 2017, 6:00 AM), <http://www.newyorklawjournal.com/id=1202784443346/Brooklyn-DA-Aiming-to-Limit-Immigration-Impact-for-LowLevel-Offenders?mcode=0&curindex=0&curpage=ALL> [<https://perma.cc/89RN-P72P>]. These formal policies are new, but individual line prosecutors in Brooklyn would sometimes take into account collateral consequences during plea negotiations even without a formal policy. As Heidi Altman documented in her article, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 28–32 (2012), individual line prosecutors in Brooklyn would sometimes take into account collateral consequences during plea negotiations, even without a formal policy.

72. Alan Feuer, *Ken Thompson’s Successor: A ‘Pure District Attorney’ Working Under the Radar*, N.Y. TIMES (Nov. 28, 2016), <https://www.nytimes.com/2016/11/28/nyregion/brooklyn-district-attorney-eric-gonzalez.html?mcubz=1> [<https://perma.cc/6DK9-QV9Z>].

73. Denney, *supra* note 71.

74. *Id.*

element—for the purpose of allowing the defendant to avoid collateral consequences. Although there is no mention of fictional pleas in the policy, such messages to line prosecutors indicate an openness to plea convictions that do not match the factual allegations.

Other offices have followed suit. In Baltimore, the Chief Deputy State's Attorney sent a memo to his staff informing them that the Justice Department's deportation efforts under President Trump "have increased the potential collateral consequences to certain immigrants for minor, non-violent criminal conduct."<sup>75</sup> As a result, he directed the attorneys: "In considering the appropriate disposition of a minor, non-violent criminal case, please be certain to consider those potential consequences to the victim, witnesses, and the defendant."<sup>76</sup> In Philadelphia, the current District Attorney is a longtime criminal defense attorney who is critical of the criminal justice system, including the impact of collateral consequences on defendants.<sup>77</sup> Dan Satterberg, the prosecuting attorney for Seattle and a Republican, instituted an immigration-consequences policy in his office in 2016, which, according to the *New York Times*, he "strengthened" after the election of President Trump.<sup>78</sup> In explaining why he no longer thought it was appropriate to handle the cases of defendants facing immigration consequences the same way he handled other cases, he noted, "[M]ore and more, my eyes are open that treating people the same means that there isn't a life sentence of deportation that might accompany [a] conviction."<sup>79</sup> Cyrus Vance, the District Attorney from Manhattan, made a similar statement in justifying a new Collateral Consequences Counsel position: "I submit today that if two New Yorkers commit the same low-level violation, and the practical consequences for one of the New Yorkers is a ticket or a couple of days in jail, while the consequences for the other New Yorker is to be taken away from her family and shipped off to a foreign country, that is not equal justice under the law."<sup>80</sup>

75. Justin Fenton, *Baltimore Prosecutors Told To Consider Consequences for Prosecuting Illegal Immigrants for Minor Crimes*, BALTIMORE SUN (Apr. 28, 2017, 5:35 PM), <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-states-attorney-immigrants-20170428-story.html> [https://perma.cc/6QVR-374P].

76. *Id.* (emphasis added); see also Collier Meyerson, *Prosecutors Keep Their Jobs by Putting People in Jail. Can They Be Leaders in the Fight for Criminal-Justice Reform?*, NATION (Nov. 14, 2017), <https://www.thenation.com/article/prosecutors-keep-their-jobs-by-putting-people-in-jail-can-they-be-leaders-in-the-fight-for-criminal-justice-reform> [https://perma.cc/G66V-VFP9].

77. Shaun King, *Philadelphia DA Larry Krasner Promised a Criminal Justice Revolution. He's Exceeding Expectations*, INTERCEPT (Mar. 20, 2018, 3:59 PM), <https://theintercept.com/2018/03/20/larry-krasner-philadelphia-da> [https://perma.cc/F83W-DZS4]; Sam Newhouse, *Running to Change How Philadelphia Does Justice*, METRO (Feb. 21, 2017), <http://www.metro.us/philadelphia/running-to-change-how-philly-does-justice/zsJqbt---GHf2Jnay4lIk> [https://perma.cc/U8MZ-N2KY].

78. Vivian Yee, *Prosecutors' Dilemma: Will Conviction Lead to 'Life Sentence of Deportation'?*, N.Y. TIMES (July 31, 2017), <https://www.nytimes.com/2017/07/31/us/prosecutors-dilemma-will-conviction-lead-to-life-sentence-of-deportation.html> [https://perma.cc/7HPD-WPT6].

79. *Id.*

80. Ramey, *supra* note 13.

These district attorneys—sometimes emboldened by Trump’s election—are shifting their policies to include explicit concern about the collateral consequences that may harm the defendant as the result of the plea bargain. As this Article explains in greater depth in Section II.B, in many cases there simply is no way to reach a plea that avoids serious collateral consequences and also lines up with the factual allegations against the defendant. It flows from these policies that prosecutors will be open to fictional pleas in certain cases where such a plea may be the only solution to holding the defendant accountable in the criminal system, while allowing him to sidestep particular sanctions outside of the system.

It is also the critics of this practice who provide evidence that prosecutors are embracing the fictional plea. In recent debates in Ohio about adopting a state rule similar to Federal Rule of Criminal Procedure 11, critics pointed to the regular use of fictional pleas in sex offense cases. Justice Michael P. Donnelly of the Supreme Court of Ohio, formerly a judge on the Cuyahoga County Common Pleas Court, has argued for a local state rule that would require a recitation of the facts underlying any plea that is accepted by the court. As part of his evidence that his proposal is necessary, he cited 400 felony charges from 2008 to 2014 in sex-crimes cases that were reduced through plea bargains to non-sex-crime offenses.<sup>81</sup> He noted that the most common reduced charges were abduction, felonious assault, or child endangerment<sup>82</sup>—all serious crimes that allow the defendant to avoid sex offender registration and do not necessarily involve a factual overlap with the underlying charges.

## ii. Benefits to Prosecutors

As Brooklyn District Attorney Eric Gonzalez has noted, the purpose of plea bargain policies that take into account collateral consequences is to “hold people accountable without their suffering enormous and disproportionate consequences for a low-level offense.”<sup>83</sup> Gonzalez has said that he hopes these sorts of policies will become a model for prosecutors nationwide.<sup>84</sup> Particularly as the Trump

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81. The 400 number was generated by original research by Justice Donnelly. Rachel Dissell, *Should Ohio Ban Judges from Allowing Plea Deals That Are ‘Lies’?* (Poll), CLEVELAND.COM (May 30, 2015), [https://www.cleveland.com/court-justice/index.ssf/2015/05/should\\_ohio\\_change\\_what\\_plea\\_d.html](https://www.cleveland.com/court-justice/index.ssf/2015/05/should_ohio_change_what_plea_d.html) [<https://perma.cc/G8TW-RLJA>].

82. *Id.*

83. *Q & A with Brooklyn Acting District Attorney Eric Gonzalez*, OUR TIME PRESS (July 16, 2017), <http://www.ourtimepress.com/q-a-with-brooklyn-acting-district-attorney-eric-gonzalez> [<https://perma.cc/4W5M-QR6H>]. In a later interview with the *Wall Street Journal*, Gonzalez noted that one of his inspirations for this formal policy was the case of a Brooklyn man who was arrested for being “unescorted in an apartment building” and then later found to have a small amount of crack cocaine on him. The man, a green card holder from Haiti, pleaded guilty to the drug possession charge and was eventually unable to reenter the country after a trip outside of the country. According to Gonzalez, he could have, instead, pleaded guilty to trespass and would not have been barred from the United States. This is an example where a creative plea bargain to a particular crime would have been available that lined up with the factual allegations against the defendant. Ramey, *supra* note 13.

84. Christina Carrega, *Brooklyn DA Eric Gonzalez Launches Campaign with Plan To Ditch Old Summons Warrants*, N.Y. DAILY NEWS (Apr. 26, 2017, 4:21 PM), <http://>

administration advances more aggressive “law and order” policies directed towards immigrants,<sup>85</sup> we are likely to see more local offices responding with a softening of their respective policies towards defendants facing collateral consequences.

Prosecutors reap political benefits by using fictional pleas. In places like Brooklyn, Baltimore, and Philadelphia where a growing number of voters are concerned about mass incarceration and the treatment of defendants,<sup>86</sup> embracing these policies shows that prosecutors can enforce the criminal law, while not having defendants “suffer enormous and disproportionate consequences.” This is likely why prosecutors are not shy about such policies. Prosecutors have recently given interviews to the *New York Times*, the *Washington Post*, and other publications to champion these policies.<sup>87</sup> In doing so, they are making political statements that they are in a tight spot between their obligations to enforce criminal law and their view that criminal law is being manipulated for other purposes. They are wiggling out of this tight spot by creating policies that rein in the consequences of criminal convictions.

The other political benefit at this particular moment is making a clear statement against the policies of an unpopular federal government. There is a sense that these policies serve as a form of resistance to the current administration’s stance on a wide range of criminal justice issues. The federal system has seen a shift from an administration devoted to criminal justice reform to one that is antagonistic to it. The Department of Justice under President Obama granted a record number of federal inmates early release under a highly publicized clemency effort,<sup>88</sup> softened its charging policies on drug laws,<sup>89</sup> and pursued a massive sentencing reform initiative.<sup>90</sup> The Trump administration has struck a notably different tone. Former Attorney General Jeff Sessions threw out old policies on charging in drug cases<sup>91</sup> and talked of fully prosecuting individuals on marijuana charges in states where it is legal under state law.<sup>92</sup>

[www.nydailynews.com/new-york/gonzalez-launches-brooklyn-district-attorney-campaign-article-1.3103917](http://www.nydailynews.com/new-york/gonzalez-launches-brooklyn-district-attorney-campaign-article-1.3103917) [<https://perma.cc/5UHB-ETYV>].

85. The President has suggested as part of a “law and order” agenda on immigration that the United States deny due process to noncitizens entering the country. Benjamin Hart, *Trump Suggests Suspending Rule of Law for Undocumented Immigrants*, N.Y. MAG.: INTELLIGENCER (June 24, 2018), <http://nymag.com/daily/intelligencer/2018/06/trump-floats-suspending-laws-for-undocumented-immigrants.html> [<https://perma.cc/KB2Z-B7US>].

86. See *supra* Section I.B.1.

87. Many of the quotes from prosecutors in this Section have come from articles in national publications. See, e.g., Ramey, *supra* note 13.

88. Sari Horwitz, *Obama to Commute Hundreds of Federal Drug Sentences in Final Grants of Clemency*, WASH. POST (Jan. 16, 2017), [https://www.washingtonpost.com/world/national-security/obama-to-commute-hundreds-of-federal-drug-sentences-in-final-grants-of-clemency/2017/01/16/c99b4ba6-da5e-11e6-b8b2-cb5164beba6b\\_story.html?utm\\_term=.e94a6f57f554](https://www.washingtonpost.com/world/national-security/obama-to-commute-hundreds-of-federal-drug-sentences-in-final-grants-of-clemency/2017/01/16/c99b4ba6-da5e-11e6-b8b2-cb5164beba6b_story.html?utm_term=.e94a6f57f554) [<https://perma.cc/U9L7-RVGG>].

89. HOLDER, *supra* note 25.

90. Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. (2015).

91. See Memorandum from Att’y Gen. Jefferson B. Sessions on Department Charging and Sentencing Policy to All Federal Prosecutors (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download> [<https://perma.cc/53WY-C3HF>].

92. See Press Release, White House, Statement by President Donald J. Trump on Signing H.R. 244 into Law (May 5, 2017), <https://www.whitehouse.gov/briefings-statements>

Much of this change in tone has little impact on the functioning of state criminal justice systems. It has, however, resulted in increasing pressure on progressive state prosecutors to publicly stand in opposition to the harsh approach to defendants by federal prosecutors. This “new prosecutor” is progressive on many fronts, including charging, sentencing, and an openness to diversion.<sup>93</sup> However, even state prosecutors who would not consider themselves particularly progressive have been moved to change policy, at least in part by President Trump’s insistence that state law enforcement cooperate with federal immigration authorities.<sup>94</sup> The federal focus on immigration has shined a spotlight on the devastating effects of collateral consequences, even though those effects were just as devastating before Trump’s election.

Finally, it is important to note that certainly not all prosecutors are engaged in this practice. As Brian McIntyre, the county attorney for Cochise County, Arizona, noted in an interview, his prosecutors are not to consider collateral consequences so as not to benefit some defendants over others.<sup>95</sup> Some prosecutors may even go a step further, specifically seeking to impose collateral consequences on certain defendants. Indeed, as Paul Crane has observed, district attorneys may use collateral consequences strategically, “undercharging” in certain cases in order to secure “the penalty they desire” without having to deal with the greater procedural safeguards in place for felony charges.<sup>96</sup> Unlike felony cases, for example, where prosecutors are obligated to present witnesses and evidence to grand juries in probable cause hearings or to judges in preliminary hearings, misdemeanor cases do not have this requirement. Even when a defendant is facing significant collateral consequences, prosecutors may initiate misdemeanor cases without a grand jury proceeding.<sup>97</sup> As Eisha Jain argues, prosecutors have “powerful incentives to ‘prosecute’ collateral consequences—meaning that they at times use their vast and unreviewable discretion over the criminal justice system to shape civil outcomes.”<sup>98</sup>

### 3. Judges

What then is the motivation for judges to accept fictional pleas? One reason might be that judges, like defendants and prosecutors, are accustomed to the regular use of plea bargaining. Judges, like other stakeholders, benefit from the typical plea bargain. Plea bargains keep the system moving along at a regular clip. This benefit is particularly critical in those jurisdictions where the dockets are already swollen with cases. As Michelle Alexander has noted, if you want to “crash the system,” go to

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/statement-president-donald-j-trump-signing-h-r-244-law [<https://perma.cc/XE4E-82VU>].

93. See *supra* Section I.B.2.i.

94. See *supra* Section I.B.2.i.

95. Yee, *supra* note 78 (“If he made accommodations for an immigrant, Mr. McIntyre said, he felt that he would also owe a citizen in similar circumstances the same option, ‘because is he not being, essentially, negatively impacted by his U.S. citizenry?’”).

96. Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775, 780, 782 (2016).

97. *Id.* at 802–03.

98. Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1200 (2016).



trial.<sup>99</sup> Plea bargains avoid this outcome. Judges, therefore, have a strong interest in making sure that pleas are accepted.

Although the role of a judge varies by jurisdiction, formally, judges have little role in the plea bargaining process. A judge must confirm that the defendant is pleading guilty both knowingly and voluntarily,<sup>100</sup> but generally that is where their participation appears to end. Most states and the federal system prohibit the judge from participating in the negotiation of a plea bargain. It is plausible then that judges accept fictional pleas because their traditional role in this regard has been to stamp approval on the agreements of the parties, without much inquiry into the nature of the deal.<sup>101</sup>

But this view of judges seems too limited and does not fully explain why judges accept fictional pleas—bargains where the plea of conviction does not match any of the factual allegations against the defendant. One explanation might be that judges are not always aware that they are accepting a fictional plea. Because some cases, particularly misdemeanors, do not require a full factual record be developed,<sup>102</sup> it might be the case that judges do not know that a particular plea *is* a fictional plea. In states where there is no requirement that the parties put a factual basis for the plea on the record, there is the risk that the judge has no idea how the parties reached agreement.<sup>103</sup> Indeed, in the process of investigation, it is common for prosecutors to discover additional facts and evidence. With such discovery, the negotiations with the defendant may evolve, leading to a plea bargain that looks very different from the charges in the initial complaint.<sup>104</sup>

But what about cases—like the one described in the Introduction to this piece—where the judge inquires or is made aware of the fiction? A recent groundbreaking study by Nancy King and Ronald Wright makes clear that many more judges likely fall into this “active” category (i.e., judges who participate in the plea bargaining among the parties) than most scholars previously thought. As King and Wright observe in their study, there are many potential benefits to judicial involvement in plea bargaining.<sup>105</sup> As a result, despite the common wisdom that judges take a hands-

99. Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), <http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html> [https://perma.cc/9UCJ-4PRX].

100. See *Brady v. United States*, 397 U.S. 742, 745 (1970).

101. At least one scholar has proposed that parties litigate a pre-plea motion that would give judges more control over the plea system and therefore more guidance to defendants about their options. E.g., Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61, 65 (2015).

102. See *infra* Section I.C.1.

103. Author's phone interview with Justice Michael P. Donnelly, Supreme Court of Ohio (Jan. 12, 2018) (on file with the *Indiana Law Journal*).

104. As noted in Section I.A.1, it is more difficult to “see” a factual fiction than a fiction of law, which requires the judge to sign off on a plea to a nonexistent crime. In those cases, there is little chance that a judge would not realize that the defendant is pleading guilty to a fiction.

105. As King and Wright observed in their study, there are several seeming benefits of judicial involvement in plea bargaining. As they note, “judicial participation accelerates pleas, shifting deals away from the eve of trial to earlier in the process.” Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial*

off approach to these agreements, they may indeed be actively involved and like the judge in the Introduction, may also understand that they are accepting a fictional plea on the record.<sup>106</sup> As Darryl K. Brown notes, the vision of judicial participation at plea bargaining laid out by King and Wright is of a judge who is less “managerial” and more “inquisitorial”—one who gets into the mix of litigation.<sup>107</sup>

So why do judges—as neutral arbiters of the process—participate in fictional pleas? (Of course, there are judges for whom active judging means they do *not* accept fictional pleas.)<sup>108</sup> One reason may be that, like other forms of plea bargaining, they are efficient. As King and Wright point out, docket control is a strong motivator for judges to become involved in the plea bargain process.<sup>109</sup> Because fictional pleas are often the only solution that will satisfy both the needs of the defendant—to avoid collateral consequences—and the needs of the prosecutor—to hold the defendant accountable within the system without a trial—the fictional plea can be the final development before the parties are forced to go to trial. For instance, many defendants will roll the dice at trial rather than accept a plea of conviction to a deportable offense.<sup>110</sup> Because many fictional pleas are meant to avoid trials, they are also appealing to a judge who wants to keep cases moving off his docket.

In addition, the same zeitgeist around collateral consequences that has gripped lawyers and the public at large has certainly also had an impact on judges. Reaction to federal immigration law produces one of the clearest examples. In *Padilla*, Justice Stevens acknowledged the realities facing noncitizens, including that immigration judges have limited discretion to grant noncitizens relief from removal.<sup>111</sup> Such limitations on immigration judges create new incentives for criminal court judges, who interact so frequently with defendants facing deportable offenses, to become more proactive in seeking solutions for these noncitizens. It is now common knowledge that there will be no opportunities for these defendants to seek relief

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*Participation in Negotiations*, 95 TEX. L. REV. 325, 393 (2016). This results in a more efficient system. In addition, when “judges are invited to help resolve a criminal case, they sometimes propose alternative ideas for sentencing that the parties had overlooked.” *Id.* at 394. Additionally, “judge’s participation also appears to help attorneys retain the confidence of clients, victims, and other constituencies.” *Id.* at 395. Finally, “[j]udicial participation can increase, rather than decrease, the amount of information available to the defense at the negotiation stage.” *Id.* at 396.

106. *But see* Darryl K. Brown, Response, *What’s the Matter with Kansas—And Utah?: Explaining Judicial Interventions in Plea Bargaining*, 95 TEX. L. REV. 47, 52–59 (2017) (explaining how rules of criminal procedure in Kansas and Utah make judicial participation at plea bargaining less likely).

107. *Id.* at 59–61.

108. Interview with Justice Michael Donnelly, *supra* note 103 (noting that he makes the parties discuss all plea bargaining decisions on the record, requires a factual basis for each plea, and does not accept pleas where no such basis exists).

109. *See* King & Wright, *supra* note 105, at 356–57.

110. This question—whether a noncitizen defendant would go to trial, even in the face of overwhelming evidence against him, where he was facing a deportable charge—was the question before the Supreme Court in *Lee v. United States*, 137 S. Ct. 1958, 1962 (2017). As the defendant in *Lee* argued, successfully, before the Supreme Court, indeed it is a rational choice for a defendant to take the risk of trial rather than agree to being deported. *Id.* at 1969.

111. *See Padilla v. Kentucky*, 559 U.S. 356, 363–64 (2010).

elsewhere. The judge who rejects a plea bargain because it is a fiction, must, in many cases, face the possibility that the defendant before him will be deported. One can see courts openly grappling with some of these issues in sentencing matters where the defendant is also facing serious collateral consequences—should a judge take this “outside” factor into account when sentencing the defendant for his criminal case?<sup>112</sup>

As Jessica Roth has observed, many federal trial judges are becoming increasingly open about their desire to see criminal justice reforms put into place.<sup>113</sup> This “new” activism conflicts with traditional expectations for how judges behave but appears to be motivated, in part, about concerns over the collateral consequences of a conviction.<sup>114</sup> As Roth notes, several judges in either panel discussions, extrajudicial writings, or legal opinions have expressed deep concern about collateral consequences.<sup>115</sup> This open call for reform includes two opinions by Judge Gleeson of the Eastern District of New York, in which he granted expungement of a criminal conviction and a “certificat[i]on of rehabilitation” to two defendants who made compelling claims that their convictions were harming their prospects for employment.<sup>116</sup> There are also dramatic examples of state and federal judges expressing their disdain for the immigration policies of the current administration.<sup>117</sup>

112. See, e.g., *United States v. Pauley*, 511 F.3d 468, 474–75 (4th Cir. 2007) (finding that the loss of the defendant’s “teaching certificate and his state pension as a result of his conduct” were appropriate sentencing considerations); *United States v. Nesbeth*, 188 F. Supp. 3d 179, 180 (E.D.N.Y. 2016) (“Nonetheless, I render[] a non-incarceratory sentence today in part because of a number of statutory and regulatory collateral consequences [the defendant] will face as a convicted felon. I have incorporated those consequences in the balancing of the 18 U.S.C. § 3553(a) factors in imposing a one-year probationary sentence.”). But see *United States v. Morgan*, 635 F. App’x 423, 445 (10th Cir. 2015) (“We agree with the reasoning of the Sixth, Seventh, and Eleventh Circuits. By considering publicity, loss of law license, and deterioration of physical and financial health as punishment, the court impermissibly focused on the collateral consequences of Morgan’s prosecution and conviction.”).

113. Jessica A. Roth, *The “New” District Court Activism in Criminal Justice Reform*, 72 N.Y.U. ANN. SURV. AM. L. 187, 189 (2018) (“[O]ver the last decade, a cohort of well-respected and experienced federal trial judges have engaged in an unmistakably public campaign for criminal justice reform that causes them to look more like players than umpires.”).

114. *Id.* at 198–202.

115. *Id.* at 205–09.

116. *Id.* at 206–08 (discussing Judge Gleeson’s decisions in *Doe v. United States (Doe I)*, 110 F. Supp. 3d 448 (E.D.N.Y. 2015); *Doe v. United States (Doe II)*, 168 F. Supp. 3d 427 (E.D.N.Y. 2016)).

117. See, e.g., Derek Hawkins, *Federal Judge Blasts ICE for ‘Cruel’ Tactics, Frees Immigrant Rights Activist Ravi Ragbir*, WASH. POST (Jan. 30, 2018), [https://www.washingtonpost.com/news/morning-mix/wp/2018/01/29/federal-judge-blasts-ice-for-cruel-tactics-frees-immigrant-rights-activist-ravi-ragbir/?utm\\_term=.e7806dc0ca7d](https://www.washingtonpost.com/news/morning-mix/wp/2018/01/29/federal-judge-blasts-ice-for-cruel-tactics-frees-immigrant-rights-activist-ravi-ragbir/?utm_term=.e7806dc0ca7d) [<https://perma.cc/C8UK-33XR>] (“It ought not be—and it has never before been—that those who have lived without incident in this country for years are subjected to treatment we associate with regimes we revile as unjust, regimes where those who have long lived in a country may be taken without notice from streets, home, and work. And sent away . . . . We are not that country . . . and woe be the day that we become that country under a fiction that laws allow it.”); Kristine Phillips, *California Chief Justice to ICE: Stop ‘Stalking’ Immigrants at Courthouses*, WASH. POST, (Mar. 17, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/03/17/california-chief-justice-to-ice-stop-stalking-immigrants-at-courthouses/?utm\\_term=](https://www.washingtonpost.com/news/post-nation/wp/2017/03/17/california-chief-justice-to-ice-stop-stalking-immigrants-at-courthouses/?utm_term=)

Such examples of judges' open sympathy for the plight of defendants facing severe collateral consequences provide some evidence that judges, already inclined to accept the agreement of the parties, may not feel compelled to put an end to the workaround that fictional pleas provide.

### *C. Common Examples of the Fictional Plea*

The criminal system has become a repository for a staggering number of sanctions and punishments—both criminal and noncriminal. Under a theory that the criminal system has identified those deserving of punishment, legislatures have piled high the number of sanctions for any given charge. This Section traces the three scenarios in which fictional pleas are used to greatest effect: low-level offenses, drug crimes, and sex offenses.

#### 1. Low-Level Offenses

Criminal grounds for deportation of immigrants, including lawful permanent residents, have become so expansive that various low-level offenses and virtually all controlled substance offenses will lead to removal.<sup>118</sup> There is a common understanding among scholars and advocates alike that misdemeanors carry with them substantial and serious collateral consequences. One only needs to peruse the American Bar Association's exhaustive list of collateral consequences<sup>119</sup> to understand how many seemingly petty criminal offenses lead to non-petty consequences outside of the criminal system. A conviction for turnstile jumping, theft of a ten-dollar video game, forging a check for less than twenty dollars, misdemeanor indecent exposure, and petty shoplifting are all examples of minor offenses considered crimes of "moral turpitude" under immigration law<sup>120</sup> that could

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.0b93f53d2380 [https://perma.cc/R6HY-SLPW].

118. Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 252 (2017); Jordan Cummings, Comment, *Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences*, 62 UCLA L. REV. 510, 532 (2015).

119. See COUNCIL ST. GOV'T JUST. CTR., *supra* note 4.

120. 8 U.S.C. § 1227(a)(2)(A)(i) (2012).

render a noncitizen deportable.<sup>121</sup> Traffic convictions are the “single largest source of the rise in criminal alien removals over the past decade.”<sup>122</sup>

Although they carry profound noncriminal consequences, low-level offenses have the benefit of offering much more flexibility to negotiate around collateral consequences than felonies for a few reasons. First, the stakes at sentencing are lower in misdemeanor cases, for the defendant and the prosecutor. Indeed, sentences tend to be shorter in misdemeanor cases.<sup>123</sup> As a result, the sentence itself may be less important to the defendant than avoiding the collateral consequence. Conversely, a defendant may care very much about his sentencing exposure if he is facing serious prison time, shifting his goal from avoiding a particular collateral consequence to reducing his sentence. For the prosecutor, higher potential sentences and more serious criminal charges may mean she is less inclined to make deals around collateral consequences.<sup>124</sup> It is more palatable for prosecutors to negotiate (or admit to negotiating) around collateral consequences when dealing with misdemeanors. As one prosecutor noted, consideration of collateral consequences “will not be extended to serious or violent crimes.”<sup>125</sup>

Second, as noted, there tend to be fewer procedural restrictions on misdemeanor pleas as compared to felonies. The New York case of *People v. Keizer* makes the point. There, the defendant was charged with petit larceny for shoplifting books from a Barnes & Noble.<sup>126</sup> At arraignment he pleaded to disorderly conduct in exchange for a conditional discharge. The defendant appealed, arguing that the plea was jurisdictionally defective because he pleaded to an offense that was neither charged in the complaint nor constituted a lesser included offense.<sup>127</sup> The New York Court of Appeals found that

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121. Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1759 (2013); see also Jillian T. Stein, *Immigration Considerations for Noncitizens in Criminal Cases*, N.J. LAW., Feb. 2017, at 66, 68 (“[E]ven turnstile jumping qualifies as a crime of moral turpitude and can subject a noncitizen to removal.”); Glenn E. Martin, *A Breakthrough Twist of the Turnstile from Manhattan DA Cy Vance*, N.Y. DAILY NEWS (July 19, 2017, 12: 28 PM), <http://www.nydailynews.com/opinion/breakthrough-twist-turnstile-manhattan-da-cy-vance-article-1.3338588> [<https://perma.cc/F9TQ-KMW8>] (noting that pleading guilty to turnstile jumping can result in collateral consequences, including deportation); James C. McKinley, Jr., *For Manhattan Fare Beaters, One-Way Ticket to Court May Be Over*, N.Y. TIMES (June 30, 2017), <https://www.nytimes.com/2017/06/30/nyregion/subway-fare-beating-new-york.html> [<https://perma.cc/8Z8D-S9J9>] (pointing out that criminal prosecution of fare evasion may put immigrants at risk of deportation).

122. Eagly, *supra* note 68, at 1218 (“[T]he category of criminal aliens removed as a result of a traffic offense increased ten-fold over the past decade, accounting for nearly thirty percent of the overall rise in criminal alien removals.”).

123. See generally Johnson, *supra* note 3, at 927–30 (discussing the reasons that it is easier to plead around collateral consequences on misdemeanor cases rather than felony cases).

124. See Johnson, *supra* note 3, at 930–31.

125. Yee, *supra* note 78.

126. 790 N.E.2d 1149, 1150 (N.Y. 2003).

127. *Id.* at 1151; see also *People v. Peralta*, Nos. 57068/01, 01-392, 2003 WL 21174608, at \*1 (N.Y. App. Div. Apr. 29, 2003) (per curiam) (holding that a plea to disorderly conduct “in satisfaction of an information charging him with several marihuana-related offenses” was not jurisdictionally deficient).

[a] prosecutor cannot bring an indictment or felony complaint and then attempt to avoid [certain] protections . . . by soliciting a plea to alleged criminal activity that has no common element (in law or fact) to the crimes alleged in the indictment or felony complaint. By contrast, [*Keizer*] concerns misdemeanors . . . . The specific constitutional limitations, and their underlying policies, that restrict the plea process for felony charges are not present here.<sup>128</sup>

As *Keizer* demonstrates, misdemeanor pleas often do not require the same procedural hurdles as felony pleas.<sup>129</sup>

Third, there are more options for alternatives to incarceration in misdemeanor court.<sup>130</sup> That means that there are greater opportunities for defense counsel to trade on the punishment end when trying to secure a fictional plea. As a result, prosecutors are more likely to play ball. As Jeff Rosen, the district attorney in Santa Clara, California, has noted, his office is often willing to trade a lesser charge for more jail or probation: “If we’re giving something, we’re going to get something.”<sup>131</sup> In fact, defense attorneys report that prosecutors are more willing to discuss the mitigation of collateral consequences on lower-level offenses as opposed to felonies because of these greater options.<sup>132</sup> For these reasons, in misdemeanor cases, defendants may be more likely to negotiate around collateral consequences, and prosecutors may be more open to fictional pleas.

Partly, this is made possible by the nature of misdemeanors and other low-level crimes. As the *Keizer* court made clear, misdemeanors tend not to require a full factual record—or any record—be made at the time of the plea.<sup>133</sup> As a result, “the reality [is] that often in the context of a plea bargain, a plea is offered to a crime that does not closely match the conduct that the factual basis establishes.”<sup>134</sup> The lack of a factual basis in most misdemeanor plea colloquies means that there is more room for the fictional plea.

And although usually used against defendants, the dearth of safeguards allows for prosecutors to manipulate misdemeanors to *benefit* defendants.<sup>135</sup> Petty offenses provide a relatively easy way for prosecutors to demonstrate leniency and mercy in a low-stakes context. There have been several recent calls for prosecutors to end prosecutions against noncitizens in petty offense cases.<sup>136</sup> A prosecutor might not be

128. *Keizer*, 790 N.E.2d at 1152.

129. A lower court in New York relied on *Keizer* in finding that a defendant, who was alleged to have been sitting in his running car while intoxicated and charged with driving while intoxicated, could plead to reckless driving, as long as the record for the proposed disposition was placed on the record. *People v. Crandall*, 39 A.D.3d 1077, 1077–78 (N.Y. App. Div. 2007).

130. As the below discussion of *United States v. Lee* demonstrates, when a defendant pleads to a misdemeanor, the range of possible attached punishments is wide ranging compared to a plea to a felony. *See infra* Section I.C.2.

131. *Yee*, *supra* note 78.

132. *Johnson*, *supra* note 3, at 931–34.

133. *Keizer*, 790 N.E.2d at 1154.

134. *State v. Harrell*, 513 N.W.2d 676, 680 (Wis. Ct. App. 1994).

135. *See Crane*, *supra* note 96, at 806–11, 828.

136. *See, e.g., Protect NY Immigrants from Trump! Halt Broken Windows!, MOVE ON*, <https://petitions.moveon.org/sign/protect-ny-immigrants> [<https://perma.cc/Z2PH-ZK29>]

willing to give up the opportunity to prosecute a defendant altogether but may very well be willing to resolve the matter with a fictional plea. Given the flexibility that low-level cases provide, it is not surprising that fictional pleas are more frequently found in misdemeanor court.

## 2. Drug Crimes

Virtually all drug crimes—both misdemeanor and felony—are removable offenses under immigration law.<sup>137</sup> Whole families have been kicked out of public housing because one member of the family used marijuana.<sup>138</sup> Young people have lost student aid for low-level drug possession offenses.<sup>139</sup> As Gabriel J. Chin has noted, “drug offenses are subjected to more and harsher collateral consequences than any other category of crime.”<sup>140</sup>

And drug offenses are also incredibly broad, covering a huge range of conduct. For instance, in New York, to “sell” drugs means to “sell, exchange, give or dispose of to another, or to offer or agree to do the same.”<sup>141</sup> Under federal law, to “distribute” means to deliver.<sup>142</sup> Thus, sharing drugs with a friend makes one guilty of “criminal sale” in New York and “distribution” under federal law. It also makes one deportable and subject to a host of other collateral consequences.

Thanks to *Padilla* and its progeny, the immigration consequences of drug crimes are particularly well known to criminal lawyers. *Padilla* made clear that defense attorneys were responsible for knowing that certain convictions result in

(containing 1274 at the author’s last visit).

137. Immigration and Nationality Act (INA) § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2012), gives the general grounds for drug deportability. Essentially, if a noncitizen after admission is convicted of a violation or conspiracy or attempt to violate a law related to a controlled substance, he is deportable. Controlled substance is defined under 21 U.S.C. § 802(5)–(6) (2012) as “a drug or other substance, or immediate precursor,” included in schedule I, II, III, IV, or V of the Federal Controlled Substances Act. These laws essentially mean that possession-only offenses, including marijuana possession (under thirty grams), are considered deportable. *See* Cummings, *supra* note 118, at 532.

138. In New York, a conviction for section 221.10, “[c]riminal possession of marihuana in the fifth degree,” a B misdemeanor with a maximum sentence of three months in jail, N.Y. PENAL LAW § 221.10 (McKinney 2008), makes an individual ineligible for New York City public housing for three years after completion of the sentence. *Collateral Consequences Calculator—New York State*, COLUM. L. SCH., <http://calculator.law.columbia.edu> [https://perma.cc/6UNX-8JQQ] (select “221.10 Criminal Possession of Marihuana in the fifth degree” from the menu on the left). Section 221.10 was the fifth most frequent charge at arraignments in New York City in 2014 with nearly 25,000 arrests in that year alone. LISA LINDSAY, CRIMINAL COURT OF THE CITY OF NEW YORK: 2014 ANNUAL REPORT 31 (Justin Barry ed., 2015), [http://www.nycourts.gov/COURTS/nyc/criminal/cc\\_annl\\_rpt\\_2014.pdf](http://www.nycourts.gov/COURTS/nyc/criminal/cc_annl_rpt_2014.pdf) [https://perma.cc/8USP-DC98].

139. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1091 (2015).

140. Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 259 (2002).

141. N.Y. PENAL LAW § 220.00(1) (McKinney 2008 & Supp. 2018).

142. 21 U.S.C. § 802(11) (2012).

deportation.<sup>143</sup> Because *Padilla* involved drug trafficking, the consequences of drug convictions received particular attention. The case sparked a movement among defense offices to provide training on immigration consequences<sup>144</sup> but also highlighted the particularly severe and definite nature of the sanctions that attached to drug laws. As a result, the legal community has been put on notice. (There is also some evidence to suggest that in a post-*Padilla* world, defense attorneys have been more aware of collateral consequences generally.)<sup>145</sup> Defense attorneys report that “even low-level marijuana charges [are] extremely dangerous for defendants” and so “defenders will try to find either noncriminal charges for their clients to plead to or different charges for which they may not have been originally charged.”<sup>146</sup> Because the noncriminal consequences for drug cases are so profound, defendants have a tremendous amount to gain from negotiating around drug offenses.

However, drug offenses are some of the trickiest charges to negotiate around and, therefore, may involve the use of fictional pleas. This is because the very mention of drugs—either in the statute itself or in the recitation of facts involved in the plea—is sufficient to trigger a litany of collateral consequences. For this reason, drug cases must be scrubbed of the fact of the drugs themselves to avoid most collateral consequences. This is where the fictional plea comes in.

The *Padilla* case itself makes clear both the trickiness of negotiation in drug cases and the need for expanded negotiation offers that may indeed involve fictions. As Part II explained, Justice Stevens encouraged defense attorneys to bargain creatively to avoid deportation consequences for the client.<sup>147</sup> Embedded in *Padilla*, then, seems to be an acceptance that defendants may plea bargain around statutorily mandated collateral consequences.

But what is a creative plea bargain that avoids deportation in a case such as *Padilla*? A brief recitation of the facts is necessary to understand the difficulty posed by trying to achieve a “creative bargain” in the *Padilla* case. Jose Padilla, a self-employed truck-driver, veteran, and longtime legal permanent resident of the United States, had been driving on Interstate 65 in Kentucky when he stopped at a weigh station.<sup>148</sup> During a search of his truck, an inspector discovered “a substantial quantity of marijuana.”<sup>149</sup> He was charged with drug trafficking under Kentucky law. Mr. Padilla said that he had no idea there was marijuana in the shipment, claiming instead that he believed he was transporting chocolate and abalone between states.<sup>150</sup> Despite these claims of innocence, Mr. Padilla, on the advice of his lawyer, decided to plead guilty to the charge.<sup>151</sup> Neither he nor his lawyer realized that he would be mandatorily deportable.<sup>152</sup> Because his lawyer’s advice was wrong, the court

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143. *Padilla v. Kentucky*, 559 U.S. 356, 368–69 (2010).

144. Johnson, *supra* note 3, at 935–40.

145. *Id.* at 945.

146. *Id.* at 925 (footnote omitted).

147. *Padilla*, 559 U.S. at 373.

148. *Padilla v. Commonwealth*, 381 S.W.3d 322, 327 (Ky. Ct. App. 2012).

149. *Id.*

150. *Id.*

151. *Padilla*, 559 U.S. at 359.

152. *Id.*



overturned the conviction and remanded the case back to the original Kentucky trial court for decision on whether he was prejudiced by such bad advice.<sup>153</sup>

But, what if Mr. Padilla's attorney had instead taken Justice Stevens's advice to plea bargain "creatively" to avoid deportation? What would the options have been? As one scholar suggested after the case was decided, there were at least two potential immigration-safe plea alternatives for Mr. Padilla.<sup>154</sup> He could have taken either a solicitation offense or a misprision felony.<sup>155</sup> One could imagine that both crimes, as felonies, would satisfy the hypothetical sympathetic prosecutor who wants to make sure there is some criminal penalty imposed on Mr. Padilla, while still being respectful of Mr. Padilla's U.S. military service and long residence in the country. Indeed, it is easy to imagine that in courtrooms across the country, defendants are opting for pleas to solicitation rather than drug trafficking to avoid collateral consequences.<sup>156</sup>

But would either plea be an accurate reflection of the facts underlying the crime? Solicitation is defined in Kentucky as follows: "A person is guilty of criminal solicitation when, with the intent of promoting or facilitating the commission of a crime, he commands or encourages another person to engage in specific conduct which would constitute that crime . . ."<sup>157</sup> Misprision is the equivalent of failing to report a felony.<sup>158</sup> Neither covers the factual allegations in the *Padilla* case.<sup>159</sup> Therefore, if Mr. Padilla had had an opportunity to plead to either crime before trial, he would have pleaded guilty to a crime everyone agrees he did not commit. The facts underlying the initial charge would have had to disappear.

It appears then that, in a case like *Padilla*, the creative bargains available that also "reduce the likelihood of deportation" are fictional pleas. Under immigration law, most drug convictions make a noncitizen deportable or at least increase the likelihood of becoming deportable.<sup>160</sup> As a result, a creative bargain in a drug case that reduces

153. *Id.* at 387.

154. See Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2653–54 (2013).

155. *Id.* at 2654 n.15.

156. Some might consider Mr. Padilla's initial decision to plead guilty to be a sort of fictional plea since he was accepting guilt for a crime he claims, until today, he did not commit. César Cuauhtémoc García Hernández, *José Padilla Speaking at University of Denver*, CRIMMIGRATION (Mar. 3, 2016, 3:03 PM), <http://crimmigration.com/2016/03/03/jose-padilla-speaking-at-university-of-denver> [https://perma.cc/323M-UZZK]. In fact, statistics indicate that a small percent of defendants plead guilty, even when they are innocent. See Rakoff, *supra* note 20 ("How prevalent is the phenomenon of innocent people pleading guilty? The few criminologists who have thus far investigated the phenomenon estimate that the overall rate for convicted felons as a whole is between 2 percent and 8 percent.").

157. KY. REV. STAT. ANN. § 506.030(1) (LexisNexis 2014).

158. Christopher Mark Curenton, *The Past, Present, and Future of 18 U.S.C. § 4: An Exploration of the Federal Misprision of Felon Statute*, 55 ALA. L. REV. 183, 184 (2003).

159. KY. REV. STAT. ANN. § 218A.1421(1) (LexisNexis 2015) (Trafficking in marijuana: "A person is guilty of trafficking in marijuana when he knowingly and unlawfully traffics in marijuana.").

160. DEFENDING IMMIGRANTS P' SHIP, REPRESENTING NONCITIZEN CRIMINAL DEFENDANTS: A NATIONAL GUIDE 33 (2008), <https://www.probono.net/library/attachment.132408> [https://perma.cc/8Y23-KRJM] (noting that "Drug Trafficking" is an "aggravated felony"

the likelihood of deportation is generally one which does not involve a direct reference to narcotics. If the defendant has only drugs on him, then a defense attorney and prosecutor seeking a non-deportable plea will likely begin to enter the realm of fiction.

The cases in the wake of *Padilla* demonstrate the confusion over the future of creative bargaining in the ineffective-assistance-of-counsel context. There has been significant debate about how the defendant establishes prejudice where his attorney gave him incorrect advice. Lower courts have struggled to determine what should happen in the space between the rejection of the initial plea bargain offer and the defendant's election to go to trial.<sup>161</sup> In our "system of pleas,"<sup>162</sup> the negotiation of the fictional plea appears to be one of the few viable options to allow defendants to face serious criminal penalties, while avoiding particular collateral consequences.

The case of *Lee v. United States*,<sup>163</sup> like the *Padilla* case, is similarly illustrative of the difficulties of negotiating around a drug charge without removing the drugs themselves from the plea bargain. In *Lee*, the Supreme Court decided whether the defendant—who was not advised that his conviction would result in deportation—could ever demonstrate prejudice in the face of overwhelming evidence of guilt.<sup>164</sup> The Court resolved the question in favor of the petitioner, finding that he could have chosen to forgo a good plea deal, even in the face of terrible trial prospects.<sup>165</sup> With this decision, the Court resolved a circuit split below.<sup>166</sup>

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under immigration law and that the Department of Homeland Security "may include some simple possession offenses, such as second or subsequent possession offenses").

161. In several ineffective assistance of counsel cases at the state and federal level, courts have referenced the attorney's work to secure a plea that avoids collateral consequences. *See, e.g.,* *Parrino v. United States*, 655 F. App'x 399, 404 (6th Cir. 2016) ("Here, Plotnik thought Parrino fit within the 'permissive' exclusion provision, and crafted a plea agreement written to minimize Parrino's culpability and persuade the Office of the Inspector General at the Department of Health and Human Services—which administers the exclusion statute—that Parrino deserved to continue practicing as a pharmacist."); *United States v. Rodriguez-Vega*, 797 F.3d 781, 788 (9th Cir. 2015) ("A petitioner may demonstrate that there existed a reasonable probability of negotiating a better plea by identifying cases indicating a willingness by the government to permit defendants charged with the same or a substantially similar crime to plead guilty to a non-removable offense."); *Song v. United States*, No. CV 09-5184 DOC, 2011 U.S. Dist. LEXIS 68465, at \*11–12 (C.D. Cal. June 27, 2011) ("Instead, Mr. Song could have asked Counsel to do what the Supreme Court urged counsel to do in *Padilla*: 'plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence.'"); *State v. Favela*, 311 P.3d 1213, 1219–20 (N.M. Ct. App. 2013) ("Thus, under this approach, a defendant could demonstrate prejudice by submitting evidence, for instance, that a different plea could have been negotiated that would have avoided automatic deportation, even if that plea would have resulted in a conviction of a crime requiring a longer period of incarceration.").

162. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

163. 137 S. Ct. 1958 (2017).

164. Put another way: "Is it always irrational for a defendant facing strong evidence of guilt on a deportable offense to exercise his right to go to trial?" *Petition for Writ of Certiorari at 12, Lee v. United States*, 137 S. Ct. 1958 (2017) (No. 16-327), 2016 WL 4920945, at \*12.

165. *See Lee*, 137 S. Ct. at 1958.

166. Prior to *Lee*, the Second, Fourth, Fifth, and Sixth Circuits held that strong evidence of

The decision—and the arguments made by the parties during litigation of the case—makes clear that drug cases are ripe territory for fictional pleas. In their briefs, the parties argued about whether there were alternative pleas available to the defendant that could have avoided deportation.<sup>167</sup> Available alternatives included, among others, a plea to a misdemeanor simple possession charge, a non-prosecution agreement, a pretrial diversion program, or a plea under the Federal First Offender Act.<sup>168</sup> Those options have in common that they carry relatively low-level criminal penalties. For instance, the misdemeanor carries only up to a year in jail. Both a pretrial diversion and a non-prosecution agreement would carry no jail time. The Federal First Offender Act is also a diversion program.<sup>169</sup>

Ultimately, the Court in *Lee* looked only to whether the defendant would have either accepted the plea on the table or gone to trial.<sup>170</sup> The “plea or trial” dichotomy, however, ignores the range of alternative pleas that could have been negotiated to avoid deportation. In setting up this dichotomy, the Court also ignored Justice Stevens’ suggestion in *Padilla* that the parties should plea bargain creatively to reach an immigration-safe resolution.

But what if the prosecutor *did* want serious criminal sanctions for the defendant *and also* an avenue to allow the defendant to remain in the country? The above options, all of which were suggested as alternatives by Lee’s counsel in his brief before the Supreme Court, would likely fall short for a prosecutor interested in pursuing serious criminal charges. One can imagine, however, a fictional plea that could result in serious sanctions *and* avoid deportation.

For instance, in many training materials for defense attorneys, public defender offices or immigration advocates will guide attorneys on how to achieve a non-deportable plea bargain. A handout from the National Association of Criminal Defense Attorneys encourages attorneys to avoid any drug-related conviction. In a drug case, this is, of course, an incredibly difficult task. One suggestion the handout makes is to “[s]pecify a substance that is not covered under 21 U.S.C. 802,” which designates “controlled substances” for the purposes of federal law. Or in a marijuana case, they encourage the defender to make sure the record reflects that the “client has no prior drug convictions” and that she accepts a charge of “possession for personal use of 30 grams or less of marijuana.”<sup>171</sup> Another strategy suggested for defense

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guilt precluded a finding of prejudice under an ineffective assistance of counsel analysis. *Kovacs v. United States*, 744 F.3d 44, 52–53 (2d Cir. 2014); *United States v. Akinsade*, 686 F.3d 248, 255–56 (4th Cir. 2012); *United States v. Kayode*, 777 F.3d 719, 724–29 (5th Cir. 2014); *Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012). The Third, Ninth, and Eleventh Circuits found that a defendant could demonstrate prejudice, even in the face of poor trial prospects. *United States v. Orocio*, 645 F.3d 630, 643–46 (3d Cir. 2011), *abrogated on other grounds by* *Chaidez v. United States*, 568 U.S. 342 (2013); *Rodriguez-Vega*, 797 F.3d at 789–90; *Hernandez v. United States*, 778 F.3d 1230, 1234 (11th Cir. 2015).

167. Brief for Petitioner at \*31–32, *Lee*, 137 S. Ct. 1958 (2017) (No. 16-327).

168. *Id.* at \*32.

169. 18 U.S.C. § 3607 (2012).

170. *See Lee*, 137 S. Ct. at 1958.

171. DEFENDING IMMIGRANT’S P’SHIP, IMMIGRATION CONSEQUENCES OF DRUG OFFENSES: HANDOUT (2012), [https://www.nacdl.org/uploadedFiles/Content/Legal\\_Education/Live\\_CLE/Live\\_CLE/03\\_Drug\\_Offenses\\_Handout.pdf](https://www.nacdl.org/uploadedFiles/Content/Legal_Education/Live_CLE/Live_CLE/03_Drug_Offenses_Handout.pdf) [<https://perma.cc/N5PN-X85X>].

attorneys in drugs cases is to plead to an “accessory after-the-fact” charge, which is not a deportable offense.<sup>172</sup>

What becomes clear by looking at *Padilla, Lee*, and the above advice to attorneys representing noncitizen defendants in drug cases is that nearly every drug conviction dooms a defendant to deportation. A step back reveals that drug charges in general cover a huge range of conduct and carry many substantial collateral consequences not related to immigration. For that reason, to secure a “safe” plea in a drug case, the plea must be wiped clean of any drugs. In this context, the fictional plea serves as the only escape valve—barring a success at trial or a dismissal—for the defendant sidestepping whatever collateral consequence will be most damaging to him.

### 3. Sex Offenses

Sex offenses, like drug offenses, generally trigger automatic collateral consequences. In the case of sex offenses, the same consequence—sex offender registration—is attached to almost any conviction and affects all defendants who plead guilty, regardless of their background. And the consequences of sex offender registration are severe.<sup>173</sup> Sex offenders have their names and addresses posted publicly to inform communities about those living in their midst who have been convicted of a registerable offense.<sup>174</sup> They are required to report to state authorities on a regular basis.<sup>175</sup> They are also likely to be subject to housing restrictions, such as prohibitions on living within a certain distance of a school.<sup>176</sup> There are tent cities full of individuals with sex offense records because of the massive number of

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172. DEFENDING IMMIGRANTS P’SHIP, *supra* note 160, at 110.

173. For an overview of state-by-state requirements for sex offender registration, see Jane Shim, *Listed for Life*, SLATE (Aug. 13, 2014, 6:44 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/08/sex\\_offender\\_registry\\_laws\\_by\\_state\\_mapped.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/sex_offender_registry_laws_by_state_mapped.html) [https://perma.cc/3NY4-XU9E].

174. See generally Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1090–94 (2011) (examining the growth in information publicly available about registered sex offenders and noting that “[a]n offender’s information is globally disseminated through online state-maintained registries, and individuals from any part of the world—whether they may ever be contemplated future victims or even have contact with the offender—can access a state’s online registry and the accumulated personal information on it”).

175. See, e.g., N.Y. CORRECT. LAW § 168-f (McKinney 2014) (codifying, inter alia, the requirements for sex offenders to check in with their local law enforcement agency at intervals dictated by their assessed sex offender level).

176. See Jennifer Burnett, *Sex Offender Residency Restriction Zones*, COUNCIL ST. GOV’T (Nov. 19, 2015, 2:42 PM), <http://knowledgecenter.csg.org/kc/content/sex-offender-residency-restriction-zones> [https://perma.cc/8TGE-DS8Y] (showing that twenty-seven states automatically impose housing restrictions for convicted sex offenders by statute, while seven other states allow government officials, such as judges or parole boards, to set housing restrictions).

restrictions on where registered sex offenders can live.<sup>177</sup> They often cannot secure employment.<sup>178</sup>

Because of these consequences, avoiding sex offender registration is particularly critical to defendants. Some defendants would rather face significantly more jail time than end up on a sex offender registry.<sup>179</sup> As one public defender in Oakland has written, “my clients would choose to take more jail time, more fees – anything to avoid being labeled a sex offender for life.”<sup>180</sup> But sex offenses are also generally perceived by the public as serious crimes for which there should be significant punishment. Even where prosecutors may be open to negotiating around the sex offender requirement, there may be other constraints to such negotiation.

The Introduction to this Article begins with a real story from criminal practice which demonstrates this point. Although the prosecutor understood that registration would lead to a serious housing crisis for the defendant, which would only exacerbate his precarious situation, she also wanted to make sure that the defendant faced a meaningful consequence for the crime. But given that almost all sex offenses were classified as registrable offenses by statute, the prosecutor and defense attorney started to experiment with fictions—how could they achieve a conviction with serious sanctions, but without the registration? They contemplated an assault charge, but it would require that they state on the record that the victim had suffered “bodily injury.” That suggestion was too great a “fiction” for the prosecutor.

They ultimately landed on the idea of three separate misdemeanor convictions—a different type of fiction—since the defendant committed only a single instance of sex abuse. The convictions would require three instances of conduct that met the elements of the statute. As Section I.C.1 made clear, misdemeanors generally require fewer procedural hoops, including the need to state the facts supporting a plea bargain on the record. Although the judge could reject the plea, he or she could also choose to go along with it, knowing that there would be no evidence of the fiction on the formal record. Indeed, this is what occurred. The defendant pleaded guilty to three misdemeanor charges, which each carried a year in prison but no sex offender registration.

There is evidence that the practice of using fictional pleas to avoid sex offender registration is common. In Ohio, for instance, the debate over “baseless pleas” has focused on the use of such pleas to help defendants circumvent registration. Ohio Supreme Court Justice Michael P. Donnelly, formerly a judge of the Cuyahoga County Common Pleas Court, has argued for a local state rule that would require a recitation of the facts underlying any plea that is accepted by the court. In support of

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177. Douglas Hanks, *Tent Camp of Homeless Sex Offenders near Hialeah ‘Has Got To Close,’ County Says*, MIAMI HERALD (Aug. 22, 2017, 6:48 AM), <http://www.miamiherald.com/news/local/community/miami-dade/article168569977.html> [https://perma.cc/34TE-KXVR].

178. *See id.*

179. *See Johnson, supra* note 3, at 922 (“[O]ne public defender described an example in which the defendant opted for fifteen months in jail—a much longer prison sentence than usual for the type of the case—to avoid sex offender registration.”).

180. Rachel Marshall, *I’m a Public Defender. My Clients Would Rather Go to Jail than Register as Sex Offenders*, Vox (July 5, 2016, 8:00 AM), <https://www.vox.com/2016/7/5/12059448/sex-offender-registry> [https://perma.cc/B5HZ-499Y].

his proposal, he cites 400 felony charges from 2008 to 2014 that were charged originally as sex crimes and, through the use of plea bargaining, reduced to non-sex-crime offenses.<sup>181</sup> He noted that the most common reduced charges were abduction, felonious assault, or child endangerment.<sup>182</sup> Interestingly, all of these are serious crimes with the potential for hefty sentences,<sup>183</sup> but they do not require sex offender registration. One can imagine that these charges would provide a space for an agreement that satisfied the needs of the prosecutor—to hold the defendant accountable—and the needs of the defendant—to avoid sex offender registration. But such a meeting of the minds might also require, as the critics of this practice note, a resort to fiction.

## II. FICTIONAL PLEAS: A CASE STUDY IN THE DECLINE OF TRUTH

Thus far, this Article has given an overview of the practice of fictional plea bargaining: Who uses such bargains and to what end? In which types of cases will fictional pleas be used to greatest effect? In this description, one sees the many benefits of the fictional plea to practitioners on the ground. These benefits are felt immediately in individual cases. A defendant may avoid being ripped from his family and the country he calls home. A prosecutor may get to use her discretion to make sure that a defendant gets help for substance abuse but does not end up on a lifetime sex offender registry, which will ultimately, in her view, harm the defendant and society more than keeping him off the list and seeking alternative forms of punishment. Or, a judge takes a stand, albeit quietly, against the federal government's immigration priorities. The fictional plea, in many cases, serves a clear purpose and is the result of the good intentions of the actors involved.

There are, of course, questions about the ethical lines crossed by lawyers and judges when they participate (knowingly) in these fictions. The Rules of Professional Responsibility require a duty of candor for lawyers before the tribunal.<sup>184</sup> There are clear arguments that when lawyers enter a plea bargain on the record based on fictions, they are in conflict with these rules.<sup>185</sup> But, as many scholars have

181. *See supra* note 81.

182. Dissell, *supra* note 81.

183. *See* OHIO REV. CODE ANN. § 2903.11(D)(1)(a) (LexisNexis 2014 & Supp. 2018) (stating that felonious assault is either a first or second degree felony, depending on the specific conduct); *id.* § 2905.02(C) (stating that the crime of abduction is second or third degree felony, depending on the specific conduct); *id.* § 2919.22(E)(2)(b)–(d) (stating that child endangerment is a felony in the fourth, third, or second degree, depending on the specific conduct); *id.* § 2929.14(A)(1)–(5) (defining the definite prison sentence ranges for felony offenses).

184. MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(1) (AM. BAR ASS'N 2015) ("A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."); *id.* r. 3.4(b) ("[A] lawyer shall not falsify evidence [or] counsel or assist a witness to testify falsely.").

185. Mari Byrne has argued specifically about why fictional pleas violate the ethical rules that bind lawyers. Byrne, *supra* note 14, at 2966–67. But other scholars have persuasively argued that lawyers should have a deeper commitment to truth than what a formalist reading of the ethical rules requires. *See, e.g.,* W. Bradley Wendel, *Whose Truth? Objective and Subjective Perspectives on Truthfulness in Advocacy*, 28 YALE J.L. & HUMAN. 105, 111, 148

persuasively argued, lawyers are not bound by a duty to total truth.<sup>186</sup> Judges have their own set of ethical rules, which also require them to act in accordance with the law and promote confidence in the judiciary.<sup>187</sup>

Leaving aside debates about judicial and attorney ethics, this Article instead focuses on how fictional pleas serve as a case study in criminal justice problem solving and how little truth matters to the current problem-solving scheme. What does it mean that all parties in the criminal justice system agree to allow a lie to become fact? What does the fictional plea tell us about the role of truth in our modern adversarial structure? Faced with the moral quandary of mandatory collateral consequences, the system adjusts by discarding truth and focuses solely on resolution. The fictional plea lays bare the soul of an institution where everything has become a bargaining chip: not merely collateral consequences, but truth itself. Rather than a grounding principle, truth is nothing more than another factor to negotiate around.

#### *A. Truth Seeking vs. Problem-Solving*

At the outset, it is important to make three things clear, each of which will be developed more below. The first is that this Article presupposes that truth is a normative goal of the adversarial model of criminal justice. The second is that this Article does not purport to define truth, but nor does it abandon the premise that some version of the truth is knowable. The third is that discarding fictional pleas will not solve any particular problem with the criminal justice system; it will not restore truth to some mythical rightful place. For this reason, the critique offered here is meant to serve as a case study in the role of truth in the system, not as a prescription to remedy an ill.

Truth is not, of course, an easily defined concept. There is a rich literature about the nature of truth in the adversarial system, which demonstrates the depth of the inquiry.<sup>188</sup> Even given these debates about truth, this Article rejects the notion that

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(2016) (“The ability of a judge, or a legal system, to face social conflict in an honest way depends on the facts of the dispute being presented to decision-makers in a fundamentally honest way. That does not mean lawyers should aim directly at the truth, but it does mean there are reasons to disfavor the traditional, unmodified version of the standard conception, in which the value of truthfulness does not serve as a constraint on advocacy (beyond the rules prohibiting the use of false evidence).”).

186. See, e.g., STEVEN LUBET, *NOTHING BUT THE TRUTH: WHY TRIAL LAWYERS DON'T, CAN'T, AND SHOULDN'T HAVE TO TELL THE WHOLE TRUTH* (2001); W. BRADLEY WENDEL, *ETHICS AND LAW: AN INTRODUCTION* 121–25 (2014) (ebook) (discussing scholarship by Deborah Rhode and William Simon that have used as an example a lawyer advising a client to tell a small lie in order to keep her public benefits; the permissibility of this advice lies in the unfairness of the public benefits scheme itself); Albert W. Alshuler, *Lawyers and Truth-Telling*, 26 HARV. J.L. & PUB. POL'Y 189 (2003) (discussing debates among scholars about the obligations for attorneys to be honest); David Luban, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, 2005 U. ILL. L. REV. 815 (2005) (arguing that lawyers should serve as an instrument to share their clients' stories, even where those stories may involve deception).

187. MODEL CODE OF JUD. CONDUCT Canon 1 (AM. BAR ASS'N 2011).

188. For just a small sample, see Alshuler, *supra* note 186 (discussing the scholarly responses to the adversarial system's relationship to truth telling); Stephanos Bibas, *Designing*

truth is undefinable.<sup>189</sup> Facts tell us the truth or at least something approximating it in any particular case.<sup>190</sup> For our purposes, it is enough to say that the discovery of truth (or something close to it) is possible in many criminal cases via the collection of facts.

Nor is truth synonymous with justice, but it is not surprising that they are often paired together as twin concepts “since establishing the truth is . . . a precursor to determining just[ice].”<sup>191</sup> But fictional pleas exist because justice does not always require truth or, rather, actors within the criminal system perceive that they can achieve justice without truth. And yet, truth is certainly one of the purported goals of the adversarial system. Wigmore’s famous line that cross-examination, the heart of the adversarial model, is “beyond any doubt the greatest legal engine ever invented for the discovery of truth”<sup>192</sup> has been repeated so often that most lawyers accept it as gospel. The American model of criminal adjudication—including plea bargaining—has been imported around the globe on the strength of the argument that it is more transparent and fair than the systems previously in place in many countries and that this, in turn, leads to more truthful outcomes.<sup>193</sup>

Furthermore, although the criminal justice system has always had a tolerance for legal fictions,<sup>194</sup> the fact that the federal system and most states require some factual basis for a plea bargain indicates a normative commitment to recording some version of truth.<sup>195</sup> For instance, in his dissent in *Libretti v. United States*, Justice Stevens

*Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055 (2016) (discussing the challenges to accuracy in the adversarial system); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032 (1975) (“My theme . . . is that our adversary system rates truth too low among the values that institutions of justice are meant to serve” and that lawyers have a responsibility for truth telling.); Kenneth S. Klein, *Truth and Legitimacy (in Courts)*, 48 LOY. U. CHI. L.J. 1 (2016) (comparing the meaning of truth within the legal system to the public perception of the role of truth in courts).

189. See Wendel, *supra* note 185.

190. Cf. Chris William Sanchirico, *Evidence Tampering*, 53 DUKE L.J. 1215, 1220 (2004) (pushing back against the concept of evidence law as being primarily about truth seeking, but noting that “[m]ost analyses of evidence law take litigation’s prime object to be the discovery of truth about past events”).

191. Tom R. Tyler & Justin Sevier, *How Do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures*, 77 ALB. L. REV. 1095, 1095, 1108–11 (2013) (discussing the ways in which truth and justice are not necessarily synonymous in studies about the popular legitimacy of the court system).

192. 5 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (James H. Chadbourn rev. ed. 1974).

193. See, e.g., Thea Johnson, *Latin Justice: A New Look*, WORLD POL’Y J., Fall 2013, at 57–64 (discussing the transition in Latin American countries from an inquisitorial to an adversarial model of justice that is based on the American system).

194. See *infra* text accompanying notes 226–27.

195. This normative value is also repeated and embraced by scholars. See, e.g., Bibas, *supra* note 188, at 1061 (“The core goals of criminal procedural system should be accuracy and fairness. The investigatory, bargaining, and advising processes should be (re)designed to ensure the factual, legal, and moral accuracy of the resulting convictions, sentences, and collateral consequences.”).



made clear that Rule 11 is the procedural vehicle by which judges determine the truth of the matter, which is required for enforcing the substantive law.<sup>196</sup> As Justice Stevens wrote, a court must “satisfy itself that there is a factual basis for any judgment entered pursuant to a guilty plea . . . . Were a court to do otherwise, it would permit the parties to define the limits of its power.”<sup>197</sup> In the same decision, Justice Stevens rejects the idea that a wealthy defendant may be able to “forfeit” property that the government has no statutory right to simply to gain a “favorable sentence.”<sup>198</sup> It is truth that, in theory, prevents that scenario from playing out.

It is interesting, then, that it was Justice Stevens who embraced the problem-solving tool of creative bargaining in the *Padilla* case fifteen years later. Although the creative bargain in *Padilla* implicates different concerns than that in *Libretti*, as Section I.C.2 makes clear, there was simply no truth-based plea that would have allowed Mr. Padilla to escape deportation *and* be punished for drug running in the criminal justice system. In the last fifteen years, the Supreme Court has caught up somewhat to the reality of the criminal system. As Justice Kennedy noted in *Missouri v. Frye*, after a lengthy discussion of the pervasiveness of plea bargaining, “To note the prevalence of plea bargaining is not to criticize it.”<sup>199</sup> *Padilla*, *Frye*, and *Frye*’s companion case, *Lafler v. Cooper*,<sup>200</sup> all acknowledge that plea bargaining as a problem-solving tool is critical to the functioning of the modern adversarial system.

But the current system of plea bargaining has become separated from the purported principles of adversarialism.<sup>201</sup> Rather than truth seeking, the system is obsessively focused on efficiency.<sup>202</sup> Indeed, the modern adversarial model has allowed efficient problem solving to subsume the broader normative goals of the system. As Christopher Slobogin argues, plea bargaining itself is incompatible with the purported premises of the adversarial system, including procedure based on open confrontation.<sup>203</sup> Such confrontation has traditionally been viewed as a means for discovering truth. The wholesale embrace of plea bargaining, then, goes along with an abandonment of some of the fundamental values that undergird the criminal system, including truth seeking. Without an anchor of truth, the only guiding principle is efficiency—getting the case resolved quickly and (ideally) with some gains for both sides.

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196. 516 U.S. 29, 56 (1995) (Stevens, J., dissenting) (footnote omitted).

197. *Id.*

198. *Id.* at 55.

199. 566 U.S. 134, 144 (2012).

200. 566 U.S. 156 (2012).

201. Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism*, 57 WM. & MARY L. REV. 1505 (2016).

202. See Dan Simon, *Criminal Law at the Crossroads: Turn to Accuracy*, 87 S. CAL. L. REV. 421, 431–47 (2014) (discussing the main barriers to accuracy in criminal law); see also Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y. L. SCH. L. REV. 911, 912 (2011/2012) (“The current American system is marked by an adversary process so compromised by imbalance between the parties—in terms of resources and access to evidence—that true adversary testing is virtually impossible.”).

203. Slobogin, *supra* note 201, at 1507–09.

The efficient plea bargaining trade-offs tend to be well-known.<sup>204</sup> The prosecutor agrees to relative leniency in sentencing or charging for a promise from the defendant that he will plead guilty and save the prosecutor's office resources. But as Section I.B outlines, these trade-offs may include much outside the sentence and charge.<sup>205</sup> This makes sense if the system is structured to purely resolve cases rather than seek truth. As Ken Strutin has noted, "Pretrial innocence and guilt are legal commodities, situational legal truths."<sup>206</sup> They become—along with the charge, the sentence, the potential collateral consequences, and, even, the truth—bargaining chips to be traded in search of a solution.<sup>207</sup>

And despite the fact that factual basis requirements indicate a normative commitment to truth, as a practical matter they tend not to stop fictional pleas from entering the formal record. Because the agreements of the parties are generally accepted by rote, "the findings of fact that emerge from plea bargaining are not subject to any meaningful testing."<sup>208</sup> Even where the judge requests a factual basis, "this requirement can be satisfied merely by asking the parties in charge of evidence production—the prosecutor and the defense attorney—if such a basis exists."<sup>209</sup> As a result, a lie—particularly a well-intentioned lie—becomes easier to present to the court.

It may be appropriate, then, to characterize fictional pleas as, what Julia Simon-Kerr has termed, "systemic lying," in which multiple actors in the criminal system allow a lie to continue.<sup>210</sup> Such lying may occur where stakeholders perceive that the lie is warranted or excused in the face of some other, greater, cause. Simon-Kerr explores a number of examples of the phenomena, including the "testilying" of police officers on the witness stand,<sup>211</sup> the use of "pious perjury" in the early nineteenth century to avoid capital punishment for minor crimes, and the tendency of juries to nullify in trials in the post-Reconstruction South.<sup>212</sup>

But as Simon-Kerr points out, resolving such conflict through lying poses grave risks to the rule of law: "[I]t is not a positive condition for the legal system such that we should welcome it when it appears and rationalize it as an efficient *de facto*

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204. Thea Johnson, *Public Perceptions of Plea Bargaining*, AM. J. CRIM. L. (forthcoming 2019) (unpublished manuscript on file with the *Indiana Law Journal*).

205. See *supra* Section I.B.2.

206. Ken Strutin, *Truth, Justice and the American Style Plea Bargain*, 77 ALB. L. REV. 825, 833 (2013/2014).

207. See Slobogin, *supra* note 201, at 1516 ("[V]ery few defendants ever exercise their rights to remain silent, testify, confront accusers, or be heard by a jury during a public trial. Rather, these rights are merely bargaining chips to be used in negotiations with the prosecutor, and are relinquished on a routine basis.").

208. *Id.* at 1518.

209. *Id.* (footnote omitted).

210. Simon-Kerr, *supra* note 12, at 2179.

211. See generally *id.* at 2202–08, 2185–89, 2195–202 (discussing "testilying," as well as other examples of the "systemic lying," such as "pious perjury" in the early nineteenth century to avoid capital punishment for minor crimes and the tendency of juries to nullify in trials in the post-Reconstruction South); Morgan Cloud, *Judges, "Testilying," and the Constitution*, 69 S. CAL. L. REV. 1341, 1350–57 (1996) (discussing those cases in which "testilying" arises most frequently).

212. Simon-Kerr, *supra* note 12, at 2220.

solution to certain moral-formal dilemmas.”<sup>213</sup> Fictional pleas have become a “de facto solution” for a group of criminal justice actors confronted with vulnerable defendants facing serious collateral consequences.

But the reason that the fictional plea emerges as a solution to such a problem is that the modern system of plea bargaining values problem solving over truth seeking. These well-meaning actors, when confronted by what they perceive as the injustices of mandatory collateral consequences have, largely, not sought to lobby federal and state legislatures to undo the law but have rather added collateral consequences to the pot of chips to be bargained for during plea negotiations. This response is possible because truth is not a guidepost for the resolution of criminal cases.

### 1. Fictions as a Prosecutorial Tool

The descriptive portion of this Article paints a portrait of a “new” district attorney, committed in certain cases—particularly cases that implicate immigration issues—to helping defendants avoid severe collateral consequences, while still holding those same defendants accountable within the criminal system. This appears to be an empathetic vision of prosecutorial discretion, and again, in any individual case it very well may be a form of compassionate prosecution.

But if everything is a bargaining chip, the party that benefits is the one with the most power to negotiate. In the criminal system, that is the prosecutor. As a systemic issue, fictional pleas function as an additional tool that increases the power of the prosecutors and may be readily used to further punish defendants. Both courts and scholars alike have written about the coercive nature of plea bargaining as a practice (separate and apart from fictional pleas).<sup>214</sup> Despite evidence that judges are taking a more active role in plea bargaining,<sup>215</sup> the modern adversarial criminal process is run by the parties, particularly by prosecutors.<sup>216</sup> Collateral consequences, although of a different variety, have now become additional bargaining chips. Although they can be used to lessen the criminal penalty, they can also be a powerful strategic tool for prosecutors to use *against* defendants.<sup>217</sup>

Progressive prosecutors who want to protest the mandatory imposition of serious collateral consequences have other options beyond the fictional plea. In examining these roads not taken, one sees again that the fictional plea—as a systemic matter—does not serve the interests of defendants in the long run, even if in any individual case there are defendants who benefit substantially from its use. One alternative option for prosecutors is to decline to charge cases in which they believe the imposition of collateral consequences would work against the interests of justice. It

213. *Id.*

214. *See e.g., Mezzanatto v. United States*, 513 U.S. 196, 209–10 (1995) (“The plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government ‘may encourage a guilty plea by offering substantial benefits in return for the plea.’” (quoting *Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978))).

215. *See supra* Section I.B.3.

216. Slobogin, *supra* note 201, at 1516.

217. *See Crane, supra* note 96, at 802–03; Jain, *supra* note 98, at 1222.

is well within the discretion of prosecutors to decline prosecution.<sup>218</sup> And such an action would serve as an expressive use of their discretion: an open rejection of the legislative decisions of both the state and federal governments<sup>219</sup> to impose collateral consequences in the first place. A prosecutor might respond to this alternative by noting that dismissing the charges serves only to benefit the defendant and eliminates the other side of the bargain—that the prosecutor gets to hold the defendant accountable. But such a defense is grounded in the idea that justice in the criminal system is manifested not by taking a stand against injustice but by negotiating around the perceived injustice.<sup>220</sup>

Prosecutors could also join lobbying efforts to reform the system of collateral consequences. Prosecutors' offices frequently lobby on criminal justice issues.<sup>221</sup> Prosecutor associations take formal positions on matters ranging from discovery laws to gun laws to reforms to the jury system.<sup>222</sup> In Ohio, prosecutors lobbied against the adoption of a rule that would require the parties to enter a factual basis for the plea on the record.<sup>223</sup> These positions can and often are adopted by the legislative bodies charged with making decisions on criminal justice reform issues. A collective call from prosecutors to do away with the imposition of mandatory collateral consequences would very likely make some headway. And yet, such a call has been absent—even as prosecutors have publicly decried the results of mandatory collateral consequences. There simply is not an institutional force to push prosecutors in this direction.<sup>224</sup> The system, rather, has settled into a particular routine to resolve issues

218. Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1252–54 (2011).

219. There would, of course, be differences between a protest against local government versus the federal government. As Section I.B.2 makes clear, prosecutors feel more comfortable speaking out openly against the imposition of immigration consequences on criminal defendants. This is likely for two reasons: first, the Supreme Court in *Padilla v. Kentucky*, 559 U.S. 356 (2010), has acknowledged the seriousness of immigration consequences and second, it may be easier for the prosecutor to take a stand against the federal government than the state government for which the prosecutor theoretically works.

220. In certain states, judges too have the power to dismiss cases. As Anna Roberts argues, judges may use this power to push back on injustices in the system, including by dismissing cases where the judge views the potential collateral consequences as excessive. Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327 (2017).

221. Josie Duffy Rice, *Prosecutors Aren't Just Enforcing the Law—They're Making It*, APPEAL (Apr. 20, 2018), <https://theappeal.org/prosecutors-arent-just-enforcing-the-law-they-re-making-it-d83e6e59f97a> [<https://perma.cc/7LKW-QJBT>].

222. See Katie Shepherd, *Oregon District Attorneys Drop Plan To Scrap Non-Unanimous Jury Verdicts*, WILLAMETTE WEEK (Jan. 30, 2018), [http://www.wweek.com/news/courts/2018/01/30/oregon-district-attorneys-drop-plan-to-scrap-non-unanimous-jury-verdicts/?utm\\_source=In+Justice+Today+Newsletter&utm\\_campaign=9a097419e8-&utm\\_medium=email&utm\\_term=0\\_0331e33901-9a097419e8-53259263](http://www.wweek.com/news/courts/2018/01/30/oregon-district-attorneys-drop-plan-to-scrap-non-unanimous-jury-verdicts/?utm_source=In+Justice+Today+Newsletter&utm_campaign=9a097419e8-&utm_medium=email&utm_term=0_0331e33901-9a097419e8-53259263) [<https://perma.cc/8CWN-3UW2>].

223. Dissell, *supra* note 81.

224. Partly, this may be explained by what David Sklansky has described as the “ambiguity of the prosecutor’s role,” namely that prosecutors “face conflicting expectations” that ask them to be “leaders of law enforcement” and “agents of mercy and discretion.” David Alan Sklansky, *The Problems with Prosecutors*, 1 ANN. REV. CRIMINOLOGY, 2018, at 451, 461; see also David

of perceived injustice and this routine embraces the “systemic lying” identified by Simon-Kerr over a more formalized fight against the injustice itself.

*B. Present Fictions as Future Truth*

One of the most concerning features of the fictional plea is that it creates a record that then becomes “truth.” Fictional pleas are not legal fictions, a commonly used device in the legal system.<sup>225</sup> The legal system has always tolerated and endorsed legal fictions. They serve as “an enabler,” allowing the “application of the law to novel legal questions and circumstances.”<sup>226</sup> Formal legal fictions require “a suspension of belief because [they are] not meant to deceive”<sup>227</sup> but rather assist. When we say that a corporation is a person, we know that a corporation does not breath air, but we accept such a fiction for the limited purposes of establishing the rights and responsibilities of the corporation.<sup>228</sup> In criminal law, there are a number of fictions that sustain the system. For instance, guilty defendants, who fully intend to plead guilty, enter formal pleas of “not guilty” to keep the case moving forward.<sup>229</sup>

But fictional pleas *are* “meant to deceive.” Unlike legal fictions, which are understood to be fictions not just by the parties to the individual transaction but also by anyone who views them from the outside, a fictional plea, even when done with a wink and a nod among the parties, results, as with all pleas, in a record of criminal conviction. After the defendant accepts a guilty plea—whether fictional or not—he carries with him a conviction which has real-world outcomes.<sup>230</sup> The conviction follows him. It may, for instance, prevent him from voting.<sup>231</sup> That consequence occurs because the conviction stands as proof that the defendant committed a crime and accepted guilt for that crime.<sup>232</sup> Even if the parties knew about the fiction, no one

Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 3 J. CRIM. L. & CRIMINOLOGY 473 (2016).

225. I focus here on the difference between fictional pleas and legal fictions because attorneys and judges tend to use the “legal fiction” phrase to describe the fictional plea. *See, e.g.*, Interview with Justice Michael Donnelly, *supra* note 103.

226. Nancy J. Knauer, *Legal Fictions and Juristic Truth*, 23 ST. THOMAS L. REV. 70, 79 (2010).

227. *Id.* at 119 (citing LON L. FULLER, *LEGAL FICTIONS* (1984)).

228. For additional examples of common legal fictions, see generally *id.* at 1–5 (noting the myriad legal fictions used in property law, family law, tax law, and elsewhere).

229. Robert F. Cochran, Jr., “How Do You Plead, Guilty or Not Guilty?”: Does the Plea Inquiry Violate the Defendant’s Right to Silence?, 26 CARDOZO L. REV. 1409, 1411–12 (2005) (“What is for lawyers and judges a casually used term-of-art is viewed by ordinary people as a serious moral claim by the defendant that he did not commit the crime. In order to make the state prove its case, the defendant must make a false statement[, i.e., not guilty].”).

230. *See generally* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012).

231. *Voting with a Criminal Record—Executive Summary*, ACLU, <https://www.aclu.org/other/voting-criminal-record-executive-summary> [<https://perma.cc/SM7L-T674>].

232. Although as Brandon Garrett has argued, we should not view plea bargains as confessions in the first place, they are not taken under oath and are not supported by a factual record—precisely what allows them to be manipulated as they are in the context of fictional pleas. Brandon L. Garrett, *Why Plea Bargains Are Not Confessions*, 57 WM. & MARY L. REV.

else does. The public, federal immigration authorities, or local state agencies that impose penalties on individuals convicted of certain crimes are all in the dark about the facts underlying the conviction. It does not make sense, then, to think of fictional pleas as legal fictions, either by operation or result.<sup>233</sup>

A fictional plea becomes a permanent record of a conviction. But there is no mark on an individual's criminal record to indicate that a particular plea represented the facts or did not. The plea formally represents a confession to a charge, which is translated to a conviction and then to a criminal record.<sup>234</sup> And in this sense, the fiction is transformed into truth. A fictional plea tells a false narrative about what crime the defendant committed and for which he accepted guilt. The fictional plea therefore does not simply enable the "application of the law to novel circumstances," but produces a record which is used in all future cases involving this particular defendant. The "downstream actors"<sup>235</sup>—whether a future judge, district attorney, or probation officer, reviewing the rap sheet of a defendant—will not ask themselves if the conviction was or was not the result of a particular type of bargain, but will accept the conviction as fact.

At the moment the plea bargain is entered, this may not seem problematic, but on both an individual level and systemic level, it is a cause for concern. On the individual level, the defendant is creating a record of behavior that is not accurate. Returning to the example from the Introduction, the defendant is admitting to three acts of sex abuse, rather than one. Although the three acts are categorized as misdemeanors and therefore less "serious" crimes, to the outside world they indicate a pattern of abusive behavior, where one may not actually exist. It is not hard to imagine a future prosecutor in a potential future criminal case pointing to the defendant's criminal record and harping on the defendant's *repeat* crimes. Similarly, the defendant who claims he inhaled toxic vapors rather than smoked marijuana has created a record of what may be seen as potentially "worse" behavior than what he was actually charged with. Marijuana is now legal across many states, which is a good indication that the social approbation associated with use of the drug has weakened. Not so with "huffing," which is essentially what the defendant pleaded to.

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1415 (2016).

233. Some scholars have argued that the traditional line between acceptable and unacceptable legal fictions appears to lie at "the ultimate question of culpability," meaning that traditionally, the system objects to an innocent man pleading guilty to a crime he did not commit, but not necessarily to a guilty man pleading to a crime he did not commit, rather than the crime he did commit. Culpability differentiates the two men. *See Bowers, supra* note 17, at 1122, 1171 (arguing, though, that the line should move to include culpability within the definition of legal fiction so that "false pleas" by the innocent man who chooses to plead guilty may be considered as a formal legal fiction). But drawing the line at culpability ignores that fictional pleas have a purposely deceiving effect. In the context of collateral consequences, particularly, the deception is what provides the defendant protection and is the entire point of the exercise. Fictional pleas, therefore, fall outside the scope of classic legal fiction.

234. As Brandon Garrett notes, we should not think of plea bargains as confessions because, as noted throughout this Article, they are often not supported by a factual record. As Garrett notes, the lack of adjudicated fact becomes a problem precisely because such convictions are used for determining collateral consequences. Garrett, *supra* note 232, at 1437–38.

235. *See Michael P. Donnelly, End Factually Baseless Plea Bargains*, 42 LITIG., no. 3, 2016, at 6.

The immediate benefits in each case were clear and important, but in both cases the plea has created a record of behavior that may have unintended consequences down the road.

There are other ways the defendant may be hurt by his false record. As Eisha Jain notes, once an individual is “marked” with a criminal conviction, criminal justice agencies and even organizations outside of the criminal system use the “mark” to make a number of determinations about the individual.<sup>236</sup> For instance, probation reports at both the state and federal level are often based on the defendant’s criminal record. These reports generate recommendations about sentencing and rehabilitation. In federal courts, each additional crime on the defendant’s record has the potential to generate points, which drive up his sentencing guidelines range. Of course, the defendant was already facing a criminal charge, even before the fictional plea, but fictional pleas (and other forms of creative bargaining) often result in the defendant accepting a more serious charge.<sup>237</sup> That more serious charge may avoid certain consequences at the moment but can easily lead to additional consequences down the road.

There are also less obvious examples of the negative consequences of fictional pleas. For instance, impeachment by prior criminal conviction is a common tactic that lawyers use during trials. Such impeachment impacts the decisions of defendants and other witnesses to take the stand and, in turn, weakens the voice of those with criminal records, even where the record may not reflect truth.<sup>238</sup> Again, there is no way to explain the nature of the plea after the fact.<sup>239</sup> As a result, a plea to a more serious charge or a charge that simply does not reflect the individual’s conduct may discourage that individual from testifying in his own defense or acting as a witness in future cases. False narratives about prior cases have a way of weaving themselves into the narrative of future cases through these evidence rules.

Beyond the individual level, fictional pleas can have a systemic impact on the criminal justice system. We are in a moment where scholars, practitioners, and politicians are focused on data collection as a way of studying the criminal system.<sup>240</sup> Fictional pleas skew the data, telling false stories not only about individual defendants but about patterns and trends more generally. The study of these trends has an impact on a range of issues, including funding for criminal justice initiatives or institutions. Fictional pleas may give accurate information about what sorts of

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236. Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1402–17 (2018).

237. See Johnson, *supra* note 204.

238. See Roberts, *supra* note 18, at 1993–94; Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152, 208–11 (2017).

239. Anna Roberts has proposed that given the unreliability of convictions, before a conviction can be used for impeachment purposes, there should be a hearing to determine whether it serves as a reliable indicator of the individual’s guilt for the crime of conviction. Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 592–94 (2014). Such a hearing would be particularly useful in the case of fictional pleas.

240. See, e.g., Andrew Lucas Blaize Davies, *How Do We “Do Data” in Public Defense?*, 78 ALB. L. REV. 1179, 1183 (2014/2015); Jennifer E. Laurin, *Gideon by the Numbers: The Emergence of Evidence-Based Practice in Indigent Defense*, 12 OHIO ST. J. CRIM. L. 325, 335–36 (2015); Pamela Metzger & Andrew Guthrie Ferguson, *Defending Data*, 88 S. CAL. L. REV. 1057 (2015).

cases are disposed of in criminal court, but they slant the data about what sorts of crimes are being committed and by whom. Indeed, in reviewing cases from Ohio that had entered the criminal justice system as registrable sex offenses but exited the system as non-registrable, non-sex offenses, one sees the ways in which the fictional plea masks the number and types of sex crimes occurring within a jurisdiction.<sup>241</sup> (Although true statistics may be masked anyway by other factors, such as policing trends in the jurisdiction.)

The fictional plea solves an immediate need for the defendant that justifies the use of the underlying fiction to the parties. But these fictions become future truths that shape the individual defendant's experience going forward and also the way the system responds to defendants, individually and collectively.

### CONCLUSION

This study of fictional pleas should force us to examine our system of collateral consequences and the nature of the criminal system more broadly. Fictional pleas demonstrate both the distorting impact that mandatory collateral consequences have on the criminal system, but also the slipperiness of the criminal system itself, which although seemingly bound by formal rules and procedures, finds a way to solve problems that are well outside those boundaries. By putting in place so many serious consequences that must be imposed even for relatively low-level criminal behavior, legislatures have created a web of overlapping concerns for criminal defendants. To untangle them from the web, defense attorneys, prosecutors, and judges are willing to engage in "systemic lying."

Fictional pleas expose the extreme lengths that stakeholders are willing to go to respond to the expanding scope of noncriminal sanctions that are implicated by the criminal system. We have a system that involves judges, prosecutors, and defense attorneys conspiring to assist defendants in avoiding the terrible fates that have been imposed upon them by legislatures. It should give lawmakers pause that their collateral consequences policies have created this morass within the criminal system.

But it should give the actors within the system pause as well that their proposed solution to this problem has not been to lobby for change, refuse to move forward on cases where injustice would manifest, or otherwise protest against the mandatory imposition of collateral consequences. Rather, the solution has been plea bargaining. Such an obsessive focus on "getting to plea bargain"<sup>242</sup> has profound consequences for the legitimacy of the criminal justice system.

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241. See *supra* note 81 and accompanying text.

242. This serves as a play on the famous negotiation primer, *Getting to Yes*. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., Penguin Books 2011) (1981) (ebook).