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# Cops and Pleas: Police Officers' Influence on Plea Bargaining

**ABSTRACT.** Police officers play an important, though little-understood, role in plea bargaining. This Essay examines the many ways in which prosecutors and police officers consult, collaborate, and clash with each other over plea bargaining. Using original interviews with criminal justice officials from around the country, this Essay explores the mechanisms of police involvement in plea negotiations and the implications of this involvement for both plea bargaining and policing. Ultimately, police influence in the arena of plea bargaining—long thought the exclusive domain of prosecutors—calls into question basic assumptions about who controls the prosecution team.

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## INTRODUCTION

From the opening credits of *Law & Order* to the pages of the *United States Reports*—and in many other sources in between—descriptions of the prosecution team divide its functions into two parts. Police officers patrol the streets, investigate cases, and make arrests. Prosecutors handle the adjudication—dismissing charges, negotiating pleas, and taking cases to trial. In this traditional dichotomy, the police are not involved in the plea bargaining between prosecutor and defense counsel, the most common means by which cases are disposed. Officers' lack of involvement in plea bargaining seems to coincide with a more general intuition that executive officials, such as police officers, ought not take part in judicial functions, like deciding upon guilt and punishment, which plea bargaining essentially does. This embrace of separation of powers is not a mere academic or ethical construct. It describes the way many officers and prosecutors think of their respective roles in the criminal justice system—a system in which ninety to ninety-five percent of cases are disposed of by plea.[1] The separation of powers in plea bargaining, as one prosecutor put it, is "an important bulwark against overreaching by police."[2]

Nonetheless, the power to arrest and the power to decide on guilt and punishment are far less separate in practice than they first appear, and police officers in jurisdictions around the country are actively involved in plea bargaining. This Essay illustrates how officers have found ways to influence plea bargaining, both with and without prosecutorial approval. In some jurisdictions, police play a formal role in the negotiations, meeting with the prosecution and discussing what pleas should be offered. In other jurisdictions, prosecutors insist that police not be involved at all, lest their involvement compromise the prosecutor's independent review of the arrest and investigative work done by the police. In still other jurisdictions, no formal policy exists regarding police influence, so prosecutors and police officers consult in an ad hoc manner about pleas. Officers around the country have even found ways to influence plea negotiations in the face of opposition from prosecutors. The very fact that they play any role at all in the plea process challenges the way we think about the balance of power and the internal politics of the prosecution team.

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1. Lindsey Devers, *Plea and Charge Bargaining: Research Summary*, U.S. DEP'T JUST. 1 (2011), http://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf [http://perma.cc/2RK5-47WY] ("While there are no exact estimates of the proportion of cases that are resolved through plea bargaining, scholars estimate that about 90 to 95 percent of both federal and state court cases are resolved through this process.").

2. Telephone Interview with Shannon Presby, Assistant Head Deputy, Justice Sys. Integrity Div., L.A. Dist. Attorney's Office (Mar. 3, 2015).

The issue of police influence on pleas is part of a larger question about how officers and prosecutors ought to work together. Not surprisingly, this larger question has generated much controversy among prosecutors and police, as the two halves of the team struggle to define whether they should stay in their own lanes—investigation for police, adjudication for prosecutors—to avoid friction, or whether the friction is a productive feature of institutional design that prevents either side from overreaching its authority. Involve police in plea bargaining? Keep them at arm's length? These are the poles of a debate for which there are no definitive policy prescriptions, despite the implications for plea bargaining and policing—implications that call into question basic aspects of how we think about the working group of prosecutors and police, commonly known as the "prosecution team." Despite its significance, the plea-bargaining clashes and cooperation within the prosecution team have received little attention from scholars, legislators, or judges. The legislature and judiciary have provided no guidelines on how prosecutors and police officers should interact on plea negotiations, so prosecutors and officers around the country remain free to fashion any arrangement they see fit.

The lack of academic and judicial attention to police influence on pleas may be a function of the low visibility of plea bargaining itself. Pleas do not produce the pageantry and fanfare of trials. Although nearly all criminal cases are resolved through pleas, the actual negotiations that take place are not easily observed because they occur behind the scenes. What back-and-forth prosecutors and police have about plea bargaining is all the more veiled because of the premium the prosecution team places on presenting a unified front to the public. For these and other reasons, police involvement in plea bargaining has flown beneath the radar, despite its implications for both plea bargaining and policing.

This Essay addresses the gap in the existing literature by describing the mechanics and implications of police influence on plea bargaining. Using interviews with prosecutors, police officers, and other criminal justice officials, this Essay provides a novel account of how police navigate the plea-bargaining system. It also lays out implications, desirable and undesirable, that flow from police involvement in plea negotiations.

There are numerous implications for the plea-bargaining process. For example, if officers have more influence on pleas, bad arrests may more easily become bad convictions. Officer influence may also shift the "market price" for certain plea bargains, if prosecutors and officers have systematically different views of what a charge is worth or of the importance of resolving the case without trial. The involvement of officers in the negotiations might also change the way defense attorneys bargain.

There are likely a number of effects on policing, as well. The obvious risk of increasing police involvement is that it allows officers to increase the considerable discretion they already exercise by extending that discretion from the street into the courtroom. But there are potential benefits, too. Involving officers in plea bargaining may reduce on-the-street abuses if it gives officers more of a stake in building cases that are worthy of court. Some of the most harassing police conduct occurs when officers act knowing full well – but not caring – that the illegal stop, search, seizure, or use of force will scuttle any future court case. The exclusionary remedies that are supposed to deter these Fourth and Fifth Amendment violations, however, only matter if officers are invested in what happens to their cases.

In addition to its practical implications, police involvement in plea bargaining also poses a challenge to the current academic accounts of plea bargaining and the prosecution team. In recent years, the prosecutor has increasingly been described as the dominant figure in the criminal justice system, in large part because of his dominion over plea bargaining. This Essay's account of police involvement in plea bargaining challenges that view. It also complicates the growing literature about the need to separate executive and judicial functions within the prosecutor's office, for such discussion of separation of powers never considers the ways in which police involvement in plea bargaining destabilizes the attempts of prosecutors' offices to balance their executive and judicial functions.

In a system where juries and judges decided cases, police influence on prosecutors' plea decisions would not be so important. Juries and judges would have the final say over guilt and punishment. But in our system of ubiquitous pleas, no neutral third party reviews the prosecution team's decisions about what plea to offer, and these offers essentially determine the defendant's guilt and punishment. The influence officers have on this process matters precisely because it will not be checked by any outside force. For this reason, it is critical to understand the various systems and normative implications of police influence on plea bargaining. Indeed, the need to understand this influence is all the more pressing because, in the present system, the influence officers exert on pleas typically occurs in an ad hoc manner that permits arbitrariness, bias, caprice, and discrimination. A first step toward addressing police involvement must certainly be transparency and intentionality about when officers choose to get involved in a plea and when they do not.

This Essay contains three parts. Part I uses interviews with prosecutors and police officers to describe the conventional justifications for preventing police involvement in plea bargaining. Part I also examines the way in which the academic literature reinforces and, occasionally, challenges the separation-of-powers conception of how the prosecution team ought to deal with pleas.

Part II is largely descriptive. It describes the range of systems for handling police involvement in plea bargaining, from jurisdictions that formally include officers in plea negotiations, to those that formally exclude them, to those that allow police involvement in an ad hoc manner. Part II examines factors that appear to make police involvement more likely and concludes with an examination of guerrilla tactics officers use to influence pleas in the face of prosecutorial opposition. These tactics raise structural questions about who is in charge of the prosecution team and challenge the basic premise of how the prosecution team is supposed to work.

Part III tackles the normative implications of greater police involvement in plea bargaining—implications for plea bargaining, policing, and the academic literature. What makes the question of police involvement so challenging is that it does not reduce to easy policy prescriptions. More involvement by the police could cure some pathologies of policing and prosecution, or it could make those pathologies more malignant.

Because all three Parts incorporate material from interviews, a note on research methods might be useful here. I conducted forty-six interviews with criminal justice officials around the country, including prosecutors, police officers, union officials, and lawyers. The interview questions were largely open-ended. I asked the interview subjects what role police in their jurisdictions played in plea bargaining and how they felt about that role as a normative matter. I used a "snowballing" method to select interview subjects, asking at the end of each interview for suggestions about the names of other people I should contact.[3] Others have written extensively about the methodological vices and virtues of snowball sampling.[4] The method was useful for illustrating the breadth of plea-bargaining arrangements throughout the country, but its obvious downside is its inability to convey how representative any particular arrangement is of the overall population. Future research might quantify how common various plea-bargaining practices are.

## I. THE SEPARATION OF POWERS WITHIN THE PROSECUTION TEAM

Police involvement in plea bargaining challenges the typical conception of the prosecution team and forces a rethinking of what limits exist—if any—on the way the prosecution team organizes itself. Police officers, prosecutors, and

3. Because these interviews were conducted as part of my fellowship at Stanford Law School, I sought—and received—approval from Stanford University's Institutional Review Board.

4. *E.g.*, Patrick Biernacki & Dan Waldorf, *Snowball Sampling: Problems and Techniques of Chain Referral Sampling*, 10 SOC. METHODS & RES. 141 (1981).

other criminal justice officials interviewed for this Essay spoke at length about the division of responsibilities within the prosecution team. Repeatedly, they stressed the importance of each actor's staying in his or her own lane. There was no consensus, however, about why this separation was necessary. Justifications ranged from the practical to the philosophical, the petty to the high-minded: separation of powers protects society from the overreach of the state, reduces the logistical difficulties involved in coordinating between prosecutors and police, decreases the potential for disagreement between police and prosecutors about overlapping plea-bargaining responsibilities, and preserves the prosecutor's power over this all-important portion of her portfolio.

The academic literature has wrestled with several issues related to police involvement in plea bargaining. A growing strain of scholarship discusses the separation-of-powers problems prosecutors face because plea bargaining forces them to employ both executive and judicial powers. The literature has also made several interesting, if limited, attempts at understanding how officers perceive plea bargaining. What it has not focused on, however, are the mechanisms by which officers take part in plea bargaining and the normative implications that follow. Part I examines the received wisdom that officers do not play a role in plea negotiations and the justifications for this separation-of-powers view.

### *A. Academic Accounts*

The literature in this area is underdeveloped in several ways. Academic accounts generally skip over the role that police play in plea bargaining, and where the police role is acknowledged, it is often simplistically described as a blanket aversion to plea bargaining. As noted above, the literature also does not engage with the separation-of-powers issues that arise from police involvement in deciding guilt and punishment. Although there is scholarship on the separation-of-powers implications for prosecutors, this scholarship pays no attention to what role police play in plea bargaining. In general, legal scholarship is inclined to treat officers as non-entities in the plea-bargaining process, as if their only involvement with pleas is a knee-jerk opposition. These academic accounts dovetail with practitioners' descriptions[5] to promote the idea that police do not—and should not—have a role in plea bargaining.

5. *See infra* Section I.B.

### 1. *Scholarship on the Police Role in Plea Bargaining*

A healthy literature exists on the ways in which plea bargaining is influenced by judges, prosecutors, victims, and defense attorneys. With a few notable exceptions, however, scholars treat the prosecutor as negotiating on behalf of the entire prosecution team. Where officers' views on plea bargaining register at all, it is assumed that the officers oppose the pleas. At the same time, there is another area of research focusing on the conflicts within the prosecution team. Prosecutors and police officers have divergent institutional interests, even though they are in most respects teammates. These divergent interests lead to conflict about how best to handle a case. Scholars have probed these divisions by looking at educational, cultural, doctrinal, and even financial factors that drive a wedge between prosecutors and police officers. Some have even postulated different goals for the two institutions, with prosecutors prioritizing convictions and officers prioritizing order maintenance. Are these conflicts a sign of dysfunction within the prosecution team, or are they are a constructive friction that keeps both sides from excess? These questions are thoroughly debated in the literature without resolution.

The topic of this Essay implicates both the plea-bargaining literature and the literature on the conflicts within the prosecution team. Unfortunately, only a handful of works have connected these strains of scholarship to ask how police involvement in plea bargaining fits with the prosecution team's internal conflicts.

The works that do address this issue are rather dated. In the late 1970s and early 1990s, the National District Attorneys Association gathered basic data on the frequency with which prosecutors consulted officers on case outcomes. In 1977, twenty-five percent of prosecutors' offices said they never consulted with police about case outcomes.[6] In 1990 and 1992, twelve and ten percent of prosecutors' offices, respectively, said they did not "routinely notify" police about dispositions.[7] In other words, a minority of prosecutors seems to apply a very strict separation of powers by *never* consulting officers about plea deals, while a large majority consults at least occasionally.[8] How occasionally is occasionally?

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6. PATRICK F. HEALY, NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTOR SURVEY 116 (1977).

7. NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTOR SURVEY (1990); Nat'l Dist. Attorneys Ass'n, NATIONAL PROSECUTOR SURVEY (1992).

8. A 1990 study of Colorado prosecutors found that ninety-six percent of chief prosecutors routinely notified police about case dispositions. The survey claimed that the national average was ninety-three percent, citing the National Prosecutor Survey. JOAN CROUCH, COLO.

How in-depth is the consultation? How relevant is this old data? The studies leave much to be desired.

Case studies from the 1970s and 1980s also raised the prospect of police involvement in plea bargaining. "[O]fficers report that their advice or input into the plea negotiations is ignored," reported a study of three New Jersey counties.[9] Of 316 officers surveyed, roughly fifty percent were "occasionally consulted by prosecutors concerning the outcome of a plea," twenty percent were never consulted, and sixty-nine percent "were very resentful toward prosecutors who decided on a just punishment before discussing a case with an officer."[10] In a study of Rhode Island police officers, nearly sixty percent said they "perceived themselves as having any influence in plea bargaining," though only forty percent thought the process "fair . . . to the arresting officer."[11] Meanwhile, a North Carolina study found significant variations in how often officers were consulted, with some district attorneys' offices consulting officers in ninety-five percent of cases and others in just twenty-five percent of cases.[12] These academic accounts of police involvement further the idea that police have little influence, even when they are consulted, and that their general position is one of opposition to plea bargaining.

The assumption that police oppose plea bargaining is reasonable enough. Police put their lives on the line to investigate and arrest defendants, only to see prosecutors deal away the cases for some fraction of what they could have received at trial. It is not hard to see why this might upset officers. "A negligent or inexperienced attorney may 'deal' a case that never should have been bargained to a lesser charge," one Arizona prosecutor said.[13] "As a result, months of work by the police may have been for nothing."[14] An author who embedded in a New York police squad for a year recounted police consternation about plea-happy prosecutors: "Over and over I heard the same complaint: 'They're backing away from the tough ones. If they see a problem in a case, they start

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DIV. OF CRIMINAL JUSTICE, COLORADO REPLICATION OF THE 1990 NATIONAL PROSECUTORS SURVEY 34 (1992).

9. Alan F. Arcuri, *Criminal Justice: A Police Perspective*, 2 CRIM. JUST. REV. 15, 16 (1977).

10. *Id.*

11. Alan F. Arcuri, *Police Perceptions of Plea Bargaining: A Preliminary Inquiry*, 1 J. POLICE SCI. & ADMIN. 93, 95, 96 (1973).

12. Allen F. Anderson, *The Police, The Prosecution, and Plea Negotiation Rates: An Exploratory Look*, 12 CRIM. JUST. REV. 35, 36 (1987); *see also* Arcuri, *supra* note 9, at 38 ("The decision to bargain is a multifarious process, and the police must be viewed as central, not simply tangential, actors in this complex calculus.").

13. Moise Beger, *The Case Against Plea Bargaining*, 62 A.B.A. J. 621, 622 (1976).

14. *Id.*

looking for a way to get rid of it.'"[15] A survey found that twenty-five percent of officers who had negative feelings about the justice system said they would make fewer arrests because of their concerns about plea bargaining.[16] "[P]lea bargaining 'affects my decisions on the street. I become less conscientious and less dedicated . . . and I lose the initiative to make good arrests,'" said an officer quoted in another study.[17] Indeed, officers' negative views of plea bargaining were taken as given by many Nebraska prosecutors in another study. Nearly half of prosecutors surveyed said "police simply dislike plea bargaining," while twenty percent said "police grudgingly accept the practice as a necessity," the study noted.[18] The authors reported that "[n]o prosecutor in the survey gave an answer which could be interpreted as a perception that police favored plea negotiation."[19]

Anecdotal accounts have repeated the idea that officers maintain a blanket opposition to plea bargaining. The officer's "call on the play is frequently unheeded" when the prosecutor has the case, one author wrote.[20] "Somehow, the respect by which the cop lives in the street evaporates when he gets downtown.

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15. H. RICHARD UVILLER, TEMPERED ZEAL 22 (1988); *see also* William F. McDonald, *Prosecutors, Courts, and Police: Some Constraints on the Police Chief Executive*, *in* POLICE LEADERSHIP IN AMERICA: CRISIS AND OPPORTUNITY 203, 204 (William A. Geller ed., 1985) ("Reiss found that the majority of police officers surveyed in three cities believed the criminal court judges were too lenient. Arcuri found that 60 percent of the sample of police officers felt that plea bargain was 'unfair to the arresting officer' in the sense that it was 'disheartening' and 'makes a police officer go sour.' In a study of rape law enforcement, the Battle Memorial Institute found that almost two-thirds of the police surveyed felt that 'plea bargaining should be either changed or eliminated.' A typical newspaper article reads: '70% of CASES DECIDED BEFORE TRIAL. . . . [P]olice detectives . . . charged that [plea bargaining] is too widespread. . . . State's Attorney defended the amount of bargaining . . . .'" (citations omitted)). In Rhode Island, where researchers surveyed seven percent of the police force, they found much suspicion about their own influence over pleas: "If I know the individuals involved and also know the circumstances, I can relay the information to the solicitor and this will help him to decide what course of action to take," one officer explained. Arcuri, *supra* note 11, at 95. "If, on the other hand, the defendant is, or has, influence, it won't make any difference what I say." *Id.*

16. McDonald, *supra* note 15 (referring to two studies that found more than six percent of officers felt plea bargaining was unfair to them and should be eliminated).

17. Arcuri, *supra* note 9, at 16.

18. Fred Kray & John Berman, *Plea Bargaining in Nebraska—The Prosecutor's Perspective*, 11 CREIGHTON L. REV. 94, 126 n.195 (1977).

19. *Id.*

20. UVILLER, *supra* note 15, at 24.

He gets the feeling that *he* becomes the suspect; his actions are questioned, his tactical decisions criticized."[21]

According to a law-and-society account, prosecutors' consultation with officers, when it does take place, is "more of a gesture than a serious invitation to interfere with the equilibrium of the court . . . ."[22] Prosecutors "often attempt to make the police feel a part of the legal process by soliciting officers' advice about the appropriate plea or sentence."[23] This feigned consultation occurs more often and with greater intensity, the authors wrote, based upon "the strength of professional models in the office; the social separation between officer and prosecutors; the commitment to a due process versus crime control mode; and political relationships between the two agencies."[24] Other authors take the position that officers are just not interested in plea bargaining. "Often the police officers do not question the ADA's [assistant district attorney's] ability to assess the arrest and determine the disposition of the case," one scholar found.[25] "Unless the arresting officer takes a personal interest in a civilian's complaint, he or she will not be particularly concerned about what the ADA does with the arrest."[26]

The above views acknowledge some police involvement in plea bargaining, but they do not address the factors that lead to this involvement or the mechanisms through which officers assert their influence. Moreover, the literature ascribes a lack of sophistication to the way officers approach plea bargaining. It assumes that officers will oppose plea bargaining in the hopes of getting the maximum punishment possible, even though officers may actually have their own interests in securing a guilty plea. The literature also fails to describe the level of conflict that exists between prosecutors and police over plea bargaining. As Part II of this Essay will show, officers actually have quite a high level of sophistication when it comes to plea bargaining and they have a number of levers to pull if they want to change the prosecutor's view on a plea. The realization of officers' influence in plea bargaining undermines the conventional wisdom

21. *Id.*

22. Malcolm M. Feeley & Mark H. Lazerson, *Police-Prosecutor Relationships: An Interorganizational Perspective*, *in* EMPIRICAL THEORIES ABOUT COURTS 216, 234 (Keith O. Boyum & Lynn Mather eds., 1983).

23. *Id.*

24. *Id.*; *see also* Elizabeth A. Stanko, *The Arrest Versus the Case: Some Observations on Police/District Attorney Interaction*, 9 URB. LIFE 395, 402 (1981).

25. Stanko, *supra* note 24.

26. *Id.* at 403.

about their lack of involvement and requires a rethinking of many assumptions about the way the prosecution team works.

### 2. *Scholarship on the Separation of Powers in Plea Bargaining*

Apart from the literature on police involvement in plea bargaining, scholars have recently taken to examining the separation-of-powers challenges that face prosecutors, who now operate in a system where almost all cases are resolved by plea bargaining. One of the leading scholars in this area has argued that principles from administrative law should be imported into criminal procedure to prevent the same person from wielding both executive and judicial powers. "[I]ndividuals who make investigative and advocacy decisions should be separated from those who make adjudicative decisions," her article argued, "the latter of which should be defined to include some of the most important prosecutorial decisions today, including . . . the acceptance of pleas."[27] The concern motivating this literature is that a prosecutor who is involved in working up a case will not be able to objectively assess the defendant's guilt or the appropriate punishment, even though this assessment of guilt and punishment is precisely what the prosecutor is called upon to do in deciding on a plea.

Scholars of this separation-of-powers issue worry that tunnel vision and bias might attach at an early stage of a case and the prosecutor, in her quasi-judicial role of signing off on pleas, would not be able to make a fair decision on the merits of the case.[28] Related to this concern about tunnel vision is the fear that prosecutors in their executive-branch functions – supervising investigations and working up criminal charges – might be exposed to facts about the defendant that are not strictly relevant to the case, yet might color the decisions

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27. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 874 (2009) [hereinafter Barkow, *Institutional Design and the Policing of Prosecutors*]; *see also* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006) [hereinafter Barkow, *Separation of Powers and the Criminal Law*] (noting that courts have failed to apply the separation-of-powers approach from administrative matters to criminal matters); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998) (drawing similarities between American plea bargaining and the civil-law inquisitorial model); Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409 (2003) (praising the New Orleans District Attorney's adoption of what the authors saw as a more transparent and less discretionary approach to decision making).

28. Barkow, *Institutional Design and the Policing of Prosecutors*, *supra* note 27, at 896 ("[P]rosecutors who have helped call the shots in an investigation will be hard pressed to retain their magisterial perspective not just about the tactics used in the investigation, but about whether charges should be pursued thereafter." (quoting Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 803 (2003))).

they have to make in their quasi-judicial roles. These scholars have gone as far as suggesting firewalls that would prevent prosecutors from taking on adjudicative responsibilities in cases in which their independence had been compromised by involvement in the investigation or workup of the case. For example, the literature suggests keeping the prosecutors who sign off on plea decisions – the judicial power – insulated from all facts of the case other than those strictly relevant to proving the elements of the crime. "The fundamental aim," the leading author explained, "is to prevent people who develop a will to win or who will be exposed to legally irrelevant information about a defendant from making key determinations about the defendant's guilt and what punishment he or she deserves."[29]

This literature is relevant to the topic of this Essay in two ways. First, if officers do have influence over plea bargaining, as Part II will argue, then the concerns about prosecutors' mixing executive and judicial powers will be applicable to police as well. Second, assuming that officers have influence over plea bargaining, then the separation-of-powers conundrum for prosecutors is even more complex than previously thought. Even if scholars and practitioners could develop a perfect firewall to prevent prosecutors from improperly mixing their executive and judicial powers, there would still be the problem of police interference with this carefully calibrated system. With their involvement in plea bargaining, officers – the consummate executive-branch officials – could upend the delicate equilibrium that separation-of-powers advocates would like to construct.

Similarly, scholars have argued that the best way to control prosecutorial misconduct is by centralizing and normalizing decision making within the prosecutor's office so that each prosecutor transacts business on terms consistent with those of his prosecutorial colleagues. But, again, even if all the prosecutors in an office could perfectly synchronize their negotiation methods, the problem remains that officers can still come in and exert their influence in some cases but not others. This would upend attempts to standardize prosecutorial practices, thus frustrating the goal of checking prosecutorial behavior. These implications are discussed in more depth later in the Essay.

29. *Id.* at 897; *see also id.* at 901 ("Neither the Assistant U.S. Attorney (AUSA) responsible for investigating or overseeing the investigation of a case or for representing the United States in court (either at trial or in pretrial proceedings) nor any individual who has directly supervised the AUSA in the investigation or courtroom decisions should be the same individual who makes the final determination of what charges to bring, what plea to accept, or whether an individual has cooperated sufficiently to merit a lesser sentence on the basis of giving substantial assistance to the government. Rather, a different prosecutor or panel of prosecutors who were not involved in the investigation (as either a line attorney or a supervisor) should make these adjudicative decisions." (footnote omitted)).

### B. *Prosecutor and Police Accounts of the Separation of Powers in Plea Bargaining*

Legislators and courts have provided no guidance about how independent the prosecutor's plea decisions should be from police influence. Indeed, these bodies have essentially placed no constraints on the prosecutor's control over plea bargaining.[30] In the absence of such guidance or constraints, prosecutors and police officers have answered for themselves the question about the separation of powers, based on their own intuitions of what justice requires. In interviews for this Essay, I asked criminal justice officials around the country about what they thought the rule on police involvement ought to be. A number of officers and prosecutors expressed support for the idea that police officers and prosecutors ought to stay in their own lanes when it comes to plea bargaining. The individuals I interviewed offered justifications for the conventional separation of powers, which included the need to protect against the overreach of the state, the need to preserve structural safeguards in the court system, the logistical concerns involved in coordinating between prosecutor and officer in numerous cases, and the differing institutional competencies of the prosecution and police.

One common theme was to refer to the separation of powers as protection against the overreach of the state. "[I]t is kind of when the rubber meets the road in terms of civil society and the police being under control of a democratic society," said Shannon Presby, a deputy district attorney in Los Angeles.[31] "The decision [on plea bargaining] should be made by the individuals who are constitutionally mandated to make those decisions, which are the district attorney and her representatives . . . . If you don't like what the DA is doing, then elect a new DA."[32] Presby called it "an important bulwark against overreaching by police that there has to be a vetting [of] the investigations by an individual from a separate agency that's not within the chain of command of the police department."[33] "At the end of the day," he said, "the arrest is not the judgment of soci-

30. *See, e.g.*, Barkow, *Separation of Powers and the Criminal Law*, *supra* note 27, at 1025 ("The Supreme Court is of the view that a prosecutor's charging and plea bargaining decisions are largely off limits from judicial review."); *id.* at 1025-26 (citing United States v. Armstrong, 517 U.S. 456, 464 (1996); Hill v. Lockhart, 474 U.S. 52, 56 (1985); and Wayte v. United States, 470 U.S. 598, 608 (1985)).

31. Telephone Interview with Shannon Presby, *supra* note 2.

32. *Id.*

33. *Id.*

ety about a criminal wrong, it is the conviction that is the judgment."[34] Likewise, Megan Frederick, the elected prosecutor of Virginia's Culpepper County, vehemently opposes any input from police on plea bargaining, especially input from narcotics officers. "I just don't take their opinion. I don't ask for [it]. I don't encourage it. I probably discourage it if anything," Frederick said. "I don't think they can make an unbiased decision."[35] Indiana Magistrate Graham Polando, a former prosecutor, wrote in an e-mail: "I generally thought it inappropriate for a police officer to suggest a possible plea offer, and it rarely, if ever, occurred. However, I did occasionally have police officers get very (very) upset with what they perceived as a too-lenient agreement after it was entered, even on what were comparatively minor cases (like traffic tickets)."[36]

Another principled justification for the separation of powers was described by Beth Murano, an attorney for the Lee's Summit Police Department in Missouri, herself a former prosecutor. Police involvement in plea bargaining, Murano feared, could short-circuit structural safeguards of the justice system. From arrest through to conviction, Murano sees the justice system as a series of stages in which different actors – police, prosecutor, jury, and judge – each have an opportunity to exercise discretion by letting the defendant off in the interest of justice. Police influence on plea bargaining, however, collapses two of these stages into one.[37] "[Prosecutors] need to be able to independently use that discretion regardless of what happened before [the case] came to them," Murano said.[38] "[Y]ou [as a prosecutor] don't become too close to a police officer's case and their actions so that you can look at it independently."[39]

Not only prosecutors, but also police officers support the idea of separation of powers in plea bargaining. Officers emphasized the importance of this division of responsibility, even if there were sometimes exceptions where police input was appropriate. "Sometimes it comes down to people need to stay in their

34. *Id.*; *see also* McDonald, *supra* note 15, at 211 ("Rather than seeking philosophical unity within the system as some advocates of better cooperation have suggested, police executives should recognize that these philosophical discontinuities are one of the system's strengths. They reflect the normative inconsistencies of the larger society and mitigate the power of any group to impose its special morality on others." (citations omitted)).

35. Telephone Interview with Megan Frederick, Commonwealth Attorney, Culpepper Cty., Va. (Feb. 19, 2015).

36. E-mail from Graham Polando, Magistrate, St. Joseph Cty., Ind. Prob. Court, to author (Jan. 7, 2015, 2:38 PM PDT) (on file with author).

37. Telephone Interview with Beth Murano, Police Legal Advisor, Lee's Summit, Mo., & Former Prosecutor, Kansas City, Mo. (Mar. 26, 2015).

38. *Id.*

39. *Id.*

lanes," said police Major Cam Selvey of the Charlotte-Mecklenburg Police Department.[40] In cases where he disagreed with the prosecutor's plea decision, Selvey said he would "plead my point with the district attorney, but that is their job, because I'm not the one who has to stand up and try the case. Their perspective is from experience in a courtroom, in a trial setting, trying to sway the jury and the judges. My perspective is gathering probable cause and making an arrest."[41]

Charles Huth, a police captain in Kansas City, said he saw value in the officers' telling the prosecutor information that might, in "the spirit of justice," inform the plea decision, but he saw significant risks in police involvement.[42] "I'm a constitutionalist," he said. "[A]ny time we have one body that has autonomy over making decisions, I think groupthink creeps in."[43] Ashby Ray, an attorney for the Raleigh Police Department in North Carolina, tells his officers not to "interfere" with the plea-bargaining process. "Our job is to go out and investigate crimes, gather facts," Ray said.[44] "The prosecution side of things handles their job."[45] He explained that the district attorney "needs to play in her playpen and we need to play in our playpen . . . . It doesn't mean that they need to get overinvested and get bent out of shape if the prosecutor decides to dismiss the case."[46] Dan Pearce, a homicide detective in the San Diego Sheriff's Department, said that on the occasions when prosecutors do consult him about pleas, his "normal response is: 'I really don't care.'"[47] Pearce added: "Some of the guys, they want the death penalty on every case. For me, it's totally the

40. Telephone Interview with Cam Selvey, Major, Criminal Div., Charlotte-Mecklenburg Police Dep't (Feb. 27, 2015).

41. *Id.*

42. Telephone Interview with Charles Huth, Captain, Kansas City, Mo. Police Dep't (Mar. 5, 2015).

43. *Id.*

44. Telephone Interview with Ashby Ray, Police Attorney, Raleigh, N.C. Police Dep't (Feb. 19, 2015).

45. *Id.*

46. *Id.*; *see also Sugarman's Arrest Ended Interrogation*, CITIZEN, June 10, 1988 (quoting a New York State police officer saying: "I don't think the job of the prosecutor includes consulting us.").

47. Telephone Interview with Dan Pearce, Sergeant, San Diego Cty. Sheriff's Dep't (Mar. 17, 2015) ("I think I've only had one attorney who pled somebody out on a homicide who didn't let know us know they were pleading out—didn't tell the victim's family. We all found out through news report and that's just tacky. You don't owe me anything . . . but you at least owe the victim's family, especially when it's a loved one that gets killed. That's just bad juju.").

prosecutor's role, what they decide is totally up to them."[48] Pearce's colleague, homicide detective Troy DuGal, said he is rarely approached by prosecutors about pleas. When he is, DuGal explained, "it's really the DA going, 'We're just going to run this by you.'"[49]

In Texas, Mike Rickman, the general counsel for the state's largest police officer association, sounded a deferential note toward prosecutors when it comes to plea decisions—a sentiment shared by a number of other law enforcement officers. "Everybody's got to remember what their jobs are and the prosecutor, if they're diligent—and I believe they are—they get the best plea they can get or go to trial," said Rickman, a former law enforcement officer.[50] "[O]ur job is to work together," said Mike Whalen, the retired police chief of the Dennis Police Department in Massachusetts.[51] "And if there is a reason why the district attorney or one of the special district attorneys thinks the case should be settled out, 9.9 times out of 10, I think the officers and I are going to not oppose that."[52] Whalen added, "The only time the officer should lobby [is] . . . if he thinks that the plea bargain is being done for reason[s] that aren't appropriate. Probably the most inappropriate reason is because the guy's got a hook with the DA's office or knows somebody."[53]

In addition to the constitutional motivations, the separation-of-powers approach to officer involvement in plea bargaining may be appealing for a number of other reasons. Some involve practical workplace politics. An officer who picks a fight with a prosecutor over plea bargaining is liable to create headaches for his own superiors and their supervisory counterparts in the prosecutor's office. Officers eager not to cause trouble at work may see staying out of plea bargaining as a prudential rule for getting along in the workplace.[54] Perhaps

48. *Id.*

49. Telephone Interview with Troy DuGal, Detective, San Diego Cty. Sheriff's Dep't (Mar. 2015).

50. Telephone Interview with Mike Rickman, Gen. Counsel, Combined Law Enf't Ass'ns of Tex. (Feb. 27, 2015).

51. Telephone Interview with Mike Whalen, Police Chief (Retired), Dennis Police Dep't, Mass. (Jan. 9, 2015).

52. *Id.*

53. *Id.*; *see, e.g.*, James E. Bond, *Plea Bargaining in North Carolina*, 54 N.C. L. REV. 823, 833 (1976) ("Most North Carolina prosecutors, like their counterparts elsewhere, have not reduced their plea bargaining practices to written policies, and most do not wish to formalize their practices in that manner.").

54. Pearce, a detective in San Diego, was practical about it: would he want to do something that would risk a row not only with the prosecutor but also with his own police department? "Probably not really good for my career," he said. Telephone Interview with Dan Pearce, *supra* note 47.

counterintuitively, the separation of powers may also lend an air of unity to the prosecution team by limiting potential areas of disagreement that could arise if prosecutors and police officers had overlapping authority over plea bargaining. "To the extent we can offer a unified front in the public eye, certainly it's better," said Huth.[55] "I think disagreement is healthy and dialogue is healthy to the extent that we can keep it internal in the criminal justice system."[56]

Other justifications for the separation of powers involve logistics. Prosecutor-police consultation on tens of thousands of cases might be too time consuming. Rather than agonizing over which cases to consult on and which to decide without consultation, the separation of powers provides an easily administrable default rule: prosecutors need not consult officers about pleas. A more selfish motivation for keeping officers out of plea bargaining is prosecutors' desire to hold on to more of their power. Adherence to the separation of powers allows them to do that.[57] "Plenty of prosecutors don't want another voice at the table . . . especially one who is invested or over-invested in the facts," said Kristen Beedle, an attorney for the San Diego Sheriff's Department and a former prosecutor. "Just in their own interest they wouldn't want to bring another person to the party because that person comes with their own set of rules and connections to the facts."[58]

Comparative institutional competence provides yet another justification for the separation of powers. Prosecutors have legal skills and court experience that better position them to anticipate what a case is worth.[59] Thus, the intuition goes, it only makes sense that they would be the ones assessing the proper punishment for the case. But maybe this intuition does not make sense. Part III takes up this issue in more detail. Regardless, officers and prosecutors repeatedly emphasized in interviews the distinction in the way the two groups think about cases. Police think in terms of "probable cause" (the standard for arrest), while prosecutors think in terms of "reasonable doubt" (the standard for conviction).[60] For many, this distinction was a significant reason why prosecutors, not officers, should control plea bargaining.

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55. Telephone Interview with Charles Huth, *supra* note 42.

56. *Id.*

57. Telephone Interview with Kristen Beedle, Legal Advisor, San Diego Sheriff's Dep't & Former Senior Deputy City Attorney, City of San Diego (Feb. 5, 2015).

58. *Id.*

59. *Id.*

60. *See, e.g., id.* ("Law enforcement's burden is reasonable suspicion and probable cause. And [prosecutors'] burden is beyond a reasonable doubt. There are many cases where they are far from each [other]."); Telephone Interview with Steadman Stahl, Sergeant, Miami-Dade Police Dep't, & Exec. Vice President, Police Benevolent Ass'n, Dade Cty. (Mar. 25, 2015)

What emerges from interviews with practitioners is a general consensus that plea bargaining ought to be free from police influence, but no consensus as to why. Criminal justice officials trot out constitutional, logistical, and political explanations all leading to the same conventional wisdom about the role of police in plea bargaining.

## II. POLICE INFLUENCE ON PLEA BARGAINING

Part I showed the range of justifications that have arisen for police noninvolvement in pleas. Despite the justifications for separation between prosecutors and police in plea bargaining, the on-the-ground practice of plea bargaining in many jurisdictions does not reflect such separation. Around the country, police officers have found a variety of ways to assert their influence over plea negotiations. This Part examines the formal systems that facilitate police input on plea bargaining, as well as the formal systems that forbid this influence. This Part also looks at the ad hoc manner in which many prosecutors and police officers handle the issue of police involvement in plea bargaining. This Part concludes by examining the situations in which officers are most likely to be consulted and the mechanisms used to pressure prosecutors when officers disagree with their assessment of a case. This Part is not only about the internal dynamics of plea bargaining, but also about the larger question of who is in charge of the prosecution team.

### A. *Formal Systems of Police Influence*

The poster child for formal systems of police influence is Charlotte, North Carolina. Prosecutors in Charlotte hold a roundtable discussion in every homicide case to decide on what plea, if any, to offer.[61] Roughly five years ago, the district attorney's office started inviting detectives to participate in the discus-

("The officer, all he needs is the probable cause. Prosecutor needs to be beyond [a] reasonable doubt. And what I needed to make that arrest is a lot less than what the prosecutor needs to prosecute the case."); Telephone Interview with Cam Selvey, *supra* note 40 ("[T]hey have obviously a higher standard. They have a different standard they bring to the table in terms of making a successful prosecution, and probable cause may not always bring you to a successful prosecution.").

61. Telephone Interview with William T. Stetzer, Assistant Dist. Attorney, Dist. Attorney's Office for the 26th Prosecutorial Dist., Mecklenburg Cty., N.C. (Feb. 25, 2015). In only five percent of the cases do defendants not receive a plea offer of any sort. *Id.* A further description of the system can be seen in Stetzer's article on the topic. William T. Stetzer, *A Collaborative Approach to Plea Offers*, POLICE CHIEF, Apr. 2014, at 26, http://www.policechiefmagazine.org/a-collaborative-approach-to-plea-offers [http://perma.cc/GGU4-4RUR].

sions.[62] The detectives, accompanied by members of the police chain of command, weigh in on what they think the case is worth. It is a formal opportunity to participate in plea bargaining, and it is a model for the active role officers could play in the negotiation process.

In Charlotte, the inclusion of the police in plea deliberations was designed to address a recurring conflict between prosecutors and police, a conflict that had grown acute under a prior district attorney's regime. Previously, prosecutors and police were at each other's throats, publicly blaming each other for settling too many cases too cheaply.[63] Police blamed prosecutors for pleading out murder cases that could have received stiffer penalties at trial, and claimed these lenient plea agreements were making it harder to enforce the law on the street.[64] Prosecutors replied that the cases could not go to trial because the police had performed such shoddy investigative work.[65] Both sides agreed that the plea-bargaining process was out of control, but each saw the other as the cause. When a new district attorney was elected, the inclusion of the police in the plea discussions was one of the reforms aimed at healing the wounds within the prosecution team. The new system of consulting officers on homicide pleas eased officers' concerns by giving them a greater sense of control over the fate of their cases, while simultaneously showing them the reasoning prosecutors were using to decide on the plea offer.[66] "The reason we decided to invite police," explained William Stetzer, the prosecutor in charge of the roundtable, "was just sort of a natural tendency of the relationship between prosecutors and police. We realized that they didn't have a lot of idea[s] about [the] decision to make a plea offer."[67] Stetzer thought police "consider[ed] plea offers generally bad," but his experience at the roundtable has shown him their willingness to settle even the most serious cases.[68]

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62. Telephone Interview with William T. Stetzer, *supra* note 61.

63. *See, e.g.*, Jonathan Reed, *Settling in with Chief Monroe*, CHARLOTTE WKLY., Sept. 26, 2008, at 1; *Comment Hints at Tensions Between Us*, WCNC (Nov. 1, 2009), http://www.wcnc.com/news/local/comment-hints-at-tension-between-da-and-new-chief/374761446 [http://perma.cc/8J36-FD7A]; Jeff Taylor, *Gilchrist vs. Monroe*, LOCKER ROOM (July 8, 2008), http://lockerroom.johnlocke.org/2008/07/08/gilchrist-vs-monroe [http://perma.cc/4MGM-N6FU].

64. Telephone Interview with Andy Leonard, Major (Retired), Charlotte Mecklenburg Police Dep't (Mar. 3, 2015); Telephone Interview with Cam Selvey, *supra* note 40.

65. Telephone Interview with Andy Leonard, *supra* note 64.

66. The group has heard more than 200 homicide cases, and made offers in about ninety-five percent of the cases. Pleas were accepted in about seventy percent of them. *Id.*

67. Telephone Interview with William T. Stetzer, *supra* note 61.

68. *Id.*

For their part, police praise the roundtable model. Prior to the roundtable, officers "were not aware what had happened in our case until we got a letter saying the case had been dismissed," explained retired police Major Andy Leonard.[69] The only time detectives were involved in negotiations, he said, was when prosecutors needed bodyguards to protect them from victims' family members, who were likely to be upset upon hearing from prosecutors about the proposed plea. "Now that we've been involved in the process," Leonard said, "we're really not sitting down with the families anymore as security [for the attorneys]. We're sitting down with the family as advocates for the district attorney—as advocates for the concessions they're making."[70] Major Cam Selvey emphasized a new feeling of empowerment among officers because of their role in plea negotiations. In the past, "[w]e turned it over to the DA. They did whatever. We would just shrug our shoulders and say, 'Oh well, we tried.' . . . [W]hen we would mouth off too much, they would come back and say, 'You handed us a crap case.'"[71] Now, police officers have a forum to talk constructively to prosecutors about pleas.[72]

Other jurisdictions, too, have employed formal methods for soliciting police input.[73] In Miami, prosecutors ask officers to indicate on the arrest paper-

69. Telephone Interview with Andy Leonard, *supra* note 64.

70. *Id.*

71. Telephone Interview with Cam Selvey, *supra* note 40.

72. Prosecutors and police in Vance County, North Carolina, have adopted this collaborative system. Sarah Mansur, *'A Proactive Approach': DA Office Uses New, Inclusive Approach in Dealing with Homicide Case Backlog*, HENDERSON DISPATCH (Jan. 30, 2016), http://www.hendersondispatch.com/news/a-proactive-approach/article_67d70eae-c78c-11e5-9554-b3cb84d345e9.html [http://perma.cc/GHP9-WE2M]. Stetzer identified the Manhattan District Attorney's Office as an example of another jurisdiction interested in using a collaborative system. Even outside of the homicide context, according to Stetzer, "[i]t is expected that ADAs when they're negotiating cases should at least talk to detectives and investigate the case." Telephone Interview with William Stetzer, *supra* note 61. The roundtables dealing with plea bargains are reminiscent of the "charge conferences" that are organized in some jurisdictions to bring prosecutors and police together to discuss whether to charge a particular case and with what. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 64 (2002) ("For the most serious crimes, including rape and homicide, the office conducts 'charge conferences' with senior prosecutors and police present to discuss the facts and potential charges.").

73. In recent decades, as plea bargaining has become more prevalent, the commitment to discuss all plea negotiations with the police has come to require much more effort. The following quotation from a Florida district attorney in 1977 gives some glimpse of the reluctance to plea bargain, which once existed, but no longer does: "We do not negotiate serious crimes in our circuit unless it follows certain strictures. If a [g]un is involved, it will not be negotiated unless under extremely special circumstances, and then only if it's assured that some prison time is involved. If a negotiation is entered into on a serious crime, it's the policy of this

work whether defendants should be sentenced according to the guidelines or whether a non-guidelines punishment is appropriate.[74] Cristina Escobar, a former prosecutor in Miami, said, "The officer's position on a plea bargain . . . , at least in Miami-Dade County, is always taken into account."[75] Where the officer has spent a lot of time investigating a case, "you've got to take their opinions more seriously," Escobar said.[76] Similarly, in Hillsborough County, Florida, the prosecutor's office has a policy of consulting with the police about plea bargaining in any case in which the officer has expressed a "sincere interest" about the outcome.[77] Laurie Woodham, an attorney for the Tampa Police Department, explained how the policy is sometimes more honored in the breach, as when prosecutors have attempted to hide a plea they knew the police opposed.[78] Such was the case, Woodham said, when a city employee was caught using a city van to trawl for foster kids to molest: "[The prosecutor] didn't contact us until after the plea because they knew we would object."[79]

From Nevada to Virginia, police officers described prosecutorial policies for consulting officers about pleas. "The former district attorney had a rule that you didn't plea out a case unless the cop said it was okay," said Chris Collins, a Las Vegas police officer, who recently served as executive director of the Las Vegas Police Protective Association.[80] Similarly, the policy in Virginia's Henrico County is for prosecutors to check with officers in all cases before offering a plea. "Usually when I do the agreement," prosecutor Elsa Seidel said, "I'll tell the defense attorney, 'I'll check with the officer and I'm pretty sure he won't have a problem with it, but I do need to check with him first.'"[81] Fellow Henri-

office to consult with the victim, parent, or kinfolk, to consult with police officers involved; and to be assured that if the plea is negotiated, it has the acceptance of the community." Ruth Drachmann, *Blair Calls Plea Bargaining "Necessary Evil,"* ST. PETERSBURG TIMES, May 14, 1975.

74. Telephone Interview with Steadman Stahl, *supra* note 60.

75. Telephone Interview with Cristina Escobar, Staff Counsel, Police Benevolent Ass'n of Dade Cty. (Mar. 26, 2015).

76. *Id.*

77. E-mail from Laurie Woodham, Legal Advisor, Tampa Police Dep't, to author (Jan. 6, 2015, 1:42 PM PDT) (on file with author).

78. *Id.*

79. *Id.*; *see also* Panel Discussion, *Plea Bargaining from the Criminal Lawyer's Perspective: Plea Bargaining in Wisconsin*, 91 MARQ. L. REV. 357, 364 (2007) (describing how a prosecutor waited for a pre-trial hearing where the officer was not present before offering a plea deal).

80. Telephone Interview with Chris Collins, Detective, Las Vegas Metro. Police Dep't, & Exec. Dir., Las Vegas Police Protective Ass'n (Mar. 2, 2015).

81. Telephone Interview with Elsa Seidel, Prosecutor, Henrico Cty. Commonwealth's Attorney's Office (Mar. 16, 2015).

co County prosecutor Mike Feinmel said he would "never make a deal without talking to a police officer first. 'Hey, I want your input. Tell me what you think.' One hundred percent of the time they'll say, 'I trust your judgment,'" Feinmel noted.[82] "They don't have a veto, it's ultimately my decision, but I will always engage in a dialogue with the officer."[83] Likewise, Virginia Beach prosecutors have employed a policy that requires them "to discuss any plea with the primary case officer before entering into an agreement with defense counsel," wrote Lyla M. Zeidan, a former prosecutor who now teaches at the Northern Virginia Criminal Justice Training Academy.[84] "It was not required that we got their approval, but we had to discuss it with them and inform them of the plea and give the officer the opportunity to share his/her comments [with] us."[85]

Nor are prosecutors the only prosecution-team members to promote formal systems of police influence. Some police departments actively encourage their officers to get involved in plea bargaining. For example, the Fairmont Police Department in Minnesota lists "plea bargain agreement consultation with prosecutor" among the duties of the detective.[86] In Massachusetts, the Dennis Police Department posts an officer at the courthouse to alert the police chief when a case is pled out too cheaply. "It was the only way to keep an eye out on things," explained Mike Whalen, the retired police chief.[87] "[Be]cause they see every case that comes through, they know who the frequent flyers are . . . . They may go to the prosecutor and say, 'I'd rather not see this case plea bargain[ed].'"[88] If the case is important enough, Whalen said, the police chief is notified and he may complain directly to the head of the prosecutor's office.[89] In Peoria County, Illinois, a police officer is stationed at the prosecutor's office,

82. Telephone Interview with Mike Feinmel, Prosecutor, Henrico Cty. Commonwealth's Attorney's Office (Mar. 24, 2015).

83. *Id.*

84. E-mail from Lyla M. Zeidan, Legal Instructor, N. Va. Criminal Justice Training Acad. & Former Assistant Commonwealth Attorney for Va. Beach, to author (Jan. 9, 2015, 7:46 AM PDT) (on file with author). Zeidan notes that police academies do not discuss the role of officers in plea bargaining. Norfolk, Virginia, was identified as another jurisdiction where "the police have worked out an agreement with the prosecutor to consult them before dismissing or negotiating a case." McDonald, *supra* note 15, at 215 n.18.

85. E-mail from Lyla M. Zeidan, *supra* note 84.

86. *Fairmont Police Detective*, FAIRMONT POLICE DEP'T (2015), http://fairmontpolice.org/about/positions/detectives [http://perma.cc/E5WR-F97P].

87. Telephone Interview with Mike Whalen, *supra* note 51. Other New England police agencies do the same.

88. *Id.*

89. *Id.*

rather than the courthouse, to act as a liaison between prosecutors and police.[90] In other jurisdictions, prosecutors are stationed at police headquarters to serve as liaisons between the two halves of the prosecution team. The goal of these liaisons is to address prosecution-team frictions, including those arising from plea bargaining.[91] "I'm able to call the chief [prosecutor] and say, 'Your baby DA [is messing up],'" said Damon Mosler, a prosecutor assigned to the San Diego County Sheriff's Department.[92] Mosler explained that the detectives can become very upset about bad plea decisions, and he tries to address their concerns through back channels.[93]

Sometimes police officers enlist the help of third parties, such as judges or state attorneys general, to give them formal influence over plea bargaining. In 1978, the police union in Detroit, Michigan, pressed local judges to adopt a policy of not accepting plea deals unless the police had been consulted.[94] In the 1980s, a police union in Toledo, Ohio, filed a complaint with the attorney general demanding that Ohio prosecutors be prevented from agreeing to any plea without first getting the sign-off of the arresting officer. "In some jurisdictions plea bargains cannot be submitted to the judge unless the police have been at least consulted about," if not asked to approve, the terms of the plea, according to a 1982 national study of police-prosecutor relations.[95] These attempts to force prosecutors to consult with police suggest the depth of police interest in influencing the process.

While the jurisdictions discussed above used formal systems to facilitate police involvement in plea bargaining, others have employed formal systems to suppress police influence. The Buffalo Police Department provides one example, as noted in a law review article from 1977: "[T]he Buffalo Police Depart-

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90. Telephone Interview with Sean Smoot, Dir. & Chief Legal Counsel, Ill. Police Benevolent & Protective Ass'n & Treasurer, Nat'l Ass'n of Police Orgs. (Mar. 16, 2015).

91. Wojciech Cebulak, *Fairness, Job Frustration, and Moral Dilemmas in Policing that Impact Police Effectiveness*, 16 J. POLICE & CRIM. PSYCHOL. 48, 53 (2001) (noting the particularly American quality of the division within the prosecution team: "In Denmark, for example, police are much less likely than United States police to be frustrated with the prosecutor's refusal to charge a suspect in situations where the police have done a great job in making an arrest. That is because, in Denmark, even in major cases which belong to the regional prosecutor's domain, it is the police chief who usually argues the case in court and the decision to initiate criminal proceedings or not ultimately rests with police chiefs." (citation omitted)).

92. Telephone Interview with Damon Mosler, Deputy Dist. Attorney, San Diego Cty. Dist. Attorney's Office (Mar. 16, 2015).

93. *Id.*

94. McDonald, *supra* note 15, at 210.

95. WILLIAM F. MCDONALD, U.S. DEP'T. OF JUSTICE, NAT'L INST. OF JUSTICE, POLICE-PROSECUTOR RELATIONS IN THE UNITED STATES: EXECUTIVE SUMMARY 26 (1982).

ment regulations mandate that an officer shall not 'recommend, approve, nor actively consent to, the reduction or changing of a charge against a prisoner.'" "When asked his opinion of a reduced plea, the officer's response must be that 'he cannot participate in "plea bargaining" and to do so would be a violation of departmental rules,'" the study reported[96] Such self-imposed bans on all types of plea bargaining appear rare, but a number of police departments have adopted policies preventing police participation in plea bargaining for particular types of cases, such as traffic offenses.[97] Some prosecutors' offices have also imposed bans on police involvement in plea bargaining, consistent with their belief in the separation of powers and its many iterations. As noted earlier, the National District Attorneys Association's surveys found between ten and twenty-five percent of prosecutors never consulted—or, at least, did not routinely consult—officers about plea bargaining.[98]

### *B. Informal Police Influence on Plea Bargaining*

In many jurisdictions—likely, the majority—there are no formal rules about when prosecutors should consult with officers about pleas. Instead, the jurisdictions employ ad hoc arrangements whereby a prosecutor may occasionally check with an officer about a plea or an officer may initiate a conversation with the prosecutor. What causes consultation in some cases and not others appears to be a function of many factors related to the case, the personalities of the prosecutor and officer, and the local customs of the prosecution team. This Section discusses some of the factors mentioned by officers and prosecutors in interviews and then turns to particular types of cases where police consultation is especially likely, including those where the victim or defendant is an officer or a cooperating witness.

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96. Karen Gorbach Rebrovich, *Factors Affecting the Plea-Bargaining Process in Erie County: Some Tentative Findings*, 26 BUFF. L. REV. 693, 696 (1977) (citing Buffalo Police Department, Police Academy Training Bulletin, Rule 4.7.9 (Feb. 1973)).

97. For some low-level offenses, the self-imposed ban on plea bargaining may reflect a desire to avoid the administrative hassle that could be imposed on law enforcement officers if they were drawn into haggling with every defendant or attorney who wanted to sway a case. Police departments' self-imposed bans on plea bargaining could also be a way to avoid any political fallout that results from ill-advised pleas. As one author put it, "[i]t may be more politically expedient for the police not to give official opinions of preferred disposition decisions because they then share in the responsibility for what could become an embarrassing decision." McDonald, *supra* note 15, at 215 n.18. Still another reason police might prevent themselves from getting involved in plea bargaining is a strong belief in the separation of powers, an issue discussed in more depth in Part II.

98. *See supra* notes 6-7 and accompanying text.

### 1. *Factors Leading to Police Involvement in Plea Bargaining*

Prosecutors and police officers are awash in criminal cases. For officers who are not routinely involved in plea bargaining, it takes something special about a case to trigger the officer's involvement. And there are many potential triggers. The examples below touch on some of the most commonly articulated triggers. Needless to say, the list is far from exhaustive.

*Personal Rapport Between Prosecutor and Officer.* According to interviews conducted for this Essay, personal relationships between prosecutors and police officers matter immensely in considering whether plea consultations will occur. "[P]lea bargain[ing], no matter what the structure is, is really about what the relationship is," said Greg Seidel, former chief of detectives at the Petersburg Police Department in Virginia.[99] "[H]ow the prosecutor views the competency of the officers and whether or not they are willing to listen . . . . [The] plea bargain is a very human thing, it's not easily broken down into a decision tree."[100] William J. Johnson, the executive director of the National Association of Police Organizations (NAPO), noted that the rapport between officer and prosecutor is hard to predict, given the variety of personality types that become prosecutors. Some prosecutors naturally gravitate toward the company of officers, Johnson said, "go[ing] on ride-alongs on [their] day off," for example, while others are decidedly wary of their police colleagues, subscribing to the notion that, "'I took this job because I really don't trust the police and my job is to police the police.'"[101] Prosecutors who align with either of these archetypes would have different levels of willingness to seek police input on a case.

*Severity of Crime.* The seriousness of the crime also factors into whether plea consultations will occur, with more serious and complicated cases being more likely to see consultation between the police and prosecutors. "Normally, as far as plea bargaining goes, they may tell us they're going to make an offer but generally speaking, unless it's an egregious type of offense, they won't discuss anything about the plea other than that they're going to do it," said Mike Rickman, general counsel for a law enforcement association in Texas.[102] Los Angeles prosecutor Shannon Presby said that, in run-of-the-mill cases, "the po-

99. Telephone Interview with Greg Seidel, Former Chief of Detectives, Petersburg Police Dep't, Va. (Mar. 4, 2015).

100. *Id.*

101. Telephone Interview with William J. Johnson, Exec. Dir. & Gen. Counsel, Nat'l Ass'n of Police Orgs. (Feb. 27, 2015).

102. Telephone Interview with Mike Rickman, *supra* note 50.

lice have almost no input,"[103] but consultation will likely take place "on the other extreme, [in] complex either homicide cases – very, very serious case[s] – or sexual assault cases or very complex fraud cases in which the police officers have [done] a whole lot of investigation and often times know the case much better than the prosecutor."[104] "Sex crimes and homicides, I would say, are the two where I think there is the most communication that goes back and forth," said Bill Amato, a former prosecutor who now works as an attorney for the Tempe Police Department in Arizona.[105] Gary Ingemunson, a police officer turned union attorney, put it this way: "Let's say I'm working burglaries and I arrest someone for [a] more or less routine burglary . . . . If I didn't ask, I would probably never hear what happened to that case unless it's going to go to a jury trial."[106] "[N]ot every case is the case of the century," said Rod Kusch, a captain in the homicide division of the Los Angeles Police Department.[107] "I would fully expect a conversation, at least some meeting of the minds [on a murder case], but low-level case[s] that happen every day in Los Angeles County, people don't always say, 'Let me stop [in and talk about it].'"[108]

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103. Telephone Interview with Shannon Presby, *supra* note 2.

104. *Id.*

105. Telephone Interview with Bill Amato, Police Legal Advisor, Tempe Police Dep't, Az. (Mar. 5, 2015).

106. Telephone Interview with Gary O. Ingemunson, Indep. Counsel, L.A. Police Protective League, & Former Police Officer, L.A. Police Dep't (Mar. 27, 2015).

107. Telephone Interview with Rod Kusch, Captain, Homicide Div., L.A. Cty. Sheriff's Dep't (Mar. 4, 2015).

108. *Id.* The surprising exception to this rule of thumb seems to be traffic enforcement, where it is not uncommon for officers to develop a special interest in the outcome of the case, despite the relatively low stakes of the offense. The traffic ticket sentiment is noted by a number of prosecutors and police officers. As Jennifer Myers noted, "I don't think the police are involved too much in plea negotiations. The only thing I can think of is traffic tickets . . . . I've never had a case where I said, 'Are you okay with this plea?' There is a discussion that is fair to have, but I don't necessarily say that we seek approval." Telephone Interview with Jennifer Myers, Assistant Counsel, Unified Gov't of Wyandotte Cty., Kansas City, Kan. (Jan. 6, 2015). Mike Feinmel, a prosecutor in Virginia, also noted this irony: "Ironically, I've found the most significant cases and the least significant case[s] are times . . . where you get the most involvement from law enforcement in terms of what you're doing, how are you handling [the case]. [The] vast majority of the middle range of cases, if I have a conversation with an officer about this is how I'm thinking about resolving the case, usually they just said, 'I don't know, that's up to you. My job is to investigate the case.' . . . Ironically, the lower the level case . . . your traffic cases, your DUIs, your hit-and-runs, you get the officers who are really animated about things. Maybe it's because of the inherent dangerousness of the traffic job that they're the ones that are involved in the pursuits, they're the ones involved in seeing the horrors of drunk driving . . . . If a police officer arrests someone for possession of cocaine and I call the officer up and I say, 'I think he's going to plead guilty . . . his

Cases less serious than murder and rape can also spur police consultation, however, when they become personal. Charlotte Police Major Cam Selvey gave two examples: domestic violence "where I knew there was a history—that was something I would not want to back off on," and cases where "someone laid their hands on me . . . '[W]e fought out in the middle of the street for twenty minutes. I'm not willing to let this one go.'"[109]

*Personal Interest in the Job.* Some officers just care more about their cases. "[There are] some guys that seek a doctorate and some guys that just are satisfied with a bachelor's," said Mike Rickman, the Texas law enforcement association attorney. "Some officers take a lot more interest in their cases."[110] Johnson, of the National Association of Police Organizations, compared officers' varying levels of interest to those of artists and tradesmen: "There are some paintings that you put more effort into. If you're a plumber there is a job you put more effort into," Johnson said.[111] Prosecutor Elsa Seidel agreed about the diversity of interest among officers. "Some officers' position is, 'I make my case and I arrest them and after that it's completely up to you,'" she said.[112] "Some officers really do want to be involved in the process. Some of them only care if the person was particularly difficult or particularly nice."[113] Damon Mosler, a prosecutor who serves as a liaison to the San Diego Sheriff's Department, estimated in "over half the cases, I think most cases . . . [the] cop could care less what happens."[114] Added Charles Huth, a police captain in Kansas City: "Empirically, there [are] varying degrees of interest. . . . [S]ome officers are extremely involved even to the point they get emotionally involved."[115]

*Officers' Job Classification and Seniority.* Detectives have more influence than patrol officers, and veteran officers have more influence than junior ones, at least according to the intuitions of those interviewed for this Essay.[116] Patrol officers see a higher volume of cases and have shallower interactions with each one. As a result, they are less likely to care about the outcomes of their cases

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guidelines call for three to six months,' ninety-nine out of one hundred times the officer is going to say, 'Yeah, whatever. I trust your judgment.'" Telephone Interview with Mike Feinmel, *supra* note 82.

109. Telephone Interview with Cam Selvey, *supra* note 40.

110. Telephone Interview with Mike Rickman, *supra* note 50.

111. Telephone Interview with William J. Johnson, *supra* note 101.

112. Telephone Interview with Elsa Seidel, *supra* note 81.

113. *Id.*

114. Telephone Interview with Damon Mosler, *supra* note 92.

115. Telephone Interview with Charles Huth, *supra* note 42.

116. Mike Rickman makes the distinction between patrol officers and detectives just after the quotation above. Telephone Interview with Mike Rickman, *supra* note 50.

than detectives, who may have spent months investigating a crime and getting to know the victims. Veteran officers have increased influence compared to junior ones. This may be a function of the older officers' more developed network of relationships, more imposing reputation, or more nuanced understanding of how the justice system works. "At the beginning, you're kind of naïve to the process," said Kusch, a detective with more than three decades on the job.[117] "Once you understand the process, if you're going to take ownership of the case, you've got to take ownership. If I really feel passionate about a particular case, I need to get that word to the DA."[118] However, some thought seniority cut against police involvement. "I think as they progress through their career they understand the disappointments that are inherent in our criminal justice system," added Johnson.[119] "[T]hey reach the point not that they don't care, but they get cynical, almost like self-protection: 'Don't get too involved, because you don't know what the DA is going to do, and you never know what the jury is going to do.'"[120]

*Office Size and Logistics.* Where there are numerous cases and large prosecutors' offices and police departments with satellite branches, the logistics of consulting with police officers can be overwhelming.[121] Where caseloads are low and the number of prosecution-team members small, the opportunity for officers to influence plea bargaining is at its height. The apex of influence, officers and prosecutors suggested, is in suburban or rural jurisdictions, especially those policed by elected sheriffs. Officers in such jurisdictions have the greatest opportunity and motivation to get involved. "When you get into the rural areas, the sheriff and the p[olice] d[epartment] and all of them—they work so closely together with the DA's office," said Mike Rickman.[122] "They have to

117. Telephone Interview with Rod Kusch, *supra* note 107.

118. *Id.*; *see also* Telephone Interview with Elsa Seidel, *supra* note 81 ("Every once in a while you'll get somebody who is obsessive and really what they are, normally, is new officers that are—that don't yet have a perspective, I guess would be the right word for it, and everything to them is a capital case. The same thing happens with new prosecutors.").

119. Telephone Interview with William J. Johnson, *supra* note 101.

120. *Id.*

121. *See id.* ("In practical terms, especially metropolitan offices, there's such a high caseload, there's times when you weren't able to get in touch with someone, particularly with the police officers [who work at night]."). On the other hand, the logistics of *not* consulting can also cause frayed relations between prosecutors and police. As police officer Chris Collins suggested, "[There's] nothing worse for the officer than to get a subpoena, run graveyard, and put on your suit [and] tie, and you walk in [to court and] they say, 'We don't need you. He's going to plead to a misdemeanor.' That's the worst thing in the world." Telephone Interview with Chris Collins, *supra* note 80.

122. Telephone Interview with Mike Rickman, *supra* note 50.

work so closely together because they cover so much ground."[123] As one author wrote, small-town police chiefs feel responsible for knowing what happened to all the town's serious cases because, "to the small town's citizens[,] [the crime] will be viewed more seriously, and they will hold their chief responsible for knowing the outcome and being able to explain it."[124] In part, this may also be because less densely populated, rural jurisdictions lack probation services to help with pre-sentence reports. A 1978 study quoted a prosecutor who "explained that in those sections the local sheriffs have a major influence in selecting an appropriate plea bargain. They have this influence because they are virtually the sole source of information. They know what the defendant did and are usually familiar with the defendant's background."[125]

### 2. *Special Cases Where Police Plea Involvement Is Heightened*

Beyond the general factors discussed above, there are special cases in which it is particularly likely officers will get involved in plea bargaining.

*Officers as Victims.* From battery on an officer to first degree murder, officers are constantly at risk of becoming victims. When an officer is a victim, prosecutors will likely consult with the officer, her family, the police union, and the police department before any plea is offered.[126] This is partially an extension of the victims' rights movement, which advocates that victims and their families be informed about the status of the prosecution's case and be given an opportunity to address the court at sentencing.[127] What makes officer-victims different from other victims is that prosecutors feel inclined to take into account not only the officers' interests, but also those of the officers' employers and un-

123. *Id.*

124. McDonald, *supra* note 15, at 215 n.18.

125. HERBERT S. MILLER ET AL., U.S. DEP'T OF JUSTICE, NAT'L INST. OF LAW ENF'T & CRIMINAL JUSTICE, PLEA BARGAINING IN THE UNITED STATES 76 (1978).

126. Malcolm Feeley, in discussing examples where a police liaison officer would "press the prosecutor to take a hard line," explained that "[t]hese cases usually involve incidents in which there was an injury or insult to the arresting officer, and in such instances the prosecutors will usually oblige with a recommendation for higher bond or a reluctance to drop the charges." Seth F. Kreimer, *Releases, Redress, and Police Misconduct: Reflections on Agreements To Waive Civil Rights Actions in Exchange for Dismissal of Criminal Charges*, 136 U. PA. L. REV. 851, 883 n.127 (1987) (quoting MALCOM FEELEY, THE PROCESS IS THE PUNISHMENT 46 (1979)).

127. *E.g.*, CAL. CONST. art. I, § 28 ("[A] victim shall be entitled [to the right] [t]o be heard, upon request, at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue.").

ions.[128] Police departments and unions have deep interests in preventing their members from becoming victims. Naturally, these organizations will want to have a say in the punishment of anyone who has victimized an officer. In San Diego, for example, police unions made an election stir when the prosecutor failed to consult them in an officer-as-victim case.[129]

Even in relatively minor cases, police unions may push prosecutors to carefully consider the officers' interests before settling the case. Cristina Escobar, an attorney for the Dade County Police Benevolent Association, sends letters to prosecutors in police-victim cases warning them not to make plea offers without first consulting her or the officers she represents: "[I] put it on the record, [the officer] want[s] to plead them to the guidelines and, anything below that, they need to [let the officer know]."[130]

*Officers as Defendants.* The officer-defendant case is the flip side of the officer-victim case. When officers are defendants, prosecutors are also likely to consult police departments and unions about the appropriate plea. Officer misbehavior tarnishes the reputation of the department, so police chiefs may want a severe punishment for the officer-defendant in order to deter future misconduct and assure the public that no special treatment is given to misbehaving police. Or, the department may want leniency, under the theory that officers' jobs entitle them to "professional courtesy."[131] Either way, the police department would want to have a say. Meanwhile, police unions may also want to weigh in on the plea bargain, if they see it as their duty to push for as low a punishment as possible for the officers they represent. Of course, there may be areas where unions are willing to give and take with prosecutors in the plea negotiations. Financially, much rides on the specific charge to which the officer pleads guilty, because guilty pleas to some crimes can strip the officer of her law enforcement credentials and retirement benefits, while guilty pleas to other

128. At least some prosecutors have internalized the need to treat officer-victim cases differently. A survey of Nebraska prosecutors includes a question of whether there are particular cases they are reluctant to plea bargain on. "Assaults on police officer" is one of the responses. Kray & Berman, *supra* note 18, at 120.

129. Telephone Interview with Damon Mosler, *supra* note 92.

130. Telephone Interview with Cristina Escobar, *supra* note 75. Escobar provided me with two sample letters that she has sent to prosecutors warning them not to plead out the case.

131. Michael Dresser, *When Police Let Officers Skate, Respect for Traffic Law Tanks*, BALT. SUN (Feb. 6, 2011), http://articles.baltimoresun.com/2011-02-06/features/bs-md-dresser-getting-there-02-09-20110204_1_police-officer-law-enforcement-professional-courtesy [http://perma.cc/6NDA-N8J6].

crimes do not.[132] In this respect, the officer might be willing to accept a more serious punishment if it is structured in such a way as to preserve her ability to work in law enforcement. For these reasons, police departments and unions have a vested interest in the plea bargain and are likely to be consulted.

*Cooperators and Informants.* Plea negotiations concerning cooperators and confidential informants are another area of great interest to the police. Officers use the prospect of a favorable plea, or the threat of an unfavorable one, to win cooperation from witnesses. In such cases, officers may have very strong opinions about what types of pleas are required to get the witness to cooperate, and officers may press prosecutors to deliver pleas on those terms. That is the good-cop approach. The bad-cop approach would be to threaten to scuttle a plea offer that is already on the table, if the potential witness refuses to cooperate.[133] There is no guarantee that the prosecutor will agree to the plea requested by the police officer, but if the prosecutor refuses to go along, he can be sure to face pressure from his law enforcement colleagues.[134]

### C. *Police Influence in the Face of Prosecutorial Resistance*

Even when prosecutors refuse to consult, or agree to consult but refuse to take police input to heart, officers still have ways to influence plea offers. This Section explores the mechanisms officers can use to pressure prosecutors.

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132. *See* 40 ILL. COMP. STAT. ANN. 5/5-227 (West 1993) ("None of the benefits provided for in this Article shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his service as a policeman."); Roger L. Goldman & Steven Puro, *Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct?*, 45 ST. LOUIS U. L.J. 541 (2001) (discussing criteria for revocation of law enforcement credentials); H.C. Lind, Annotation, *Misconduct as Affecting Right to Pension or Retention of Position in Retirement System*, 76 A.L.R.2d 566, § 5 (1961).

133. *See, e.g.*, JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 191 (2d ed. 1975) ("When the police do bring prostitution cases to court, they will typically put pressure upon the district attorney not to accept a plea of guilty in exchange for a fine . . . . [A]n arrest which does not lead to conviction and a jail sentence undermines the policeman's ability to constitute an authoritative threat to the prostitute.").

134. Prosecutor Feinmel recalled a recent case where the defendant was on his fourth DUI, but the police wanted to give him a favorable plea because he could provide useful information about a drug trafficker. "I said I can't do that," Feinmel recalls. "Ultimately, I called the detectives . . . . If he kills somebody, aside from the public image side of it, it's on my conscience." Telephone Interview with Mike Feinmel, *supra* note 82. Pearce recalled a situation where he developed a suspect in a host of identity thefts, but federal prosecutors wanted her to have immunity so that she could help with a drug trafficking investigation. "No frigging way I'm going to let you drop a case with all these victims and all the money she owes," Pearce said. Telephone Interview with Dan Pearce, *supra* note 47.

### 1. *Police Brass and Police Unions*

Upset with the prosecutor's proposed plea? Officers can raise their concerns with police management or with their union representatives in the hopes that the higher-ups in these organizations can change the prosecutor's decision.[135] Police departments and district attorneys' offices necessarily work together on many thousands of cases each year, and the chain of command on each side of the prosecution team has a lot at stake in maintaining good working relations with their prosecution-team colleagues. A high-ranking police official can call a supervisor in the prosecutor's office to ask for help overturning a line-level prosecutor's plea decision, assuming the police official is willing to spend the capital. "If you were in a detectives squad, it would be your bosses in the detectives squad speaking with the district attorney's office why someone was getting a plea deal rather than going to trial," said Michael Paladino, a police union official and a detective in the NYPD.[136] Even if the line officer does not want to involve his supervisors, the police bureaucracy might get involved if the organization has a particular interest in the outcome of the case, an interest that could include protecting the police department's public image.[137]

Because police unions are important players in local politics, they are also able to pressure district attorneys' offices about bad pleas. "[I]f the union president has a good working relationship both with his or her police chief . . . as well as with the prosecutor, it's often times better for everyone involved," said Johnson. "Most of the participants involved, they understand that there are going to be cases where I have to publicly disagree with something you did, but next week I'm still going to call you about something [to ask for a favor or work out an issue]."[138]

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135. For examples of police chiefs criticizing prosecutors' plea deals, see Barry Meier, *Alan Dershowitz on the Defense (His Own)*, N.Y. TIMES (Dec. 12, 2015), http://www.nytimes.com/2015/12/13/business/alan-dershowitz-on-the-defense-his-own.html [http://perma.cc/WD4Y-5QJ7] ("A local prosecutor, after meetings with Mr. Epstein's defense team, recommended that he be charged only with a misdemeanor. The chief of the Palm Beach police department was so outraged by the proposal that he wrote a letter to the Justice Department asking it to get involved in the case."); and Letter from Michael S. Reiter, Chief of Police, Town of Palm Beach, to [Redacted] (July 24, 2006), http://abcnews.go.com/images/WNT/police_letter1.pdf [http://perma.cc/5EUW-B4QF].

136. Telephone Interview with Michael Paladino, President, Detectives' Endowment Ass'n of the N.Y. Police Dep't (Mar. 24, 2015).

137. *See supra* Section II.B.2 (discussing cases involving officer-defendants and officer-victims).

138. Telephone Interview with William J. Johnson, *supra* note 101. In Miami, Steadman Stahl of the police union explained that the union is involved in political screenings for elected judges. Telephone Interview with Steadman Stahl, *supra* note 60 ("Anyone who wants to run for

Although union officials mostly focus on cases involving officers as victims or defendants,[139] unions sometimes see it as their duty to speak up when their members are upset about the way prosecutors are handling cases. Sean Smoot, an Illinois union official, gave the example of a group of sex-crime investigators who complained to the union about a prosecutor who was always pleading cases out to the less serious charge of simple battery. "When that issue was raised with the state's attorney, they reviewed some cases and wound up letting the assistant state's attorney go," Smoot said.[140] Similarly, a group of officers in Gulfport, Mississippi, banded together to pressure a prosecutor they believed was not doing her job. The prosecutor was fired after her supervisor received "outraged complaints from a number of police officers that [the prosecutor] was negotiating plea bargains and dismissing cases without their input."[141]

Police management and police unions can sometimes work in tandem to influence a plea, with the police chief using the threat of union pressure as cover to raise his own concerns with the district attorney. "I give the chief the excuse to go over and talk to the state's attorney and he can tell the state's attorney, 'I wasn't going to say anything, but now the union's involved and they're asking questions, and just as a professional courtesy I'm telling you,'" Smoot

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a judge, we do an interview, we bring them in. On [the] questionnaire we ask them, 'Would you listen to an officer to get their input before sentencing somebody?' I've only had one or two who said . . . 'No, it's unethical.'").

139. The influence of the police brass and the police unions was much discussed in the wake of the shooting of Michael Brown in Ferguson and the killing of Eric Garner in New York. In those deaths, however, prosecutors were criticized for not prosecuting officers aggressively enough. *See, e.g.*, Paul Butler, *The System Must Counteract Prosecutors' Natural Sympathies for Cops*, N.Y. TIMES: ROOM FOR DEBATE (Apr. 28, 2015), http://www.nytimes.com/roomfordebate/2014/12/04/do-cases-like-eric-garners-require-a-special-prosecutor/the-system-must-counteract-prosecutors-natural-sympathies-for-cops [http://perma.cc/GZJ3-8ZB9] ("There is one reason that Daniel Pantaleo is not being charged in the death of Eric Garner. It's because District Attorney Dan Donovan of Staten Island did not want him to be."); Joel Currier, *Appeals Court in St. Louis Hears Arguments over Special Prosecutor in Michael Brown Shooting*, ST. LOUIS POST-DISPATCH (May 10, 2016), http://www.stltoday.com/news/local/crime-and-courts/appeals-court-in-st-louis-hears-arguments-over-special-prosecutor/article_30cb6adb-30be-5fd3-9538-16e3cf4ad13c.html [http://perma.cc/66NA-2ZSD] ("Activists who filed suit last year say St. Louis County Prosecuting Attorney Robert McCulloch acted in bad faith during grand jury proceedings and 'never intended to prosecute Darren Wilson,' the Ferguson officer who shot Brown, 18, on Aug. 9, 2014."). Meanwhile, in other cases, prosecutors may be doing wrong by allowing the union and the police administration to push for a more aggressive prosecution.

140. Telephone Interview with Sean Smoot, *supra* note 90.

141. Brief for the Respondent in Opposition to Petition for Writ of Certiorari at 9, Golden v. City of Gulfport, 523 U.S. 1138 (1998) (No. 97-1599), 1998 WL 34112511, at *9.

said.[142] Indeed, the union may have even more freedom than police brass to meddle with prosecutors' plea decisions, because the police union is not part of the prosecution team—it does not have to abide by whatever plea bargaining etiquette reigns within the jurisdiction.

However, the union's position outside the prosecution team also adds controversy to its involvement in the plea process. "I never dealt with unions, and I don't think that's the appropriate place" for them to get involved, said Andy Leonard, a retired major with the Charlotte-Mecklenburg police. And some union officials say they would never get involved in plea bargaining. "I can't say that that has happened," said Paladino, the NYPD detective and union official. "I never had to ask the union to get involved in any of that . . . . It's not a union issue when a member of the public [is involved]."[143]

### 2. *Media*

Newspapers and local television news are routinely part of police efforts to influence plea bargaining. Officers can derail a plea by leaking word that the prosecutor is considering a lenient offer and did not consult with police first. If the plea offer has already been made, officers may go on the record to voice their dissatisfaction with the plea and make clear that they were not consulted.[144] These disparaging comments can help galvanize public opposition to the plea and put pressure on the sentencing judge to reject the plea agreement as not being in the interests of justice. Even after the judge accepts the plea, officers may publicly denounce the plea to put pressure on prosecutors to be more punitive in the future.[145] In one such example, police stormed out of the sen-

142. Telephone Interview with Sean Smoot, *supra* note 90.

143. Telephone Interview with Michael Paladino, *supra* note 136.

144. Alex Green, *Whiskey Bottle Plea Deal Garners Attention*, SANDUSKY REG. (May 19, 2014), http://www.sanduskyregister.com/News/2014/05/19/Whiskey-bottle-plea-deal-garners-attention [http://perma.cc/JR4Q-RWAY] ("Detective Carpenter has joined Mitchell and Taylor in their strong opposition of the plea deal for Johnson. 'The judicial system has failed this family,' Carpenter said recently. '(Mulligan) didn't consult me, he didn't consult the family.'"); Mark Wilson, *Detective Criticizes 'Bad' Plea Agreements for Sexual Offenders*, EVANSVILLE COURIER & PRESS (Sept. 19, 2010), http://archive.courierpress.com/news/local/detective-criticizes-bad-plea-agreements-for-sexual-offenders-ep-446234341-326825181.html [http://perma.cc/76NM-LVER] ("'I just couldn't live with another bad deal,' [Detective Turpin] said. 'What this has to do with is that this is the umpteenth time I've had a case in which (the prosecutor's office has shown) no regard for the victim.'").

145. Kristina Smith, *Detective Expresses Plea Deal Concerns*, PORT CLINTON NEWS HERALD (May 19, 2014), http://www.portclintonnewsherald.com/story/news/2014/05/19/detective

tencing hearing for a defendant accused of murdering a cop. The officers made clear to the press that they "were not consulted on the plea bargain, and when they learned of it and objected, their objections were overlooked."[146] Interestingly, even though there is no requirement that prosecutors consult police officers about plea bargaining, media accounts often portray the lack of consultation as a failure on the part of the prosecutor,[147] perhaps suggesting that the public expects officers and prosecutors to act in concert on plea bargaining.[148]

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-expresses-plea-deal-concerns-/9303121 [http://perma.cc/S3U5-288F]. Commenters on the article encouraged the police to object to more prosecutorial practices.

146. Gay Elwell, *Pflugler Pleads Guilty in Killing of Officer, Gets up to 30 Years*, MORNING CALL (May 17, 1989), http://articles.mcall.com/1989-05-17/news/2689922_1_dirt-road-bowser-s-oct-police-officers [http://perma.cc/6JNM-Z8UV].

147. One article recounted the back-and-forth recriminations about whether the prosecutor had actually tried to consult with the officer, another indication that the media expects consultation: "'There have been times we enter plea bargains and don't talk to the police first because we have so many cases,' [the prosecutor] said, 'but this wasn't one of them.'" Debbie Wachter Morris, *District Attorney Disputes Police Claim in Plea*, NEW CASTLE NEWS (Feb. 16, 2007), http://www.ncnewsonline.com/news/local_news/district-attorney-disputes-police-claim-in-plea/article_71e76850-dd67-5127-9a3c-8e0660a61e71.html [http://perma.cc/U4A3-6Q77].

148. Another measure of this is that, when police *are* consulted, prosecutors make sure to tell reporters that the police signed off on the plea. This appears to be a way to share any of the blame that might flow from the plea. *See, e.g.*, Kyle Campbell, *Man Charged in Noyac Home Invasion Takes Plea Deal*, 27EAST.COM (May 14, 2014), http://www.27east.com/news/article.cfm/General-Interest-Southampton/61542/Man-Charged-In-Noyac-Home-Invasion-Takes-Plea-Deal [http://perma.cc/UW85-S2QP] ("Robert Clifford, a spokesman for Suffolk County District Attorney Thomas J. Spota, said the decision was made to offer a plea based on the findings of Mr. Spota's office and Town Police investigators. 'This disposition is based on our criminal investigation of this matter in consultation with the Southampton Town Police Department,' Mr. Clifford said."); *Overlin Sentenced in Student Death*, WAYNESVILLE DAILY GUIDE (Sept. 5, 2013), http://www.waynesvilledailyguide.com/article/20130905/NEWS/130909496 [http://perma.cc/C2Z8-F3JX] ("Rice said Smith's family and police were consulted as he negotiated with Overlin's attorneys with regard to the plea bargain. 'Both law enforcement and Tomarken's family were involved from the very beginning, and agreed that the final outcome of this case was just and appropriate,' said Rice, adding that members of Smith's family were present when the sentence was handed down."); David L. Shaw, *Decision Time in DA Race*, FINGER LAKE TIMES (Oct. 28, 2009), http://www.fltimes.com/news/election-decision-time-in-da-race/article_4bddee04-0b08-5bf4-8d46-da5871c573fc.html [http://perma.cc/PN2U-GEX2]; Doug Staley, *Kidnapping Charges Dropped*, INDEONLINE.COM (Apr. 23, 2009), http://www.indeonline.com/article/20090423/News/304239885 [http://perma.cc/XWE6-CTAC]; *Toledo Man, 56, Found Guilty in 1976 Death at North-End Bar*, BLADE (Nov. 27, 2002), http://www.toledoblade.com/local/2002/11/27/Toledo-man-56-found-guilty-in-1976-death-at-north-end-bar.html [http://perma.cc/9V9B-MBAN] ("Mr. Cook said Mr. Duran's family and police were consulted in advance about the plea agreement entered into by Briceno. He said the prosecution will not oppose a request for early release, which 'the family is also aware of,' Mr. Cook said.").

Going to the media is not uncommon, but neither is it routine. In interviews for this Essay, prosecutors and police officers expressed their concerns about the effect on the prosecution team of involving the media in the team's internal conflicts. "On a case-by-case basis, I think that has the potential to undermine the reliability of the justice system," said prosecutor Mike Feinmel.[149] "They're certainly free to say at election time, 'Hey, we need a district attorney that is going to protect the public.' That's fair game, that is a little different than in a case-by-case basis undermining the public perception of the justice system."[150] Attorney Gary Ingemunson, a former police officer himself, pointed to a recent Los Angeles case where an officer who was unhappy with the way police were handling a child molestation case complained to the *Los Angeles Times*. The police department leadership disciplined him for this breach of prosecution-team etiquette.[151] "It makes a certain amount of sense for the state's attorneys to at least touch base [with the police], especially when you're talking about cases [with] really significant crimes," said Smoot.[152] "From a political standpoint, if you're going to do a plea agreement and you don't want somebody out in the newspaper the next [day] calling you out on it, then it's probably a good idea to talk to the officers."[153]

This discussion about the use of media coverage would not be complete without a coda of skepticism. It may be that the police complain to the media, even when they believe a plea is appropriate, because it benefits them to criticize a plea bargain in the press. By publicly distancing themselves from the plea, the police can get all the benefits of a guilty plea – including certainty of a conviction[154] and limited expenditure of resources on further investigation[155] –

149. Telephone Interview with Mike Feinmel, *supra* note 82.

150. *Id.*

151. Telephone Interview with Gary O. Ingemunson, *supra* note 106.

152. Telephone Interview with Sean Smoot, *supra* note 90.

153. *Id.*

154. Prosecutor Mike Dynes points out: "The other thing I think our officers are always disappointed with [is] the judge's sentencing. They know that if we get a decent plea deal that they wouldn't have expected much more from the judge . . . . They don't necessarily address the court directly about it, but there is a sense of disappointment. Officers who understand the system and how it works and the nuances, they seem to be satisfied. It's the ones who don't understand it . . . they tend to not listen to what you're saying." Telephone Interview with Michael Dynes, Assistant City Prosecutor, Peoria, Ariz. (Mar. 16, 2015).

155. "I think that police officers accept plea negotiations and plea offers," said Bill Amato. "There is a benefit to the police officers because [] a trial can often take a lot of time away from the police officer's other duties . . . . I would say it's an accepted, necessary evil in the minds of law enforcement." Telephone Interview with Bill Amato, *supra* note 105; *see also* Telephone Interview with Cam Selvey, *supra* note 40 ("When they have a trial, I have a detective who is

without appearing soft on crime. By giving the impression that the police want to take every case to trial, the department can promote its own reputation for assiduousness without having to do additional work.

### 3. *Judges*

For an officer who has a burning desire to influence a plea deal, there is the nuclear option: tell it to the judge. Officers have gone this route by writing letters to judges or showing up at sentencing hearings to condemn the prosecutor's plea offer.[156] This technique is extremely controversial within the prosecution team, not only because it airs the team's internal conflicts, but also because it raises the question of who is bound by the prosecutor's plea bargain: the prosecutor only, or the prosecutor and the police? If the plea deal promises that the state will not make a recommendation at sentencing or that the state will ask for the minimum guideline sentence, does this promise prevent the police officer from asking the court for a severe punishment? And what is the remedy if the officer is found to have breached the agreement?

Courts have waded into these questions when defendants have attempted to withdraw pleas or asked for specific performance to be ordered on the grounds that the police violated the terms of the plea agreement by weighing in on the punishment.[157] At the point that a defendant seeks to withdraw his or her plea, the court must determine whether the terms of the agreement were violated by the officer's actions, which in turn requires the court to decide whether the prosecutor's promise to the defendant binds the police as well.[158]

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unavailable for anything else because they are tied up in court for however long that case is going on.").

156. A similar end run can be accomplished if the officer funnels information to a probation officer. The probation officer makes the sentencing recommendation and is, in at least some jurisdictions, not seen as an officer of the court bound by any promises made by the prosecutor. Enterprising police officers will sometimes give information to the probation department as a way to get around the prosecutor's plea deal.

157. Examples of this fact pattern can be seen in the following cases. State v. Rogel, 568 P.2d 421, 423 (Ariz. 1977); Thomas v. State, 593 So. 2d 219, 220 (Fla. 1992); State v. Lampien, 223 P.3d 750, 760 (Idaho 2009); State v. Chetwood, 170 P.3d 436, 441 (Kan. Ct. App. 2007); State v. Sanchez, 46 P.3d 774, 780 (Wash. 2002), *as amended* (May 13, 2002); State v. Matson, 674 N.W.2d 51 (Wis. Ct. App. 2003) (holding that officer violated plea by sending letter to judge asking for maximum punishment); *see also* State v. Conger, 797 N.W.2d 341, 346 (Wis. 2010) (narrowing *Matson* by ruling that it "did not stand for the proposition that law enforcement views can never be properly considered by a court" but was limited to its facts).

158. In one case, the dissatisfied police officer first complained to the judge and then to the newspaper. The officer claimed to have learned about the armed robbery plea agreement just minutes before he was supposed to testify. The detective "objected toward the end of the

Not surprisingly, given the contentiousness of the issue and the lack of rules about the prosecution team's internal dynamics, courts are evenly split about whether the officer is bound by the prosecutor's plea offer.

Courts that hold that the police are bound by the prosecutor's promise, and thus that the defendant should be allowed to withdraw his plea, believe that the officer's recommendation to the judge is "an improper attempt to influence the sentencing by breaching the state's promise."[159] The Florida Supreme Court even extends this doctrine to cover statements made by officers in pre-sentence reports. "[B]asic fairness mandates that no agent of the state make any utterance that would tend to compromise the effectiveness of the state's [plea] recommendation," the Florida court held.[160] Meanwhile, courts that do not allow the defendant to withdraw her guilty plea rely on the assumption that officers play no role in plea bargaining. Because officers play no role, the courts reason, no defendant should have assumed that the prosecutor's plea offer would limit what the police could say, and therefore the officer's statement to the judge does not deprive the defendant of the benefit of any bargain. The Arizona Supreme Court explained: "The police participate in neither negotiations nor the agreement and have no voice in dictating what terms should be considered, bargained for or included."[161] It added that "[t]he provision requiring the State to stand mute on sentencing here obviously refers to and binds only the county prosecutor and was not intended to prohibit police officers from airing their opinions when specifically asked to do so by probation officers."[162]

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proceedings, requesting a conference in the judge's chambers," which the judge granted so that he could explain why he agreed to the reduction in charges. *Lesser Robbery Charge Irks Police*, MILWAUKEE J., July 12, 1977.

159. Ohio v. Liskany, 964 N.E.2d 1073, 1088 (Ohio Ct. App. 2011).

160. *See also* Thomas v. State, 593 So. 2d 219, 220 (Fla. 1992) (expanding the reasoning to probation officers: "Clearly, a probation officer is an agent of the 'state,' notwithstanding the State's surprising assertion to the contrary. *Lee* therefore dictates that Thomas should have been allowed to withdraw his plea because a sentencing recommendation higher than the one Thomas originally bargained for was communicated to the court"); *cf. Lampien*, 223 P.3d at 760 ("[T]his Court holds that a plea agreement is not breached when such officers testify contrary to the plea recommendation *as victims* pursuant to their individual statutory and constitutional rights." (emphasis added)).

161. *Rogel*, 568 P.2d at 423.

162. *Id.*; *see also* State v. Thurston, 781 P.2d 1296, 1299-1300 (Utah Ct. App. 1989) ("These statutes would become meaningless if law enforcement were bound to recommend only what the prosecutor had agreed to recommend in a plea bargain, and could not express contrary information or opinions, particularly when they had not participated in the bargain itself."); *cf.* State v. Bowley, 938 P.2d 592, 600 (Mont. 1997) ("[W]hen a probation officer recommends a sentence different from that contained in a plea agreement, this does not constitute a breach of the plea agreement . . . .").

Regardless of the rule in a particular jurisdiction, the threat that the defendant may be allowed to withdraw her plea does not seem to be much of a deterrent to an officer's contacting the judge about sentencing. After all, if the officer really opposes the plea, he will not be too upset if his interference in the process results in the plea's withdrawal.

* * *

These three examples show how the police can use their leverage over the prosecutor to influence the plea-bargaining process even when the prosecutor—the one ultimately in charge of the plea decision—disagrees with them. The officer can appeal to his own superiors or his union representatives for help in pressuring the prosecutor. The officer can use the media to pressure the prosecutor. And the officer can complain directly to the sentencing judge. The biggest constraints on using these pressure tactics are not doctrinal, but rather political. There is an abiding sense that officers who get involved in plea bargaining are poaching on prosecutors' territory. Each of these pressure techniques runs the risk of upsetting the balance of power within the prosecution team and bringing down condemnation on the officer responsible for the breach of protocol. Yet officers employ these pressure techniques, nonetheless, because there is just too much at stake in the plea-bargaining process for them to cede all control to their prosecutorial colleagues.

## III. IMPLICATIONS OF POLICE INVOLVEMENT IN PLEA BARGAINING

By this point, we have seen the outlines of the taboo against police involvement in plea bargaining. We have also seen this taboo violated by police involvement. The question remains, however: what are the consequences of greater police involvement in plea bargaining? Part III explores the implications for plea bargaining, policing, and the academic literature.

### *A. The Effect on Plea Bargaining*

In a world where police officers are involved in plea bargaining, the plea process would differ from one in which prosecutors have exclusive control over pleas. The more involved officers are, the less of an independent check the prosecutor can provide against improper police action. Bad arrests would be more likely to become bad convictions. Also, as officer involvement increased, there would be situations where the interests of the officers in settling a case would systematically diverge from the interests of the prosecutor in settling the case. The more influence the officers have, the more likely they are to get their

way in such situations. These diverging interests include cases in which the police want to avoid the discovery process because it would reveal instances of police misconduct and cases in which departments may not want their officers cross-examined, for fear of what the cross-examination would bring to light. These cases of diverging interests might also include times when the police want to lock down a guilty plea, rather than take their chance at trial, because the guilty plea would prevent the defendant from bringing a civil rights suit later on.

More broadly, police influence on plea bargaining might change the market price for a plea to a particular crime. Officers' views of what a case is worth may differ from prosecutors' views because of their differing backgrounds, moral and legal sensibilities, and resource constraints. To the extent officers have more of a say, their influence would change the ultimate terms of the plea agreement. In short, police involvement in plea bargaining could upend the delicate equilibrium of plea negotiations in a number of ways because it imports a new set of institutional interests into the equation: the police's interests.

### 1. *Bad Arrests Become Bad Pleas*

Prosecutors who advocate the separation of powers in plea bargaining often do so because they think prosecutors have a duty to act as checks against police overreach. In this separation-of-powers model, the police may make an arrest for improper motives or based on faulty evidence, but before anyone can be punished as a result of these allegations, there is an opportunity for independent review by a prosecutor not involved in the police misconduct. Where the prosecutor finds the police action was inappropriate, she can prevent it from sending the defendant to prison by dismissing the charges or offering a plea with a reduced punishment more in line with the crime.

The prosecutor's ability to oversee, restrain, and correct police misconduct would be greatly diminished, however, if the police gained power in the plea-bargaining process. Or so the argument goes. If police officers are able to exert their influence on the plea decision, there is a greater risk that they will use this influence to convert an improper arrest into an improper conviction. In the process, the prosecutor's independent review would shrink to nothing. In this way, greater police influence has the potential to transform the problems associated with bad arrests and investigations into problems that afflict adjudication, as well.

### 2. Brady, Giglio, *and Civil Rights Litigation*

Police officers have a variety of institutional interests that might lead them to seek a guilty plea—and a particular kind of guilty plea, at that—in cases where a prosecutor would not otherwise be inclined to do so. The typical take on the police view of plea bargaining is that officers always oppose pleas, while prosecutors embrace the pleas as a necessary part of the administration of the justice system. No doubt, police involvement in plea bargaining could play out along these lines, with police doing their utmost to block plea deals or, in what amounts to the same thing, to demand the most severe terms possible from every defendant.

But there may also be times when the police are *more* inclined than the prosecutor to settle a case. Where going to trial would lead police misconduct to be disclosed through discovery, pretrial motions practice, *Brady* and *Giglio* disclosures, or cross-examination, police officers may want to settle the criminal case to prevent embarrassing information about the police agency from coming out.[163] If an officer does not have to testify at a trial, there is no need to provide information that would impeach his credibility, such as information about his history of misconduct. Likewise, if an arrest was effected through an illegal surveillance program or with excessive force, settling the case by guilty plea would spare the police agency from having its practices publicly exposed at trial.[164] Were the prosecutor the only one whose interests mattered, the threat of police embarrassment might not register. But if police have more influence

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163. *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), require prosecutors to disclose any information that could be favorable and material to the defendant, including evidence of police misconduct. *See* Jonathan Abel, Brady*'s Blind Spot*, 67 STAN. L. REV. 743 (2015).

164. *See, e.g.*, CAL GOV'T CODE § 945.3 (West 2016) ("No person charged by indictment, information, complaint, or other accusatory pleading charging a criminal offense may bring a civil action for money or damages against a peace officer or the public entity employing a peace officer based upon conduct of the peace officer relating to the offense for which the accused is charged, including an act or omission in investigating or reporting the offense or arresting or detaining the accused, while the charges against the accused are pending before a superior court."); John Kaplan, *American Merchandising and the Guilty Plea: Replacing the Bazaar with the Department Store*, 5 AM. J. CRIM. L. 215, 218 (1977) ("Too often the exclusionary rule, which is expected to bring to light police violations of constitutional rights, does not get a chance to operate because the offer made in a plea bargain is too good."); Michael E. Tigar, *The Supreme Court, 1969 Term—Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 21 (1970) ("Such an approach seriously weakens the deterrent effect of exclusionary rules and other procedural protections since police and prosecutors need not worry about their conduct in the seventy to ninety percent of cases where judgment is entered on a plea of guilty.").

over the negotiations, there would be a greater potential for pleas that help the police department to save face, even if the pleas otherwise do little for the prosecutor.

A variation on this face-saving interest can be found in the conditions the prosecutors set for the guilty plea. Where there is potential that the criminal defendant will sue the police department later on for civil rights violations, the police might have a particular interest in obtaining a guilty plea—even to reduced charges—if the plea contains a promise that the defendant will not bring any future lawsuit resulting from the case. The U.S. Supreme Court has signed off on the constitutionality of incorporating an agreement not to sue into the guilty plea.[165] This civil litigation context is another example where the police would have an interest in settling the case that the prosecutor would not otherwise have had on his own.

Similarly, the police may want a guilty plea because the conviction itself protects against some civil rights litigation.[166] Bill Amato, an attorney for the Tempe Police Department in Arizona, referred to the U.S. Supreme Court's decision in *Heck v. Humphrey* for the rule that a federal civil rights claim for damages cannot prevail if the suit's success would imply that a criminal conviction is invalid.[167] "[T]hat's not something that prosecutors necessarily know," Amato said, so "[I] went to my city prosecutor's office one day without any case pending" and told the prosecutor about this doctrine: "'Don't plead it to the trespass, plead it out to the aggravated assault."[168] In this way, the decision about what charge to plead a defendant to has implications for the police department's civil liability—implications that the prosecutor likely would not

165. Town of Newton v. Rumery, 480 U.S. 386 (1987) (addressing waiver of civil suit in exchange for dropping charges); *see* 3 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 9:39 (3d ed. 1991); Kreimer, *supra* note 126, at 853 (opposing release-dismissal agreements). Beth Murano, an attorney for the Lee's Summit Police Department and a former prosecutor herself, said that she has seen in prior employment that "sometimes the case gets dismissed and the defendant's asked to sign a release." Telephone Interview with Beth Murano, *supra* note 37. *But see* Telephone Interview with Sean Smoot, *supra* note 90 ("State's attorneys got their own job to do . . . . They're not representing the officer. Many, if not most—if not all—the prosecutors I know, if an officer came to him and said, 'Hey, can we drop this case because this guy's going to sue me for civil rights violations,' they'd say, 'Sorry, but no.' Because the fact of the matter is that a lot of those types of complaints are made against officers and are later unsubstantiated, and it really is the [criminal defendant] trying to position themselves in a better way for the criminal case.").

166. *See* Kreimer, *supra* note 126, at 852-53.

167. Heck v. Humphrey, 512 U.S. 477, 486-87 (1994).

168. Telephone Interview with Bill Amato, *supra* note 105.

know, or care, about if the police were not involved in the negotiation process. Another example where police may push for a particular plea offer is in cases involving officers as defendants. As noted earlier, certain guilty pleas will strip officers of their law enforcement credentials and pensions, while others will not.[169]

The takeaway from this discussion is that the police may have their own interests in settling cases without trial, distinct from prosecutors' interests. If the police have greater influence in the plea-bargaining process, these self-interested reasons are more likely to affect the plea negotiations than if prosecutors retain complete control.

### *3. The "Market Price" of a Guilty Plea*

The consensus of the academic literature is that plea bargaining takes place in the shadow of trial, with prosecutors and defense attorneys assessing the expected value of a case at trial and then negotiating a plea that benefits both sides.[170] The prosecution gains from the certainty of a conviction without having to invest resources in a trial; the defendant benefits from a sentence that is presumably less than what he could expect if the case went to trial. The lower the sentence offered to the defendant, the better the benefit of the bargain, and the more likely the defendant is to accept it. The lynchpin of the plea negotiations, then, is the parties' assessments of what the case is worth.

But throwing officers into the mix could change the prosecution team's assessment of what a case is worth. That is because prosecutors and police officers may have systematically different ways of thinking about cases. Empirical testing would help to answer this question definitively. But there is good reason to suspect that officers' and prosecutors' divergent backgrounds would lead them to analyze cases differently. Prosecutors' expertise is in assessing how the facts of a case match up to the elements of a crime. This assessment requires a knowledge of the legal doctrine governing criminal procedure and evidence. The prosecutor's assessment of the expected value of a case takes into account legal considerations, such as the likelihood that certain evidence would be excluded or certain jury instructions denied. This assessment also likely draws on prosecutors' experiences presenting cases to juries.[171]

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169. *See* Telephone Interview with Rod Kusch, *supra* note 107; discussion *supra* Section II.B.2.

170. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2464-65 (2004) (summarizing leading citations for the shadow-of-trial theory).

171. This discussion dovetails with the discussion of "comparative institutional competence." *See* Telephone Interview with Shannon Presby, *supra* note 2 ("I wouldn't want the police officers

Police expertise, on the other hand, does not derive from this legal background; rather, officers' comparative expertise is in their familiarity with the facts of the case, their ties to the victim or the victim's family, and their assessment of the credibility of the witnesses, to name just a few examples.[172] Officers can also contextualize the defendant beyond the facts of the crime. Some prosecutors, like Arizona prosecutor Mike Dynes, welcome hearing this "very helpful" information from police officers. "If there is somebody who is a problem, that's generally when I'll hear about it," Dynes said.[173] "Generally what it would be [is], '[We] caught so and so trespassing and looking in windows,' and they suspect that usually he is burglarizing homes."[174] This additional information would be reason to make the plea offer more punitive. Dynes said officers are also frequently helpful in domestic violence cases, where they can say, "'[W]e've been called to that house fifteen times in the last month, and when we get there everybody said nothing happened.'"[175] Officers may also know of mitigating information – the defendant's mental health status, his history of being abused, or other humanizing factors – that could cause prosecutors to lessen the punishment they seek. For better or worse, officers' informal comments about the defendant could thus serve similar functions to a probation officer's pre-sentence report, by giving a holistic account of the defendant's culpability. The downside of all this, of course, is that a defendant might end up receiving a more punitive sentence based on such "facts," which have never been proven true and which the defendant has never been given the opportunity to contest (because officers and prosecutors discussed the facts behind closed doors).

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to be the people who decide what the charges are and whether or not to charge . . . . After all, they're not lawyers, and they're not going to prosecute the case, and they don't have the experience of presenting a case to a judge [and jury]."); *supra* notes 59-60 and accompanying text. Nor are such legal diagnostic skills apparently taught in police academy classes or in on-the-job training. *See* E-mail from Lyla M. Zeidan, *supra* note 84.

172. A number of officials mentioned the usefulness of this additional information about defendants. Telephone Interview with Elsa Seidel, *supra* note 81 ("Officer[s] have gone out of their way to tell me, 'This guy was really cooperative. I really think he was left holding the bag. I think he deserves a second chance.' Sometimes they come in, they write a note and say, 'This guy was really, really difficult to deal with and was hateful and was screaming and yelling about how he is going to kill my family.'"); Telephone Interview with Mike Whalen, *supra* note 51 ("The court officer, [be]cause they see every case that comes through, they know who the frequent flyers are . . . . [S]omebody had a mental health issue . . . . They're in a pretty good place to see what's going on with that person generally.").

173. Telephone Interview with Michael Dynes, *supra* note 154.

174. *Id.*

175. *Id.*

But even where prosecutors are not receptive to hearing facts outside of the case, these facts may still shift the terms of the plea agreement if they are persuasive to the police and the police have a chance to influence the prosecutor. To the extent prosecutors and police officers have systematically different ways of analyzing a case's value—differences that would be repeated over numerous cases—the involvement of police officers in plea bargaining could shift the prosecution team's offers for particular types of crime, thus altering the market price for pleas. Whether police involvement would shift the market toward more severe, or more lenient, punishments is unknown. At the very least, though, greater involvement by the police in calculating cases' worth would create further uncertainty in the market for plea bargains.

More speculatively, police and prosecutors may come to different values for a case not only because of methodological differences—i.e., legal versus factual analysis—but also because the two parts of the prosecution team may have different moral or cultural views of culpability. These differences, too, could affect the price of a plea. In this regard, the common assumption is that police officers are more punitive than prosecutors and more eager for stiffer punishment.[176] If this assumption is correct, police involvement in plea bargaining could make plea bargaining costlier for defendants. And there certainly are reasons to believe officers would be more punitive than prosecutors. Officers have direct, unfiltered experience with the defendant, the victims, and the witnesses. They see firsthand the impact of the defendant's crimes. They are the ones most likely to run into the defendant on the street again after she has served her term. All of these factors could explain why police would be more inclined than prosecutors to seek tougher punishments in plea bargaining.

But there are also reasons to suspect the opposite. One study, for example, gave hypothetical cases to prosecutors and officers and found:

> [W]hen the police and prosecutors who recommended [that] the case be plea bargained were compared, the police were twice as likely to recommend that the charges be reduced, twice as likely to recommend straight probation, and almost half as likely as the prosecutors to recommend a severe sentence (five years or more).[177]

176. This assumption is related to the notion that police officers would always oppose plea bargains. *See supra* Section I.A.

177. McDonald, *supra* note 15, at 205.

More anecdotally, William Stetzer, the Charlotte prosecutor who invited police input at the plea-bargaining roundtable, said disagreements at the roundtable had not broken down along prosecutor-police lines.[178]

And then there is this: a Florida study looked at roughly one thousand cases randomly assigned to an experimental program that required police involvement in plea bargaining, and found that police influence had no effect on the ultimate terms of the plea agreement.[179] So maybe there would be no effect at all on the market price. Again, though, even if police officers do not differ from prosecutors in any systematic way, the influence of the police in plea negotiations injects further uncertainty into the plea-bargaining process.

Police involvement has the potential to change not just the result of the negotiations, but also their feel. When it is just the prosecutor and defense attorney negotiating, the discussion is one between lawyers. Adding the police to the discussion could change the dynamics in several ways, depending on how openly and actively the police become involved in the negotiations. First is the potential cultural effect. "You don't want law enforcement involved in plea negotiations because things come out during plea negotiations – you need the defense to feel free to say things that they're trying to say to sway your opinion," explained Kristen Beedle, a former prosecutor who now works as an attorney for the San Diego Sheriff's Department.[180] "The defense is not going to do all [those] things with a potential trial witness sitting in the room."[181] Beedle added that, in an atmospheric sense, "bringing guns to a lawyer discussion, is not really conducive to that process [of negotiating]."[182]

The second way police involvement might change the feel of the plea negotiations is a matter of game theory. With the police officer involved in the nego-

178. Telephone Interview with William T. Stetzer, *supra* note 61.

179. Wayne A. Kerstetter, *Police Participation in Structured Plea Negotiations*, 9 J. CRIM. JUST. 151, 163 (1981). The court system in Miami-Dade randomly assigned roughly 1,000 cases to an experimental program of settlement conferences. The prosecutor, defendant, victim, and police officer were invited to participate in the settlement conference, along with the judge. Researchers kept statistics on who participated, how much they said, what they asked for, and whether their presence affected the resolution of the case. Beforehand, prosecutors, defense attorneys, and judges predicted that including the police in the discussions would be problematic because they would make intransigent demands for severe punishments. But that was not how they behaved in the conferences, and their presence did not quantifiably change the outcome of the pleas. *Id.* Admittedly, though, the dynamics in court-sponsored settlement conferences might be different from what would take place if prosecutors and police were speaking by themselves about the plea.

180. Telephone Interview with Kristen Beedle, *supra* note 57.

181. *Id.*

182. *Id.*

tiations, the prosecutor may have an opportunity to extract further concessions from the defense attorney by claiming that the police are pushing him to get a stiffer sentence.[183] In this way, police involvement—or, even just the specter of police involvement—would strengthen the prosecutor's hand in negotiations. At the same time, if the defense attorney is savvy enough, she can play the same game. "If you're the defense attorney, you'd say, 'I deposed Officer Jones and I don't think he'd have a problem [with a lower plea],'" said William J. Johnson.[184] Cam Selvey of the Charlotte police said defense attorneys sometimes consult with the police for the bargaining advantage it may convey on them later on: "We're going to do this, what do you think about that? Are you okay with that?"[185] If the officer finds the defense suggestion acceptable, the defense attorney can use that later on to persuade the prosecutor to take the deal.

### *B. The Effect on Policing*

Police involvement in plea bargaining would have an immediate impact on the negotiation process, as discussed above. But, beyond this impact on plea bargaining, police involvement in the process would also have an impact on policing itself. If police became more invested in the plea-bargaining process, and thus in the outcome of their cases, there would be the potential for a fundamental change in policing practices, one that focuses more on court outcomes and less on street-level enforcement statistics. In the current system, police officers have little incentive to care about what happens to their cases once they turn the cases over to the prosecution. Nor are they generally given much influence on how the cases end up in court. As a result, police enforcement activity has embraced actions that mete out street justice without any concern about what will happen to the court case that results—or often does not result—from the police action. Stop-and-frisk, illegal searches, improper seizures, excessive force in making arrests—all manner of ultra vires actions are taken without concern for the criminal case that follows. This Section explores a potential

183. Woodham, an attorney for the Tampa Police Department, described the dynamics in the following way: "Many times, it's like a hot potato, depending on who the defense lawyer is—the defense lawyer approaches the detective: 'Help my guy out, come on!' Cop: 'I can't, the state attorney makes the plea offer.' Then, defense lawyer to state attorney: 'Give my guy 3 years, come on!' State Attorney: 'I can't do that. The detective will never agree to that.'" E-mail from Laurie Woodham, *supra* note 77. Johnson of NAPO was skeptical of the very premise and said it would be "a remarkable admission by the prosecutor" to say things were out of his hands: "The cops, nah. The defense attorney is like, 'Come on.'" Telephone Interview with William J. Johnson, *supra* note 101.

184. Telephone Interview with William J. Johnson, *supra* note 101.

185. Telephone Interview with Cam Selvey, *supra* note 40.

benefit of getting officers to be more invested in the outcome of their cases. Such investment could lead to cleaner policing. Or not. Perhaps the effect would be the opposite, with officers using their newfound power over case outcomes to give even more bite to illegal policing practices that already exist.

Let's start with the potential for negative consequences. On the surface, police involvement in plea bargaining could worsen already abusive policing practices. As discussed in Section III.A.1, the officer's newfound power over plea bargaining could allow her to more easily convert improper arrests into improper pleas. In a negative feedback loop, police could use this increased power to make their policing practices even more aggressive and threatening. But the dynamic could also cut in the other direction. If officers had more influence over plea bargaining, they might become more invested in the outcomes of their cases in court. And if they cared more about the court outcomes, they might logically prefer to refocus their investigative energies on cases that would result in high-quality convictions, rather than spending their time on proxy crimes, pretextual stops, and "junk arrests" never destined to hold up in court.

In the present state of affairs, officers have "the power to punish citizens for short periods of time without prosecutorial or judicial supervisor," as one casebook described it—and they use this power even when they know that these abuses of power will doom any court case that follows.[186] As another author noted, "the goals of prosecutors and police officers are fundamentally different: Police want to restore order and assert authority, and they may be less concerned with securing convictions."[187] A whistleblowing Baltimore detective recounted as much in a recent *New York Times* op-ed, where he described what happened when he complained that a search lacked probable cause: "A sergeant pulled me aside and said I needed to mind my business. 'We don't care about what happens in court,' he told me. 'We just care about getting the arrest.'"[188]

Such harassing police practices, not targeted at convictions, are a major source of police abuses.

On the margins, giving officers more control over plea bargaining could channel police energy away from meting out rough justice on the street and toward a more orderly and procedurally protected administration of justice in

186. RONALD WRIGHT & MARC L. MILLER, CRIMINAL PROCEDURES 157 (1999).

187. Sanford C. Gordon & Gregory A. Huber, *The Political Economy of Prosecution*, 5 ANN. REV. L. & SOC. SCI. 135, 150 (2009); *see also* McDonald, *supra* note 15, at 212 ("Most of what the police do with their time involves order maintenance rather than law enforcement.").

188. Joseph Crystal, *When Police Are Poor Role Models for One Another*, N.Y. TIMES (Aug. 15, 2016), http://www.nytimes.com/2016/08/15/opinion/when-police-are-poor-role-models-for-one-another.html [http://perma.cc/FR9K-E74N].

the courts.[189] Likewise, with more influence over adjudication decisions, police might feel more confident about investing resources in worthwhile cases, without worrying that such investment could be squandered by a prosecutor's improvident decision down the line to plea out a case too cheaply.

Admittedly, there are a lot of uncertain inferences in the above chain of events leading from greater police influence over plea bargaining to a reduction in abusive policing practices. The point of this chain of inferences is not to say that police misconduct could be completely eliminated if only police were more involved in plea bargaining—without further empirical research, it is impossible even to know whether policing would become cleaner or dirtier if officers were more invested in case outcomes, and it would probably depend on the particular officers and agencies. Rather, the point of discussing the potential, positive effects from police influence on plea bargaining is to challenge the existing paradigm about the need to keep police far away from plea bargains.

The separation-of-powers rationale supporting this distance assumes that keeping the police out of plea bargaining keeps police power in check. But this may be precisely the opposite of what is needed. Officers' alienation from the adjudication process may be part of the reason officers act on the street without considering what those actions will do to their cases in court. Officers' lack of interest in case outcomes means not only that they may be willing to fritter away enforcement time on activities that do not lead to worthwhile cases, but also that large swaths of Fourth, Fifth, and Sixth Amendment law are rendered toothless. The remedy for many of these constitutional violations is the exclusion of evidence from trial. But if officers do not care about the outcome of the case at trial, then the threat of excluding evidence in the case is no threat at all. Only by getting officers invested in the outcomes of their cases in court can the Fourth, Fifth, and Sixth Amendment exclusionary remedies have a deterrent effect on police action. Giving officers some influence in the plea-bargaining process would hopefully be a step in the direction of inducing them to care about these case outcomes.

In this vein, it is worth addressing the mixed messages officers hear about whether they should care about the outcomes of their cases. An officer who lobbies the prosecutor about a plea may sometimes be faulted for being too zealous, even as an officer who does not care at all about the outcome of the

189. The lack of police incentives to conduct arrests with an eye towards trial has long been identified as a problem that needs fixing. In a 1982 study entitled *Police-Prosecutor Relations in the United States*, the authors recommended, among other things, "redefining the police role in a case as ending with conviction rather than arrest and, accordingly, developing incentives that would give the police a stronger interest in making all cases they refer for prosecution as strong as possible . . . ." McDonald, *supra* note 95, at vii.

case may be accused of policing without any interest in guilt or innocence. This is more than a messaging problem. It reflects a conceptual tension over how the prosecution team is supposed to fit together. Is an officer's decision to make an arrest deemed right or wrong independently of what the prosecutor decides to do with the case? If the officer knows the prosecutor will not pursue the case, is the officer still justified in making the arrest where he believes he has probable cause?

Finally, it should be noted that if the overarching goal is to get officers to care about their cases, a significant change must take place in the way law enforcement officers are trained and evaluated. On the training front, officers repeatedly noted the advice not to track the outcome of cases because it would be too upsetting. "Just make the arrests," said Steadman Stahl, a police union official.[190] "[Y]ou have a relationship with your state attorney. They are king whether a case goes forward, [or] gets nolle prossed."[191] Eric Daigle, a police detective turned lawyer, said his class in the police academy was given a similar warning: "'Do your job. Keep your head down. Don't follow your case because you'll get discouraged.'"[192] Other police officials give the same advice.[193]

Furthermore, crushing caseloads make it even harder for officers to care about case outcomes. "I didn't really track my cases and keep up with them once they went to the courthouse because I wasn't the complainant," said Bob Armbruster, a former detective in Texas, who is now a union lawyer.[194] "It's not that you're apathetic, it's just that you have daily things to deal with." "Having worked both sides of it," said Smoot, an Illinois union official, "I think it really depends a great deal on what the role of the officer was in the case and just how big of a case there is."[195] Huth, the Kansas City police official, noted that "[s]ome officers see themselves [as], 'We tag 'em, we bag 'em, and we move on.'"[196] The motivation to care about case outcomes and the reasons not to care about case outcomes, he added, are part of an inherent tension in the personalities of police officers: "The type of person that you need to do law enforce-

190. Telephone Interview with Steadman Stahl, *supra* note 60.

191. *Id.*

192. Telephone Interview with Eric Daigle, Attorney & Police Consultant (Mar. 17, 2015).

193. *But see* Telephone Interview with Andy Leonard, *supra* note 64 ("I think police need to be involved in following up on their cases because it shows an ownership [of] their case.").

194. Telephone Interview with Bob Armbruster, Attorney, Hous. Police Officers' Union (Mar. 13, 2015).

195. Telephone Interview with Sean Smoot, *supra* note 90.

196. Telephone Interview with Charles Huth, *supra* note 42.

ment, in general, is a very high-spirited, alpha, protective, aggressive person."[197]

A further impediment to caring about cases is institutional. Police departments track the number of stops, tickets, arrests, and closed cases their officers produce, but they do not track information about the court outcomes of these cases. "The only thing that we track [in terms of outcomes] are DWI arrests and dismissals and those are required by law," explained Ray, an attorney for the Raleigh Police Department.[198] Case outcomes just do not seem to matter to police departments—even to departments that value statistics of other sorts. For example, one study found that "[i]n the opinion of 180 officers from New York City and Washington, D.C., the number of arrests that result in conviction is the *least important* to their supervisors of 16 criteria that their supervisors might use to rate individual officer performance."[199] Yes, compiling statistics on what happens in court would be logistically difficult. And, yes, it would potentially penalize an officer for the prosecutor's decision to drop a case—or the prosecutor's error in bungling a case. But the failure to track case outcomes means that officers get the same credit for poorly investigated, even bogus, arrests as for arrests that are thoroughly investigated and for which the underlying crimes are significant enough to merit investigators' time. That is not much of an incentive to produce cases that will fare well in the court system.

The upshot of this discussion: officers currently face a number of impediments to caring about the outcomes of their cases. This indifference may be connected to abusive policing practices and/or shoddy police work, both of which are drains on the criminal justice system and on society. By giving officers more of a say in plea bargaining, prosecutors could help focus police attention on work that would produce high-quality cases. In so doing, prosecutors could help deter some of the most virulent policing practices, which result from police actions that are completely untethered from any adjudicative purpose. Focusing police effort on winning cases in court could realign police interests with the constitutional protections already in place for ensuring that court proceedings are conducted fairly.

This refocusing of efforts would require a major cultural shift in which new police recruits are trained to care about the outcomes of their cases and police departments begin to evaluate officers based on whether they actually produce court-worthy cases. The involvement of police officers in plea bargaining could

197. *Id.*

198. Telephone Interview with Ashby Ray, *supra* note 44.

199. McDonald, *supra* note 15, at 214 n.8 (emphasis added).

be part of a much-needed shift in the focus of police activity, away from street justice and toward court adjudication.

### C. *The Effect on the Literature*

The involvement of police officers in plea bargaining has several implications for the academic literature on plea bargaining, as well as for the academic literature on the prosecution team. In chief, the existence of police involvement in plea bargaining undermines the idea that the prosecutor has a monopoly over the prosecution team's adjudicative powers, and it challenges the notion that the prosecution team can be controlled by controlling the prosecutor alone.

In recent years, legal scholarship has come to consider the prosecutor to be the ascendant figure in the criminal justice system.[200] This exalted status—above defense counsel, judge, and jury—has come about in large part because of the prosecutor's control over the plea-bargaining process. The power to decide on plea offers, along with the control over what charges to bring in the first place, make the prosecutor the central node of the justice system. But the fact that police are involved in plea bargaining, an issue this Essay has discussed in depth, challenges the notion of the prosecutor's ascendancy. While the prosecutor makes the ultimate decision on what plea to offer, the police officer can influence that decision through a range of methods. In this regard, the police officer is a check on the prosecutor's power over plea bargaining and over the criminal justice system more generally.

This Essay's findings also have implications for another aspect of the academic literature: the scholarship on the separation of powers in criminal law. Building on the perception of the prosecutor as the chief figure in the criminal justice system, scholars have worried about the mixing of executive and adjudi-

200. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 295 (2011) ("Over the course of the past few decades, prosecutors have replaced judges as the system's key sentencing decisionmakers, exercising their power chiefly through plea bargaining. That prosecutorial power is unchecked by law and, given its invisibility, barely checked by politics."); Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 733-34 (2010) (lamenting that "the chronic imbalance of prosecutorial power over the last thirty years has shrunk the roles of the defendant, the defense attorney, and even the court to small ones that are easily pushed aside"); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960 (2009) ("No government official in America has as much unreviewable power and discretion as the prosecutor."); Janet Moore, *Democracy and Criminal Discovery Reform After* Connick *and* Garcetti, 77 BROOK. L. REV. 1329, 1374 (2012) (describing prosecutors as "the most powerful players" in the justice system and citing a variety of sources to support this assertion).

cative powers in the prosecutor's hands. Elaborate prophylactic measures have been proposed to keep the prosecutor who was involved in investigating and charging the case from being the one to sign off on the final plea. The idea is that a prosecutor who has been heavily involved in the investigation and charging of a case is not capable of being fair and impartial when it comes to deciding on the appropriate plea. This separation-of-powers literature goes to great lengths to separate the prosecutor's dual roles, executive from judicial. But the involvement of police officers in plea bargaining destabilizes this construct about the separation of powers. Even if prosecutors were able to strike the perfect balance between their own executive and judicial functions, there would still be the problem of the police—consummate executive-branch officials—having a say over the plea. Whatever equilibrium the prosecutor's office established between executive and judicial functions could be disrupted by police decisions to pressure prosecutors on some cases but not others. The involvement of police officers in plea bargaining thus raises questions about the utility of any separation-of-powers solution that attempts to address the problem only with respect to prosecutors and not with respect to police.

Similarly, some scholars have suggested reforming inequities in the criminal justice system by standardizing prosecutorial policies within an office.[201] Through centralization, normalization, and routinization, prosecutorial supervisors could ensure that line-level prosecutors were all making similar policy decisions on their cases. A strong office culture could promote probity in prosecutorial functions. Rather than enforcing prosecutorial norms externally, this method would use institutional design to ensure the prosecutors all stayed in line. But this proposed reform suffers from the same problem that plagues the separation-of-powers advocates. If police officers are involved in plea bargaining, even a prosecutor's office in which the line prosecutors all acted in a uniform manner would have to contend with the uneven influence of the police—influence that would intrude into some cases while leaving other cases untouched. The outside influence of the police could upend whatever systematic administration of justice the prosecutor's office had decided to pursue.

In short, the root problem for these and other areas of the academic literature is that they do not sufficiently account for the role that police officers play in challenging the prosecutor's hegemony over the process of adjudication.

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201. Bibas, *supra* note 200, at 1003 ("[P]rosecutorial self-regulation can and does work well. In other words, head prosecutors can align their subordinates' actions with principals' interests by writing down and enforcing procedural and substantive office policies."); Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1034-36 (2005).

## CONCLUSION

Police involvement in the plea-bargaining process has its virtues and vices. Some practices are obviously troubling. An officer who makes a bad arrest should not have the power to push for a guilty plea that would validate his improper arrest. Nor should officers be able to use their influence on plea bargaining to settle scores with defendants they personally dislike. And guilty pleas that officers push so that they can insulate themselves from future civil rights litigation should also be seen as an abuse of the system. Like guilty verdicts, guilty pleas should be sought because the defendant violated the law, not because the plea would benefit some proxy interest of the police officer or police agency. These are the easy cases when it comes to outlining improper police influence on plea bargaining.

More difficult is the task of when, if ever, police influence would be desirable. To a large extent, answers to this question depend more on one's theories about guilt and punishment than on one's theory about plea bargaining itself. For example, some separation-of-powers advocates argue that the adjudicative decision maker—in this case, the prosecutor—should not decide the defendant's guilt or punishment based on any facts that are not "relevant" to the case. By *relevant*, these advocates mean facts connected to one of the crime's elements, rather than facts about who the defendant is or what impact he has had on people outside the four corners of the charges. Such separation-of-powers advocates would blanch at the thought of an officer's telling the prosecutor that the defendant, though charged with a run-of-the-mill burglary, is actually a menace to the community and should get as stiff a punishment as possible. They would also be concerned, presumably, if the officer conveyed facts about the defendant's tough life that called for leniency. But maybe a more fleshed-out, holistic account of the defendant and his actions is exactly what prosecutors need to make informed decisions about punishment. Indeed, this would be similar, in a way, to how a capital jury hears facts in aggravation and mitigation to decide whether to sentence a defendant to death. Depending on one's philosophy on punishment, police influence in the form of extra-record facts about the defendant is either very improper or very much desirable. The plea-bargaining system itself can accommodate either philosophy.

Another reasonable fear about police influence is that it will mean less flexibility for a prosecutor to give a lenient plea. Yet this fear assumes that police officers are more punitive than their prosecutorial colleagues. If this empirical assumption is wrong, then police influence on plea bargaining could actually lead to more lenient pleas. Likewise, there is a concern that giving officers power over the plea-bargaining process will push them to convert questionable arrests into guilty pleas. But there is also the potential, discussed in Part III, that

this influence over plea bargaining will incentivize officers not to waste their time with junk arrests, instead focusing them on worthwhile cases. Ultimately, it is hard to say whether police influence on plea bargaining is good or bad without knowing the answers to these questions about how punitive the police are or how they would respond to more autonomy over case outcomes. In this way, one's theory about whether the police should be involved in plea bargaining depends on a host of factors unrelated to the plea negotiation process.

Going forward, in thinking about what role police should play in plea bargaining, what is needed is some combination of honesty and optimism. The honesty part first: those who would attempt to build a wall between prosecutors and police officers on plea bargaining are setting themselves up for disappointment. Police officers have a deep, vested interest in being able to influence plea outcomes, even if they choose to invoke this power in a scattershot manner. Blanket rules preventing officers from getting involved in plea negotiations are doomed to fail, just as blanket bans on prosecutors' ability to plea bargain were easily circumvented.[202] If officers want to influence a case, they are too deeply enmeshed in the prosecution team to be kept from doing so. Now, for the optimistic part: Instead of fighting an unwinnable battle against police involvement in plea bargaining, society could embrace this involvement with the hope that bringing officers into the plea-bargaining fold will reorient them to the adjudicative process with all of its attendant procedural protections. This would take a cultural shift, to be sure; it would have to begin with the way departments evaluate their officers and then percolate down to promotions, training, and the police academy. Of course, this gamble might fail, and police and prosecutorial abuses could become even more pernicious if officers had more influence over plea bargaining. Some experimentation by the nation's thousands of prosecutorial and police agencies would surely be welcome in answering these questions.

Even without such a culture shift, however, there are some changes that can be put in place immediately. At a minimum, what is needed is transparency and intentionality about the police decision to get involved in some plea negotiations but not others. In some jurisdictions, there are formal guidelines dictating this involvement, but in the majority of jurisdictions, police involvement is

202. *See, e.g.*, Teresa White Carns & John A. Kruse, *Alaska's Ban on Plea Bargaining Reevaluated*, 75 JUDICATURE 310, 317 (1992) ("Although the prohibition of both charge and sentence bargaining in most cases remains the official policy of the attorney general's office, charge bargaining, but not sentence bargaining, returned to most areas of the state after about 1985."); Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265, 313 (1987) ("This study reinforces the notion that plea bargaining is a permanent component of American criminal process . . . .").

entirely ad hoc. Wherever a decision is left completely to the unguided discretion of the officer or prosecutor, there is an opportunity for racism and other prejudices to affect the criminal justice system. Do crimes involving female victims particularly spur officers to care about case outcomes? Are crimes involving African-American victims less likely to motivate a police officer to push for a particular plea? It would be worrisome if this discriminatory pattern, seen in the charging decisions in death-penalty cases, were motivating police involvement in plea bargaining. Prosecutors, police agencies, and courts that see this pattern unfolding should be very concerned about the police influence on plea bargaining. Official department policies guiding officers' decisions on when to contact prosecutors about pleas and what types of things to say would help limit the capriciousness that may exist. Likewise, data on how often these consultations occur would be helpful in understanding the dynamic.

One measure of how much work remains to be done in this area is the absence of a conceptual account of who should be allowed to influence plea decisions in the first place. Victims have been given influence over the plea-bargaining process by a wave of victims' rights statutes that entitle victims to be informed about the progress of the criminal case against the accused and to have a formal say at sentencing proceedings. However, the fact that it required legislative action for victims to have a say is some indication that they may not otherwise have been powerful players in the criminal justice system. Police officers, on the other hand, are sufficiently powerful within the criminal justice apparatus to use their position to influence plea decisions—and influence they do. But what right do they really have to weigh in on these cases? They are not victims or otherwise aggrieved parties, yet there is a sense in which their sweat equity in working on the cases entitles them to a say in the cases' outcomes. But is this sweat-equity theory enough to distinguish officers from city council members or state senators who might want to press prosecutors to ask for a particular punishment in a case? Politicians' influence on cases would be unseemly, but it is not abundantly clear why officers who are not victims have more legitimate stakes in influencing decisions over guilt and punishment. This is one of the many aspects of this topic where additional theoretical work is needed.

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The story of police influence on plea bargaining probes whether there are any guidelines the prosecution team should consider as restraints on its own actions. What sort of inner compass should prosecutors and police officers have to ensure that their use of plea bargaining is just? This is a question about plea bargaining, to be sure, but also about the operation of the prosecution team.

There are so many variables from officer to officer and from jurisdiction to jurisdiction that it is impossible to say what would occur if police officers had more influence over plea bargaining. Indeed, this Essay has attempted to show that the issue of police involvement in plea bargaining is one for which there is no consensus among the line-level actors in the criminal justice system, much less academics, courts, and legislators.

Contrary to conventional wisdom, police officers in many jurisdictions do play a significant role in plea bargaining, even when prosecutors are resistant to their input. In some jurisdictions, police are formally invited into the deliberations about what plea to offer. In others, they are formally excluded from giving input. In still other jurisdictions, prosecutors and police officers have found ways to discuss plea bargaining in an ad hoc, case-by-case manner. Formal consultation, informal consultation, formal bans on consultation, and ad hoc arrangements on consultation—each of these has its own virtues and vices, and all of them are completely acceptable under statutory and case law.

Although criminal procedure has much to say about the nitty-gritty mechanics of how an officer can search a car or a prosecutor can select a jury, the doctrine has strikingly little to say about the foundational question of how the prosecution team is organized. This is true despite the fact that the structure of the prosecution team has such high stakes for defendants, the court system, and society. Should police officers and prosecutors be close collaborators in the plea-bargaining process, or should the two parts of the team maintain a studied independence from each other? Neither way is necessarily right, but both ways hold significant consequences for plea bargaining and policing.

In the end, this is a story about the individuals and institutions of the prosecution team who have a shared mission in the broadest sense—enforcing the law—but have very different methods of, and interests in, pursuing that goal. Prosecutors and police each have their own independent powers and yet they are also dependent on one another. How they work through their own institutional frictions could be an inspirational model for other governmental institutions mired in gridlock and conflict. Likewise, the prosecution team's failure to work through these issues could be just as foreboding.