NOTES

BASELESS PLEAS: A MOCKERY OF JUSTICE

*Mari Byrne**

This Note addresses the ethicality of the baseless plea, a guilty plea entered by a defendant for a crime that everyone in the courtroom—judge, prosecutor, defense attorney, and defendant—knows the defendant did not commit. Used in the interest of efficiency and leniency, the baseless plea allows a defendant to plead guilty to a crime that has no basis in the facts of the case. Though used by courts in numerous jurisdictions, baseless pleas have been largely unaddressed as courts have sought to conceal the practice and as commentators have therefore failed to detect it. This Note seeks to remedy that omission by shedding light on baseless pleas and the ethical concerns this practice raises. This Note begins by describing baseless pleas, both the context in which, and the reasons for which, they are used. Next, this Note reviews the ethical duties of prosecutors, defense attorneys, and judges as they relate to baseless pleas. Then, this Note surveys the limited body of commentary on this practice, which consists of criminal justice policy and legal ethics arguments made by courts and commentators in support of, and in opposition to, these pleas. Ultimately, this Note concludes that regardless of the justifications offered in support of this practice, including the interest in efficiency, prosecutors and judges cannot participate in baseless pleas because the practice defies their ethical responsibilities to uphold the integrity of the court and legal profession and to ensure the fairness of the criminal process. This Note ends with a proposal to clarify the ethical prohibition against baseless pleas by amending legal ethics rules to clarify prosecutors' probable cause obligation and by installing prosecutorial and judicial policies that bar prosecutors and judges from participating in baseless pleas.

* J.D. Candidate, 2011, Fordham University School of Law; M.A. Candidate, 2011, Fordham University Graduate School of Arts and Sciences; M.S.W., 2008, Columbia University School of Social Work; B.S., 2007, George Mason University. I would like to thank Professor Bruce Green for his wisdom and encouragement and my husband Paul for his constant support.

TABLE OF CONTENTS

INTRODUCTION 2963
I. BASELESS PLEAS: THE PRACTICE AND RELEVANT ETHICAL DUTIES 2966
A. *The Practice of "Baseless Pleas"* 2966
1. An Explanation of Baseless Pleas 2966
a. *The Definition and Context of Baseless Pleas* 2966
b. *Baseless Pleas Compared with Factually Based Pleas* 2969
2. Why Baseless Pleas Are Used 2971
B. *Ethical Duties Relevant to Baseless Pleas* 2974
1. The Prosecutor's Ethical Duties as Minister of Justice 2975
a. *Bring Charges Supported by Probable Cause* 2975
b. *Uphold Candor Toward the Court and Third Parties* 2977
c. *Prevent and Rectify Wrongful Convictions* 2979
2. The Defense Counsel's Duty as the Zealous Advocate 2981
3. The Judge's Ethical Duties as Administrator of Justice 2983
a. *Uphold the Integrity of the Judiciary* 2983
b. *Regulate the Bar* 2984
c. *Ensure Fair Criminal Proceedings* 2985
II. DEFENSES AND CRITIQUES: THE LEGAL ETHICS AND CRIMINAL JUSTICE POLICY ARGUMENTS MADE FOR AND AGAINST BASELESS PLEAS 2986
A. *Defenders of Baseless Pleas Cite Criminal Justice Policy Justifications* 2987
1. Defendants May Plead to Any Less Serious Offense As Long As the Facts Support Guilt for Some More Serious Offense 2987
2. Judicial Efficiency Supersedes the Need for a Factual Basis 2988
3. Mutually Beneficial Plea Agreements Justify Baseless Pleas 2990
B. *Critics of Baseless Pleas Cite Criminal Justice Policy and Legal Ethics Concerns* 2991
1. Criminal Justice Policy Concerns 2991
a. *Baseless Pleas Weaken Deterrence* 2991
b. *Baseless Pleas Threaten Public Safety* 2992
2. Ethics Concerns 2993
a. *Baseless Pleas Violate Prosecutors' Obligation To Bring Charges Supported by Probable Cause* 2993
b. *Baseless Pleas Threaten the Integrity of Court* 2994

III. JUDGES AND PROSECUTORS CANNOT ETHICALLY PARTICIPATE IN BASELESS PLEAS 2995
A. *Prosecutors Violate the Probable Cause Rule by Participating in Baseless Pleas* 2996
B. *Baseless Pleas Undermine the Integrity of the Court, Legal Profession, and Criminal Proceeding* 2997
1. Baseless Pleas Undermine the Integrity of the Court and Legal Profession 2997
a. *Prosecutors' Participation in Baseless Pleas Undermines the Integrity of the Court and the Legal Profession* 2998
b. *Judges' Participation in Baseless Pleas Undermines the Integrity of the Court and the Legal Profession* . 3000
2. Baseless Pleas Undermine the Fairness of Criminal Proceedings 3001
a. *Baseless Pleas Permit Prosecutors To Secure Wrongful Convictions* 3002
b. *Baseless Pleas Violate Judges' Duty To Ensure Fair Proceedings* 3002
C. *Proposals To End the Unethical Use of Baseless Pleas* 3003
CONCLUSION 3005

INTRODUCTION

If you looked at Jewell C. Walker's rap sheet, you would think he was a frugal music lover who pirated a few too many songs.[1] He pled guilty to making 1000 illegal recordings of music without consent—and without ever recording a song.[2] "In a legally sanctioned game of courtroom make-believe, Walker avoided a potentially hefty jail term for robbery by instead accepting responsibility for a separate crime that never occurred."[3] Walker was arrested for violently robbing a man on the street, but when the victim was unwilling to cooperate for trial, the prosecutors had to bargain if they were going to get a conviction.[4] Walker was unwilling to accept a plea with jail time, and his previous rape conviction would demand incarceration if he pled to a theft charge, so the prosecutors got creative.[5] With the judge's approval, in order to get Walker's guilty plea, the prosecutors allowed Walker to plead to illegally recording music, a crime everyone in the courtroom knew he did not commit.[6]

1. *See* Thomas Clouse, *Man Admits Bogus Crime: Creative Plea Settles Robbery Case*, SPOKESMAN-REV. (Spokane, Wash.), May 1, 2006, at 1A.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

Although Walker's case is among the more bizarre, state courts across the country enter similar plea bargains everyday—plea bargains to crimes that never happened.[7] In certain jurisdictions, courts, especially those dealing with misdemeanors, allow defendants to enter guilty pleas for charges that are not supported by the facts because they want to avoid trials and get convictions.[8] Everyone connected to these cases knows that there is no factual basis for the pleas entered, but no one argues because everyone is benefitting: the judge and prosecutor save time and resources,[9] the defense attorney strikes a good deal for her client,[10] the defendant enjoys a lenient sentence,[11] and everyone avoids litigation.[12] "In the words of one municipal court clerk, 'Everybody likes a bargain.'"[13]

In some courts, allowing defendants to plead guilty to charges that are unsupported by fact is a common practice.[14] Supporters of the practice have accepted it as a "time-honored"[15] custom or a "necessary evil"[16] that allows defendants to benefit from lenient punishment while courts benefit from the efficient disposal of cases.[17] However, some authorities have begun to recognize problems with this practice, arguing that, although factually baseless pleas may benefit those involved in an individual case, "self-interest does not necessarily coincide with justice."[18]

---

7. *See infra* notes 35–39.

8. *See infra* notes 9–12 and accompanying text.

9. *See* James Ahearn, *No Compromise When It Comes to Traffic Violations*, RECORD (Bergen County, N.J.), May 24, 2000, at L9 (stating that by entering baseless plea bargains, "[p]rosecutors don't have to spend the better part of an hour trying a case. . . . [and m]unicipal judges can turn their attention to more important matters").

10. *See, e.g.*, Matt Campbell, *KC Reverses Plea-Bargain Policy: The City Council Votes To Reinstate a System That Allows Motorists To Get Speeding Tickets Reduced*, KAN. CITY STAR, Sept. 8, 2006, at A1 (describing how defense attorneys in Kansas City had pressed the city council to allow plea bargains to defective equipment instead of the moving violations for which defendants were initially charged).

11. *See* Tom Hester, *Municipal Courts Told: End Deals on Tickets, Critics of State Mandate Fear Back Log of Traffic Disputes*, STAR-LEDGER (Newark, N.J.), Apr. 30, 2000, at 1 ("The [defendant] motorists are happy because they've reduced their fines or limited damage to their driving records.").

12. *See id.* (describing the benefit to all the parties involved in a baseless plea of avoiding litigation).

13. Jennifer V. Hughes & Dan Kraut, *A Bargain That Can't Be Driven Anymore: Judges Apply Brakes to No-Point Tickets*, RECORD (Bergen County, N.J.), Apr. 30, 2000, at A1 (quoting a municipal court clerk in New Jersey).

14. Statute 215 "goes back years as a way to keep court cases moving" by allowing defendants to plead guilty to failing to obey directional signals despite having committed other more serious offenses. *Id.*; *see also* N.J. STAT. ANN. § 39:4-215 (West 2009).

15. Hester, *supra* note 11.

16. Clouse, *supra* note 1.

17. *See supra* notes 9–11 and accompanying text.

18. Ahearn, *supra* note 9 (arguing that "if you are arrested for speeding or careless driving you ought to be prosecuted for that offense" because "[i]f the Legislature believes present penalties are excessive, it can reduce them").

To date, although arguments have been made in support of, and in opposition to, the use of baseless pleas,[19] considerations of judicial and prosecutorial ethics have not been thoroughly addressed in assessing the legitimacy of this questionable practice. This Note seeks to remedy that omission by analyzing baseless pleas through the ethical lens to provide insight as to why this practice has gone largely unaddressed, what implications this practice has on legal ethics and the integrity of the criminal process, and how court officers should respond to baseless pleas to protect the integrity of the criminal justice system. Accordingly, Part I.A.1 of this Note introduces the practice of baseless plea bargaining by providing a definition of the practice and comparing baseless pleas to pleas that are supported by fact. Part I.A.2 then describes the various benefits of baseless plea bargains, benefits that serve to illustrate why the practice is used in some jurisdictions without debate. Part I.B describes the ethical duties of the prosecutor, defense attorney, and judge relevant to an analysis of the ethicality of baseless pleas. First, Part I.B.1 describes the responsibilities of the prosecutor, as minister of justice, to bring charges supported by probable cause, to uphold candor toward the tribunal and third parties, and to avoid wrongful convictions. Next, Part I.B.2 explains the duty of defense counsel, as the zealous advocate, to obtain the best result for her client while maintaining her duty of candor. Finally, Part I.B.3 discusses the obligations of the judge, as overseer of the administration of justice, to uphold the integrity of the judiciary, to regulate the bar, and to ensure the fairness of criminal proceedings.

Part II of this Note describes the opposing views on baseless pleas, explaining both the ethical and criminal justice policy justifications put forth in support of, and in opposition to, the practice. Part II.A examines claims by supporters of baseless pleas who argue that the practice is justified because the defendant pleading to the factually baseless charge is guilty of a crime, even if unrelated; the interest in judicial efficiency outweighs the need for a factual basis; and the baseless plea provides a mutually beneficial resolution that supersedes the factual basis requirement. Next, Part II.B describes criminal justice policy and legal ethics arguments made by critics of baseless pleas who find that this practice weakens deterrence, threatens public safety, violates prosecutors' probable cause obligation, and threatens the integrity of the courts.

Finally, Part III of this Note assesses the debate over baseless pleas in light of court officers' ethical obligations, particularly those of prosecutors and judges. It argues that, regardless of the criminal justice policy arguments used to justify the practice, prosecutors and judges cannot ethically participate in baseless pleas because the practice defies their responsibility to uphold the integrity of the court and legal profession and to ensure the fairness of the criminal process. Part III concludes with a

19. This Note uses the term "baseless plea" to refer to the discussed practice. A more thorough definition is provided in Part I.A.1.a.

proposal to clarify the ethical prohibition against baseless pleas by amending legal ethics rules to clarify the probable cause requirement for prosecutors and by installing prosecutorial and judicial policies that bar prosecutors and judges from participating in baseless plea bargains.

I. BASELESS PLEAS: THE PRACTICE AND RELEVANT ETHICAL DUTIES

A. *The Practice of "Baseless Pleas"*

Part I.A begins by explaining the practice of baseless pleas, first defining baseless pleas and describing the context in which they occur, and then comparing baseless pleas to guilty pleas that are supported by a factual basis. This section continues by describing the benefits of baseless pleas to the various participants in criminal cases, which serve to explain the popularity and largely undisputed use of this practice.

1. An Explanation of Baseless Pleas

a. *The Definition and Context of Baseless Pleas*

A "baseless plea" is a guilty plea,[20] a factual admission of the elements of a crime,[21] or a plea of *nolo contendere*,[22] an "admission of guilt for the purposes of the case,"[23] entered by a defendant for an offense that the defendant did not commit, and that all the parties in the case know the defendant did not commit.[24] Instead of pleading to a more serious crime that the prosecutor thinks the defendant actually did commit,[25] the

---

20. *See* People v. Keizer, 790 N.E.2d 1149, 1151–52 (N.Y. 2003) (holding that a defendant could plead guilty to a baseless offense).

21. *See* McCarthy v. United States, 394 U.S. 459, 466 (1969) (citing DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 23 (1966)).

22. *See* People v. West, 477 P.2d 409, 419–20 (Cal. 1970) (holding that a defendant could plead *nolo contendere* to a baseless offense).

23. Hudson v. United States, 272 U.S. 451, 455 (1926); Fortson v. Hopper, 247 S.E.2d 875, 876–77 (Ga. 1978) (stating that a plea of *nolo contendere* is "an assertion by the defendant that he does not desire to contest the truth of the charges against him"). Note that "by pleading *nolo* . . . the defendant has made no statement at all of what the facts actually are," so despite making an admission of guilt for purposes of the case, the defendant is not making a factual admission as in a guilty plea. Patrick W. Healey, Note, *The Nature and Consequences of the Plea of* Nolo Contendere, 33 NEB. L. REV. 428, 431, 433–34 (1954).

24. *See West*, 477 P.2d at 419–20 (affirming the conviction of a defendant who pled guilty to selling narcotics even though the trial court knew there was no factual basis to support the charge); Iowa Supreme Court Att'y Disciplinary Bd. v. Howe, 706 N.W.2d 360, 367 (Iowa 2005) (describing how a city prosecutor filed 174 baseless charges with the approval of police officers, defendants, and the magistrate judge, all of whom knew there was no factual basis for the charges).

25. *See, e.g.*, Clouse, *supra* note 1; *see also supra* text accompanying notes 1–6 (describing how prosecutors allowed a defendant who they had reason to believe committed robbery to plead to illegally downloading music).

defendant is permitted, pursuant to a plea bargain,[26] to plead guilty to an offense that is unrelated to the facts of the case.[27] Note that baseless pleas are distinguished from "fictional pleas," a situation in which a defendant is allowed to plead guilty to a crime that does not exist by criminal statute.[28] Additionally, baseless pleas do not arise in the context of *Alford* pleas—guilty pleas coupled with claims of innocence—because judges are explicitly prohibited from accepting *Alford* pleas "until they have established that factual bases . . . exist for the pleas that resolve the conflict between the waiver of trial and the claim of innocence."[29]

In a typical baseless plea, the defendant is brought into the justice system with probable cause for the offense initially alleged.[30] In order to obtain an expedient conviction and avoid expending effort to resolve issues related to insufficient or inadmissible evidence, uncooperative witnesses, or defendants who are unwilling to plead to the original charges,[31] the prosecutor offers the defendant the option to plead guilty to a less serious, unrelated offense that is unsupported by the facts of the defendant's case. Note that a less serious offense charged in a baseless plea where "the lesser crime does not logically compose a part of the greater"[32] is distinguishable from a lesser-*included* offense, which is an offense "'necessarily included in the offense charged'"[33] and supported by a factual basis.[34] Despite

---

26. A plea bargain is an exchange of concessions from the state for the defendant's guilty plea, which includes a waiver of the right to trial. *See* JAMES E. BOND, PLEA BARGAINING AND GUILTY PLEAS §§ 1.1, 1.7 (2d ed. 1982).

27. *See supra* note 24 and accompanying text.

28. *See* People v. Stephenson, 30 P.3d 715, 716–17 (Colo. App. 2000) (holding that a defendant could not be convicted of "attempted felony murder" pursuant to a plea agreement because "attempted felony murder" was not recognized as a statutory offense in Colorado and noting that "the power to define crimes and prescribe punishments is vested exclusively in the General Assembly and may not be usurped by courts"). For further background on the separation of powers as it relates to criminal law and, correspondingly, baseless pleas, see U.S. CONST. arts. I–III; Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978) (describing the United States' tripartite system of government and the constitutionally delineated functions of each branch); Robert J. Punshaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996) (explaining the separation of powers doctrine within the context of judicial decision making); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992) (describing the relationship between the three branches).

29. Curtis J. Shipley, *The* Alford *Plea: A Necessary but Unpredictable Tool for the Criminal Defendant*, 72 IOWA L. REV. 1063, 1066 (1987) (explaining that "[c]ourts must establish factual bases for such pleas from evidence outside of the statements of the accused"). *See generally* North Carolina v. Alford, 400 U.S. 25 (1970).

30. *See* Ahearn, *supra* note 9 (explaining how defendants are typically cited for conduct constituting speeding or other moving violations); Clouse, *supra* note 1 (describing how a defendant was originally arrested for robbery for attacking and taking $306 from the victim).

31. *See, e.g.*, Ahearn, *supra* note 9 (describing how baseless pleas benefit parties by avoiding litigation); Clouse, *supra* note 1 (describing how a baseless plea was used because the witness refused to testify, the evidence was insufficient without the witness' testimony, and the defendant was unwilling to plead to an offense that would result in jail time).

32. People v. West, 477 P.2d 409, 420 (Cal. 1970).

33. Berra v. United States, 351 U.S. 131, 134 n.4 (1956) (quoting FED. R. CRIM. P. 31(c)) (holding that defendants may be found guilty of lesser-included offenses).

knowing that the offense being pleaded to has no factual basis, the judge, prosecutor, and defense counsel allow the defendant's guilty plea.[35] A Kansas City reporter described the process of how a defendant pleads guilty to an offense with no factual basis, such as defective equipment,[36] which is common in Missouri:

> Let's say you're driving 60 mph in a 45 mph zone. Police ticket you for speeding. If you just pay the ticket, it will cost you about $100. You will also get 2 points on your driving record. And if you're a really bad driver, that might be enough points to lose your license.
>
> But if you hire an attorney, he can ask the city prosecutor to amend your ticket to a defective equipment plea, similar to if you had a broken taillight. If the prosecutor agrees, you will pay about $160 for the defective-equipment citation and $100 to $200 for the attorney. . . . But you won't get any points on your driving record, you won't lose your license and you will avoid a potential increase in your insurance rates.[37]

The types of offenses charged in baseless pleas vary from defective cowl lamps[38] to disorderly conduct,[39] and a given court or jurisdiction that allows this practice often has a certain offense that is routinely used as a baseless plea.[40] Some jurisdictions, however, allow baseless pleas to any offense,[41] as long as the defendant had sufficient notice of the charge.[42]

---

34. "When it is impossible to commit a particular crime without concomitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is, with respect to the former, a 'lesser included offense.'" N.Y. CRIM. PROC. LAW § 1.20 (McKinney 2003) (providing as an example that "[i]n any case in which it is legally possible to attempt to commit a crime, an attempt to commit such crime constitutes a lesser included offense").

35. *See, e.g.*, *West*, 477 P.2d at 411, 419 (holding that "[t]he court may accept a bargained plea of guilty or nolo contendere to any lesser offense reasonably related to the offense charged in the accusatory pleading" even if there is no factual basis for the actual offense pled); People v. Keizer, 790 N.E.2d 1149, 1152 n.2 (N.Y. 2003) (affirming a defendant's conviction made pursuant to a baseless plea and stating that "a defendant may plead guilty to a crime for which there is no factual basis and even plead guilty to a hypothetical crime" (citing People v. Francis, 341 N.E.2d 540 (N.Y. 1975))).

36. "[A] defective equipment plea [is] similar to if you had a broken taillight." Michael Mansur, *A Defective System Gives Speeders a Pass*, KAN. CITY STAR, Jan. 29, 2006, at A1.

37. *Id.*

38. *See* Iowa Supreme Court Att'y Disciplinary Bd. v. Howe, 706 N.W.2d 360, 367 (Iowa 2005) (describing how city prosecutor, Bradley Howe, effectively moved the court to amend 174 citations that originally charged violations of city traffic laws to allege violations of the cowl-lamp statute).

39. *See Keizer*, 790 N.E.2d at 1150–51 (describing a baseless plea to disorderly conduct when the defendant was originally accused of petit larceny and criminal possession of stolen property).

40. *See, e.g.*, Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 105 n.119 (1995) (describing how prosecutors' offices typically have "standard deals" that "may be contained in written guidelines formulated by those in charge of the prosecutor's office or based on unwritten practices developed over time and passed on to newer members of the office"); Hughes & Kraut, *supra* note 13 (reporting that the "sweetheart deal" in New Jersey traffic courts allowed defendants accused of various moving violations to plead to an "unrelated statute, known as '215'"); Mansur, *supra* note 36 (describing how "the Municipal Court repeatedly

b. *Baseless Pleas Compared with Factually Based Pleas*

Although baseless pleas have not received significant attention, the resolution of criminal cases by voluntary guilty plea is well-known, and, in fact, the majority of cases are resolved by plea bargain.[43] Guilty pleas, factual admissions "of all the elements of a formal criminal charge,"[44] are typically made pursuant to plea bargains, an exchange of concessions from the state for the defendant's guilty plea.[45] Plea bargaining "dominates the day-to-day operation of the American criminal justice system."[46] The practice is widely used[47] and constitutionally legitimate[48] despite its imperfections.[49] The Supreme Court, while recognizing plea bargains as "inherent in the criminal law and its administration,"[50] has held that because guilty pleas are admissions of criminal charges and waivers of

---

allows thousands of speeders and red-light runners to reduce dangerous moving violations to defective-equipment pleas").

41. *See* People v. West, 477 P.2d 409, 410–11, 419–20 (Cal. 1970) (allowing defendant Dale Irven West, who was originally charged with possession of marijuana under section 11530 of the Health and Safety Code, to plead *nolo contendere* to a violation of "opening or maintaining a place for the selling, giving away, or using of a narcotic" under section 11557 because "[t]he court may accept a bargained plea of guilty or nolo contendere to any lesser offense reasonably related to the offense charged in the accusatory pleading" (citing CAL. HEALTH & SAFETY CODE §§ 11530, 11557)).

42. *Id.* at 419–20 (holding that a defendant can plead to a baseless charge as long as the "accusatory pleading adequately notifies the defendant that the People will seek to prove the elements of a lesser offense" (citing People v. Marshall, 309 P.2d 456, 462–63 (Cal. 1957))).

43. *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 1 (1979) [hereinafter Alschuler, *Plea Bargaining*] (describing how the majority of cases are resolved through guilty pleas and these are most likely obtained through plea bargaining).

44. McCarthy v. United States, 394 U.S. 459, 466 (1969) (citing NEWMAN, *supra* note 21, at 23).

45. *See West*, 477 P.2d at 413 (stating that the "great majority" of criminal cases are disposed of through plea bargaining).

46. Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 409 (2008).

47. *See* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 1012–13 (2000) (noting that "guilty-plea rates above ninety or even ninety-five percent are common"); O'Hear, *supra* note 46, at 409 (reporting that roughly ninety-five percent of criminal cases are resolved by plea bargains); *accord* Marshall J. Hartman & Marianna Koval, *The Immorality of Plea Bargaining*, *in* LEGALITY, MORALITY, AND ETHICS IN CRIMINAL JUSTICE 70, 70, 80 (Nicholas N. Kittrie & Jackwell Susman eds., 1979) ("[P]lea bargaining . . . is probably the key mechanism by which the criminal justice system in this country operates today.").

48. *See* North Carolina v. Alford, 400 U.S. 25, 27–29 & 28 n.2 (1970) (emphasizing the constitutionality of plea bargains); Brady v. United States, 397 U.S. 742, 751 (1970) (upholding plea bargaining).

49. *See, e.g.*, Alschuler, *Plea Bargaining*, *supra* note 43, at 1–3 (stating that, although the historical justifications for plea bargaining are inaccurate, the practice has become an institution within the criminal justice system).

50. *Brady*, 397 U.S. at 751; *see also* Santobello v. New York, 404 U.S. 257, 260 (1971) (stating that plea bargaining is "an essential component of the administration of justice," and "[p]roperly administered, it is to be encouraged" in the interest of judicial efficiency).

certain constitutional rights, guilty pleas made via plea bargains must be entered voluntarily and knowingly.[51]

The first constitutional requirement for a guilty plea, and thus for a baseless guilty plea, is voluntariness, which is "determined only by considering all of the relevant circumstances surrounding it,"[52] and is presumed if the plea is negotiated without "actual or threatened physical harm, mental coercion overbearing the defendant's will, or the defendant's sheer inability to weigh her options rationally."[53] In light of the circumstances surrounding the typical baseless plea, in which the defendant benefits from a charge to a lesser offense and therefore a lesser penalty and in which she pleads without evidence of coercion or harm by the prosecutor, baseless pleas are generally assumed to be entered voluntarily.[54]

The second constitutional requirement that pleas be entered knowingly is fulfilled where the defendant is advised by competent counsel, is aware of the nature of the charge against her, and does not exhibit incompetence.[55] Defendants who enter baseless pleas for the most part have the advice of counsel and fulfill the requirements described, so baseless pleas are likewise assumed to be entered knowingly.[56]

Beyond the due process requirements that ensure the admission of guilt and waiver of constitutional rights are knowing and voluntary, our highest Court has explained that "because a guilty plea is an admission of all the elements of a formal criminal charge . . . . [a guilty plea also] requires the judge to satisfy himself that there is a factual basis for the plea."[57] In making this inquiry, judges must assure that "there is sufficient evidence

51. Boykin v. Alabama, 395 U.S. 238, 243 n.5 (1969) ("'A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. . . . [So] if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.'" (quoting McCarthy v. United States, 394 U.S. 459, 466 (1969))); *accord Brady*, 397 U.S. at 748.

52. *Brady*, 397 U.S. at 749.

53. Dawn Reddy, *Guilty Pleas and Practice*, 30 AM. CRIM. L. REV. 1117, 1119–21 (1993) (describing the requirements of a voluntary and knowing plea).

54. *See, e.g.*, Iowa Supreme Court Att'y Disciplinary Bd. v. Howe, 706 N.W.2d 360, 367 (Iowa 2005) (explaining that baseless cowl-lamp pleas were typically sought by defendants to avoid points on their licenses); Clouse, *supra* note 1 (reporting that prosecutors offered to negotiate a baseless plea because the defendant was unwilling to plead to the factually supported theft charge); Mansur, *supra* note 36 (describing how defendants seek baseless pleas).

55. *See Brady*, 397 U.S. at 756 (describing the requirements of a knowing plea). Federal courts disagree on whether a defendant can voluntarily plead guilty without consulting an attorney. *Compare* United States v. Loughery, 908 F.2d 1014, 1018 (D.C. Cir. 1990) (holding that the decision to plead can be made only after consulting with an attorney providing effective counsel), *with* United States v. Pregler, 925 F.2d 268, 269 (8th Cir. 1991) (stating that a lack of counsel when defendant entered a plea agreement was not sufficient grounds for setting aside a knowing and voluntary plea).

56. *See, e.g.*, Campbell, *supra* note 10 (describing how defense attorneys are involved in arranging baseless plea bargains); Mansur, *supra* note 36 (explaining that a defendant can get a baseless plea if he hires an attorney).

57. McCarthy v. United States, 394 U.S. 459, 466–67 (1969).

upon which the defendant could be convicted if he or she elected to stand trial."[58] This factual basis requirement is reflected by Rule 11 of the Federal Rules of Criminal Procedure, which states, "Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea."[59] Evidence of this factual basis is often provided solely by the defendant's own admission of guilt in court.[60]

However, "[t]he procedure prescribed by Rule 11 is not the constitutional minimum required for a knowing and voluntary plea; it merely constitutes the procedure for federal courts. Thus, Rule 11 is not binding on the states,"[61] and a guilty plea is constitutionally valid in state courts as long as the plea is deemed to have been entered voluntarily and knowingly.[62] Although only bound by the constitutional standard, numerous state courts have adopted procedures similar to those of Rule 11,[63] including the requirement of a factual basis.[64]

2. Why Baseless Pleas Are Used

"Properly administered, [plea bargains] can benefit all concerned,"[65] and, in the same way, properly administered, baseless pleas benefit all concerned. The following description of the numerous benefits of baseless pleas to the various participants in criminal cases explains the appeal and largely undisputed use of this practice and also demonstrates why baseless pleas are sought and encouraged.

---

58. ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-1.6 cmt., at 65 (3d ed. 1999) (citing Godwin v. United States, 687 F.2d 585 (2d Cir. 1982)).

59. FED. R. CRIM. P. 11(b)(3).

60. *See* Iowa Supreme Court Att'y Disciplinary Bd. v. Howe, 706 N.W.2d 360, 371 (Iowa 2005) ("Oftentimes in a plea bargaining situation, probable cause will be supplied by the defendant's admission."); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 968–76 (1989) (describing how the defendant's confession takes the place of trial evidence in a plea bargain).

61. Gaddy v. Linahan, 780 F.2d 935, 943 n.8 (11th Cir. 1986) (citing Frank v. Blackburn, 646 F.2d 873, 882 (5th Cir. 1980)); *see also* Smith v. Scully, 614 F. Supp. 1265, 1269 (S.D.N.Y. 1984) ("[The] requirement that federal judges satisfy themselves that there is a factual basis for the plea is [not] a statutory restatement of a constitutional requirement.").

62. *See Gaddy*, 780 F.2d at 943 n.8 ("[A] 'wide range of constitutional plea procedures [are] available to the state courts.'" (quoting *Frank*, 646 F.2d at 882)); Ames v. N.Y. State Div. of Parole, 772 F.2d 13, 15 (2d Cir. 1985) ("The State court's inquiry did not have to be patterned after Fed.R.Crim.P. 11.").

63. *See* BOND, *supra* note 26, § 3.6(a) (explaining that states are free to use less stringent procedures than Rule 11 to determine the voluntariness and intelligence of pleas but that many have enacted procedural rules similar to Rule 11).

64. *See* Purvis v. Connell, 182 S.E.2d 892, 894 (Ga. 1971) ("It is clear from the majority Boykin opinion and also from its dissenting opinion that a state trial judge, in accepting a plea of guilty, now has the same duty in this respect that a federal trial judge has under Rule 11 of the Federal Rules of Criminal Procedure."); ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-1.6(a), at 64, 66–68 (3d ed. 1999) (advising all courts to make an inquiry into the factual basis for guilty and *nolo* pleas). *But see* Stepp v. State, 686 S.W.2d 279, 280 (Tex. App. 1985) ("Texas courts are not bound to follow Federal Rule 11." (citing Joseph v. State, 614 S.W.2d 164, 165 (Tex. Crim. App. 1981))).

65. Blackledge v. Allison, 431 U.S. 63, 71 (1977).

There are several ways in which baseless pleas benefit prosecutors. First, they give prosecutors incredible flexibility and discretion in resolving their cases.[66] Using the bargaining system, prosecutors are able to "maximize . . . the number of convictions" and also have discretion to do the "'right thing' for the defendant in view of the defendant's social circumstances or in view of the peculiar circumstances of his crime."[67] Second, prosecutors often operate with limited resources, and plea bargaining provides a prompt and efficient method of managing an overwhelming caseload within those limitations.[68] By plea bargaining, "prosecutors conserve vital and scarce resources"[69] because they can "dispose of each case in the fastest, most efficient manner in the interest of getting [their] and the court's work done."[70] Especially where prosecutors have overwhelming numbers of similarly situated, seemingly minor cases, baseless pleas provide a quick and efficient resolution,[71] allowing prosecutors to focus their litigation efforts on more critical cases.[72] Third, in cases with procedural problems, like suppressed evidence or uncooperative witnesses, baseless pleas allow prosecutors to obtain a conviction where they are unlikely to do so successfully at trial.[73]

"[D]efense attorneys have powerful incentives to avoid trial, even when a trial would be in the client's interest" and therefore benefit similarly from baseless pleas.[74] A large portion of defendants are indigent and "nearly all of [indigent defense attorneys] work for a flat fee paid in advance," so it is in defense attorneys' financial interest to avoid the time and effort of trial.[75] Defense attorneys, who often practice with scarce resources, benefit from the quick disposition of cases,[76] and with a baseless plea bargain, they "can

---

66. *See* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52–53 (1968) [hereinafter Alschuler, *Prosecutor's Role*].

67. *Id.*

68. *See Blackledge*, 431 U.S. at 71 (describing how prosecutors must conserve resources); Alschuler, *Prosecutor's Role*, *supra* note 66, at 56 (recounting prosecutors' overburdened caseload).

69. *Blackledge*, 431 U.S. at 71.

70. Alschuler, *Prosecutor's Role*, *supra* note 66, at 52.

71. *See* Mansur, *supra* note 36 (describing how municipal court prosecutors quickly dispose of thousands of minor traffic violations by using baseless defective equipment pleas).

72. *See* Ahearn, *supra* note 9 (describing and criticizing how prosecutors can focus their attention to more pressing matters by entering baseless pleas in minor cases).

73. *See* Alschuler, *Prosecutor's Role*, *supra* note 66, at 60 (stating that in making convictions, prosecutors insist that "'[h]alf a loaf is better than none'"); Clouse, *supra* note 1 (describing how a baseless plea was used when the victim was unwilling to cooperate).

74. Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1988 (1992).

75. *Id.*

76. *See* Fisher, *supra* note 47, at 1063 (stating that public defenders' heavy caseloads create an incentive to plea bargain as a way to efficiently dispose of cases); David J. Richards, Note, *The Public Defender Defendant: A Model Statutory Approach to Public Defender Malpractice Liability*, 29 VAL. U. L. REV. 511, 538 (1994) (reporting that as attorney caseloads increase, so do the use of guilty pleas). *See generally* Albert W.

collect a fee for a routine procedure."[77] Additionally, many jurisdictions impose caps on compensation for the representation of indigent clients, and if these capped amounts are inadequate for the time and expense of bringing a case to trial,[78] then a baseless plea provides a sufficient compromise for an attorney to adequately represent her client while supporting herself.[79] In addition, a defense attorney's goal is to obtain the best result for her client,[80] and baseless pleas significantly benefit the defendant.[81]

The benefit for defendants in entering baseless pleas is straightforward: defendants receive more lenient sentences and less serious charges in exchange for pleading guilty and avoiding trial.[82] Despite losing the opportunity for acquittal and waiving their right to a jury trial, defendants escape potentially harsher penalties,[83] a record with more serious charges,[84] and "the anxieties and uncertainties of a trial."[85]

The judiciary also benefits from baseless pleas because the speedy disposition of cases conserves already limited judicial resources.[86] Baseless pleas alleviate congested caseloads and reduce expenses by avoiding jury trials.[87] As Chief Justice Warren E. Burger observed,

> The consequence of what might seem on its face a small percentage change in the rate of guilty pleas can be tremendous. A reduction from 90 per cent to 80 per cent in guilty pleas requires the assignment of twice the judicial manpower and facilities . . . . A reduction to 70 per cent trebles this demand.[88]

By entering baseless pleas, judges "'are still getting some accountability no matter what it's called,'"[89] and avoiding the burden of time and resource-consuming trials.[90]

Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1206–55 (1975) [hereinafter Alschuler, *Defense Attorney's Role*].

77. Ahearn, *supra* note 9.

78. *See* Mackenzie v. Hillsborough County, 288 So. 2d 200, 200–02 (Fla. 1973) (upholding $750 fee for over 500 hours reasonably spent defending a capital case); Huskey v. State, 688 S.W.2d 417, 419 (Tenn. 1985) (upholding a $500 fee for 181.3 hours reasonably spent in noncapital felony-murder trial).

79. *See* Michael Mansur, *Ticket Deals Go Beyond Speeding*, KAN. CITY STAR, Mar. 12, 2006, at A1 (reporting defense attorneys' opposition to a ban on baseless pleas because it would cause them to lose fees).

80. *See infra* notes 161–64 and accompanying text.

81. *See infra* notes 83–85 and accompanying text.

82. *See supra* notes 11, 26 and accompanying text.

83. *See, e.g.*, Clouse, *supra* note 1 (explaining that a defendant avoided jail time by entering a baseless plea).

84. *See, e.g.*, Iowa Supreme Court Att'y Disciplinary Bd. v. Howe, 706 N.W.2d 360, 367 n.2 (Iowa 2005) (describing how a defendant originally charged with theft was allowed to plead to a violation of the cowl-lamp statute).

85. Blackledge v. Allison, 431 U.S. 63, 71 (1977).

86. *See id.*

87. *See* Warren Burger, *The State of the Judiciary—1970*, 56 A.B.A. J. 929, 931 (1970).

88. *Id.*

89. Clouse, *supra* note 1 (quoting the presiding judge who entered the baseless plea for Jewell C. Walker).

90. *See* Hester, *supra* note 11.

Perhaps less apparently, baseless pleas "may be mercy not only for the accused but also for the accuser."[91] When the defendant's criminal act has a direct victim, the victim may benefit from a baseless plea, which allows the victim to gain an immediate sense of closure by knowing the defendant will not go unpunished and to avoid the rigors of testifying at trial.[92] Additionally, baseless pleas foreclose the possibility of an acquittal, which would leave the victim without any form of retribution.[93]

The public also derives benefits from having cases resolved by baseless pleas rather than litigation.[94] The public forfeits the cost of the criminal justice system—the judges, the prosecutors, and the public defense attorneys—so the quicker and more efficient the resolution of cases, the more the public saves.[95] In fact, it is often argued that the "[plea bargaining] system reflects the likely results of the trial system, but at a lower cost."[96]

B. *Ethical Duties Relevant to Baseless Pleas*

Part I.A illuminated the practice of baseless pleas by defining the practice, discussing the context in which it occurs, comparing the practice to factually based guilty pleas, and describing the benefits derived from baseless pleas that explain their prevalent and accepted use. This section discusses the ethical duties of prosecutors, defense attorneys, and judges relevant to baseless pleas. Beyond the constitutional requirements for a valid plea as discussed in Part I.A, there are "difference[s] between what is *ethically* required and what is *constitutionally* required of an attorney."[97] First, this section discusses the responsibilities of the prosecutor, as minister of justice, to bring charges supported by probable cause, to act with candor

91. Carolyn E. Demarest, Letter to the Editor, *Plea Bargaining Can Often Protect the Victim*, N.Y. TIMES, Apr. 15, 1994, at A30.

92. *See* Clouse, *supra* note 1 (reporting how prosecutors convicted a defendant without the testimony of the victim, who refused to testify); Demarest, *supra* note 91 ("Often a crime victim is very young or elderly, or otherwise infirm and does not want to be subjected to the rigors of trial, to have to relive in the presence of the accused the detailed horrors of victimization.").

93. *See* Demarest, *supra* note 91 (stating that "[i]n [weak] cases a plea will insure a conviction where a trial may result in acquittal").

94. *Id.* ("[T]he public is ill served by perpetuation of the myth that plea bargaining is a copout by the criminal justice system. . . . Apart from the simple reality of too many cases for the limited resources available, there are substantial benefits to be derived from plea bargaining that better serve the community than taking every case to trial.").

95. *See supra* notes 87–88 and accompanying text.

96. Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1136–37 (1998) (describing the "Just Result" theories that serve as justifications for plea bargaining). For discussion of arguments against plea bargaining, see Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37 (arguing that most plea bargains are unconscionable because they are a product of unequal bargaining power); David Lynch, *The Impropriety of Plea Agreements: A Tale of Two Counties*, 19 LAW & SOC. INQUIRY 115 (1994) (arguing for reduced reliance on plea bargaining).

97. JOHN M. BURKOFF, CRIMINAL DEFENSE ETHICS: LAW AND LIABILITY § 5:5, at 5-26 to -27 (rev. ed. 2000) (citing Jones v. Barnes, 463 U.S. 745 (1983)).

toward the tribunal and third parties, and to avoid wrongful convictions. Next, this section explains the ethical duty of defense counsel, as zealous advocate, to obtain the best result for her client, the defendant, while maintaining candor to the court and third parties. Lastly, this section discusses the ethical obligations of the judge, as the overseer of the administration of justice, to uphold the integrity of the court, properly regulate the bar, and assure the fairness of criminal proceedings.

1. The Prosecutor's Ethical Duties as Minister of Justice

The prosecutor's duty in our criminal justice system is to "seek justice"[98] on behalf of the people.[99] As minister of justice,[100] the prosecutor's "interest . . . in a criminal prosecution is not that [she] shall win a case, but that justice shall be done,"[101] and as the representative of the people, she is obliged to uphold a higher ethical standard than required of other lawyers.[102] For a prosecutor to behave otherwise "not only undermines the public trust, but inflicts damage beyond calculation to our system of justice"[103] and to the public's confidence in the legal profession.[104] Thus, to maintain the public's trust in the justice system and in the integrity of the legal profession, prosecutors must strictly adhere to their ethical obligations, which in the context of baseless pleas require that prosecutors bring charges supported by probable cause, act with candor toward the tribunal and third parties, and avoid wrongful convictions.[105]

a. *Bring Charges Supported by Probable Cause*

Prosecutors, governed by rules of professional responsibility,[106] have an ethical obligation to bring charges against a defendant only where the

---

98. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1980); ABA STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE, THE PROSECUTION FUNCTION Standard 1.1(c) (1974).

99. *See* Hosford v. State, 525 So. 2d 789, 793 (Miss. 1988) (stating that the prosecutor's "'paramount obligation is to the public'" (quoting People v. Zimmer, 414 N.E.2d 705, 707 (N.Y. 1980))).

100. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. (2009).

101. Berger v. United States, 295 U.S. 78, 88 (1935).

102. *See* People v. Kelley, 142 Cal. Rptr. 457, 466–67 (Ct. App. 1977) (describing the "additional standards of conduct" that apply to prosecutors as representatives of the people).

103. *In re* Doe, 801 F. Supp. 478, 480 (D.N.M. 1992).

104. *See* AM. BAR ASS'N, COMM'N ON PROFESSIONALISM, ". . . . IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM, at vii (1986) ("The citizens of this country should expect no less than the highest degree of professionalism when they have entrusted administration of the rule of law—one of the fundamental tenets upon which our society is based—to the legal profession.").

105. *See infra* Part I.B.1.a–c.

106. *See generally* Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205 (2002); Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469 (2001) (describing the creation of ethical rules, promulgated by the American Bar Association and adopted by courts, that attorneys must follow to avoid discipline).

prosecutor knows the charge is supported by probable cause[107] because a prosecutor must be dedicated to "the ascertainment of the true facts surrounding the commission of the crime."[108] "[I]t is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause"[109] or to continue an action when there is no probable cause.[110] The requirement of probable cause is embodied in Model Rule 3.8(a),[111] a provision in the Model Rules of Professional Conduct[112] that has been enacted in most jurisdictions[113] and ensures that prosecutors have a "'reasonable ground for supposing that a criminal charge is well-founded.'"[114] A prosecutor, therefore, cannot bring charges or seek charges greater in number or degree than she can reasonably support with evidence at trial[115] because in order to afford defendants procedural justice, prosecutors must assure that "guilt is decided upon the basis of sufficient evidence."[116]

The probable cause requirement is the widely accepted prosecutorial standard for charging a criminal defendant,[117] and states that a prosecutor must "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."[118] However, probable cause is considered "the minimum ethical threshold for a prosecutor to charge a defendant criminally"[119] and has been argued to set "too low an ethical floor."[120]

107. MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2009) ("The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause . . . .").

108. United States v. Wade, 388 U.S. 218, 256 (1967) (White, J., dissenting in part and concurring in part).

109. United States v. Lovasco, 431 U.S. 783, 791 (1977).

110. *See* Commonwealth v. Hawkins, 469 A.2d 252, 255 (Pa. Super. Ct. 1983).

111. MODEL RULES OF PROF'L CONDUCT R. 3.8(a).

112. The Model Rules of Professional Conduct are the ethical standards for attorney conduct published by the American Bar Association that have been formally adopted by all state courts, with some variations, and therefore generally apply to most lawyers in the United States. *See* MODEL RULES OF PROF'L CONDUCT (2009); American Bar Association, Center for Professional Responsibility, Model Rules of Professional Conduct: Dates of Adoption, http://www.abanet.org/cpr/mrpc/alpha_states.html (last visited Apr. 19, 2010) [hereinafter Dates of Adoption] (reporting the states that have adopted the Model Rules to date).

113. *See* NIKI KUCKES, REPORT TO THE ABA COMMISSION ON EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT: CONCERNING RULE 3.8 OF THE ABA MODEL RULES OF PROF'L RESPONSIBILITY: SPECIAL RESPONSIBILITIES OF A PROSECUTOR 12 (1999) [hereinafter SPECIAL RESPONSIBILITIES OF A PROSECUTOR] (reporting that at least thirty-three states had adopted Model Rule 3.8(a) verbatim and a number of others have adopted a variation).

114. Iowa Supreme Court Att'y Disciplinary Bd. v. Howe, 706 N.W.2d 360, 368 (Iowa 2005) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1806 (unabridged ed. 2002)).

115. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 3-3.9(f) (3d ed. 1993).

116. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1.

117. *See* SPECIAL RESPONSIBILITIES OF A PROSECUTOR, *supra* note 113, at 12; Dates of Adoption, *supra* note 112.

118. MODEL RULES OF PROF'L CONDUCT R. 3.8(a).

119. Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427, 455 (2009).

Numerous groups have supported the adoption of a higher standard,[121] such as that set forth by the American Bar Association's Criminal Justice Standards Committee that suggests prosecutors "should not initiate, cause to be initiated, or permit the continued pendency of criminal charges 'in the absence of sufficient admissible evidence to support a conviction.'"[122] Some jurisdictions, such as the District of Columbia, have adopted this higher standard, and have made it unethical to file or maintain a charge the "prosecutor knows is not supported by probable cause" or to "prosecute to trial a charge the prosecutor knows is not supported by evidence sufficient to establish a *prima facie* showing of guilt."[123]

b. *Uphold Candor Toward the Court and Third Parties*

As ministers of justice, prosecutors have a "special duty not to impede the truth"[124] and furthermore to ensure "fundamentally fair trials by seeking not only to convict, but also to vindicate the truth and to administer justice."[125] Lawyers in general have a preeminent obligation to truthfulness[126] that prohibits intentionally dishonest conduct,[127] but beyond this, prosecutors have a unique "legal and ethical duty to truth"[128] and the responsibility to facilitate the "truth-finding function of the courts."[129] This duty requires prosecutors to "be forthright, honest, sincere, and unreserved"[130] toward the court and not to make misrepresentations to third

---

120. *Id.* at 454 (referring to Model Rule 3.8(a)).

121. *See, e.g.*, NAT'L PROSECUTION STANDARDS Standard 43.3 (Nat'l Dist. Att'ys Ass'n, 2d ed. 1991) (arguing that a state prosecutor may file "only those charges which he reasonably believes can be substantiated by admissible evidence at trial"); U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-27.220(A)–(B) (2d ed. 2000) (stating that federal prosecutors may only initiate prosecution where "admissible evidence will probably be sufficient to obtain and sustain a conviction" and emphasizing that "no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact").

122. Kuckes, *supra* note 119, at 455 (quoting ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 3-3.9(a) (3d ed. 1993)).

123. *See* D.C. RULES OF PROF'L CONDUCT R. 3.8(b)–(c) (2007).

124. United States v. Reyes, 577 F.3d 1069, 1077 (9th Cir. 2009).

125. Thompson v. Calderon, 120 F.3d 1045, 1058 (9th Cir. 1997).

126. *See* Att'y Grievance Comm'n v. Guberman, 896 A.2d 337, 340–41 (Md. 2006) ("'[C]andor and truthfulness are two of the most important moral character traits of a lawyer.'" (quoting Att'y Grievance Comm'n v. Myers, 635 A.2d 1315, 1319 (Md. 1994))); *In re* Meyerson, 59 A.2d 489, 496 (Md. 1948) ("No 'moral character qualification for Bar membership' is more important than truthfulness and candor.").

127. *See* Att'y Grievance Comm'n v. Vanderlinde, 773 A.2d 463, 488 (Md. 2001) ("[I]ntentional dishonest conduct by a lawyer [is] almost beyond excuse.").

128. Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 313 (2001).

129. United States v. Duke, 50 F.3d 571, 578 n.4 (8th Cir. 1995) (citing United States v. Bernal-Obeso, 989 F.2d 331, 333–34 (9th Cir. 1993)).

130. Barbara Hanson Nellermoe & Fidel Rodriguez, Jr., *Professional Responsibility and the Litigator: A Comprehensive Guide to Texas Disciplinary Rules 3.01 Through 4.04*, 28 ST. MARY'S L.J. 443, 454 (1997).

parties,[131] including "downstream users"—persons that are not involved in the current criminal proceeding but who may nonetheless be affected by the conduct, representations, or decisions from the current proceeding.[132]

The duty of candor to the court is a foremost ethical obligation[133] that prohibits prosecutors from knowingly making false statements to the court, bans submission of false evidence, and requires that prosecutors take remedial measures to make falsities known to the court.[134] These prohibitions are necessary if the prosecutor's "truth-seeking function is to have any meaning";[135] thus they have been interpreted broadly to apply even to false statements that "do not go to the heart of the issue being litigated"[136] and to false evidence with "no bearing on the ultimate resolution of the matter."[137]

In addition to the duty of truthfulness to the court, prosecutors have an obligation to be truthful to third parties.[138] This prohibits them from knowingly making false statements of material fact to third parties and also requires them to disclose material facts to third parties when necessary to avoid assisting fraud.[139] False statements made in court documents[140] and misrepresentations in pretrial negotiations[141] constitute false statements to third parties within the realm of this ethical obligation, and third parties include "downstream users."[142]

In addition to the duties to avoid deceiving the court and third parties, prosecutors have a broader obligation to avoid deceptive or fraudulent

---

131. *See* MODEL RULES OF PROF'L CONDUCT R. 4.1 (2009) (discussing the obligation of truthfulness in statements to third parties); *id.* R. 8.4(c) (discussing the obligation to avoid engaging in deceitful conduct).

132. *See* N.J. Advisory Comm. on Prof'l Ethics, Op. 710 (2006), http://lawlibrary.rutgers.edu/ethics/acpe/acp710_1.html (stating that a lawyer who deliberately overstates a property's sales price in a real estate contract violates her ethical obligation not to engage in conduct intended to defraud third parties, pursuant to Model Rule 4.1, and not to engage in conduct that is generally deceitful, pursuant to Model Rule 8.4, because it defrauds the future mortgage loan investor).

133. *See* CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, ANNOTATED MODEL RULES OF PROF'L CONDUCT 315 (4th ed. 1999) [hereinafter ANNOTATED MODEL RULES].

134. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3; Peter R. Jarvis & Bradley F. Tellam, *The Dishonesty Rule—A Rule with a Future*, 74 OR. L. REV. 665, 668–75 (1995) (explaining how the duty of candor applies to private conduct, to speaking as well as failure to speak, to situations without proof of detrimental reliance on the false statement, and to situations considered protected by attorney-client privilege).

135. Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 209, 240 (2006).

136. ANNOTATED MODEL RULES, *supra* note 133, at 315.

137. *Id.* at 316.

138. *See* MODEL RULES OF PROF'L CONDUCT R. 4.1 (discussing the obligation of truthfulness in statements to others).

139. *See id.*

140. *See* Am. Airlines, Inc. v. Allied Pilots Ass'n, 968 F.2d 523, 528 (5th Cir. 1992).

141. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370 (1993) (forbidding lawyers from deliberately misrepresenting facts to judges in pretrial negotiations).

142. *See supra* note 132 and accompanying text.

conduct.[143] Despite this, courts have recognized that in exceptional circumstances, prosecutors, and in some jurisdictions defense attorneys,[144] may be justified in using deceptive methods during criminal proceedings[145] for the purpose of "arriving at the truth[, which] is a fundamental goal of our legal system."[146] The use of deceptive conduct, such as the "use of an undercover investigator to detect ongoing violations of the law[,] is not ethically proscribed, especially where it would be difficult to discover the violations by other means."[147] Though the limits of ethically permitted deception remain in dispute,[148] deception is recognized as ethical when it (1) is perpetrated for a compelling reason for which there is no reasonably available alternative, (2) does not directly benefit the deceiver, (3) is exposed within a reasonable time after it is perpetrated, and (4) is perpetrated with the intent of furthering justice.[149]

c. *Prevent and Rectify Wrongful Convictions*

The purpose underlying requirements like probable cause and other truth-seeking obligations is for prosecutors "to convict the guilty and to make sure they do not convict the innocent."[150] Society has a deep-seated interest

---

143. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4.

144. *See, e.g.*, N.Y. County Lawyers Ass'n Comm. on Prof'l Ethics, Op. 696 at 3 (1993) (stating that "the rule against secret recordings has been relaxed with respect to prosecutors and defense counsel involved in criminal investigations"); Colo. Bar Ass'n, Formal Op. 112 (2003), http://www.cobar.org/index.cfm/ID/386/subID/3809/CETH/Ethics-Opinion-112:-Surreptitious-Recording-of-Conversations-or-Statements,-07/19/03/ (describing circumstances in which defense attorneys are permitted to make surreptitious recordings).

145. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 337 (1974) ("There may be extraordinary circumstances in which the Attorney General of the United States or . . . [other] prosecuting attorneys might ethically make and use [deceptive methods such as] secret recordings if acting within strict statutory limitations conforming to constitutional requirements."); Colleen E. McCullough, Comment, *The Pursuit of a Prosecutorial Exception:* In Re *Conduct of Gatti*, 27 J. LEGAL PROF. 217, 222–25 (2003) (describing the use of covert operations by law enforcement officials to expose criminal conduct and the use of undercover "testers" to expose discriminatory employment or housing practices).

146. United States v. Havens, 446 U.S. 620, 626–28 (1980) (holding that the government may use illegally obtained evidence to impeach a defendant's fraudulent statements during cross-examination for the purpose of seeking justice).

147. Apple Corps. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456, 475 (D.N.J. 1998).

148. *See* David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the* Model Rules of Professional Conduct, 8 GEO. J. LEGAL ETHICS 791, 794–95 & n.10 (1995) (explaining that the ethical standard for covert activities by prosecutors is still unclear).

149. *See* Christopher J. Shine, *Deception and Lawyers: Away from a Dogmatic Principle and Toward a Moral Understanding of Deception*, 64 NOTRE DAME L. REV. 722, 749–50 (1989); *see also In re* Friedman, 392 N.E.2d 1333, 1337–40 (Ill. 1979) (Underwood, J., concurring) (arguing that a prosecutor's deceptive conduct is justifiable if the prosecutor reasonably believes it is necessary to avoid greater injury such as corruption or bribery, as long as the court is promptly informed).

150. United States v. Wade, 388 U.S. 218, 256 (1967) (White, J., dissenting in part and concurring in part).

in protecting the innocent from wrongful convictions,[151] including those made through plea bargaining,[152] because a justice system that convicts the innocent, even where defendants voluntarily plead guilty, "exposes the failure to uphold criminal justice standards upon which society is constructed."[153] This interest in protecting the innocent is reflected in the abundance of safeguards created to prevent and rectify wrongful convictions, including habeas corpus, innocence legislation, and projects to overturn wrongful convictions through DNA testing.[154]

This interest in preventing wrongful convictions is also reflected in the prosecutor's ethical obligations. The prosecutor's duty to seek justice, and not merely to convict, means that the prosecutor has a "twofold aim . . . that guilt shall not escape or innocence suffer," so a prosecutor has just as much a responsibility to protect the innocent as she does to convict the guilty.[155] Thus, prosecutors' ethics rules command that "special precautions are taken to prevent and to rectify the conviction of innocent persons."[156] This requires, for example, that prosecutors inform defense counsel when the prosecution has evidence that creates a "reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted."[157]

Such obligations to prevent the unknowing or mistaken conviction of innocent defendants implies an equally if not more serious obligation to avert prosecutors from knowingly convicting the innocent.[158] "There is something profoundly troubling about knowingly facilitating injustice, more so than inadvertently allowing it to happen. . . . [S]ociety cannot knowingly facilitate the punishment of those who do not deserve it, even if

---

151. *See* Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and* Nolo Contendere *Pleas*, 88 CORNELL L. REV. 1361, 1386 (2003).

152. *See* AM. BAR ASS'N AD HOC INNOCENCE COMM. TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY 90 (2006) (reporting concern that innocent people are convicted through plea bargains); Bryan H. Ward, *A Plea Best Not Taken: Why Criminal Defendants Should Avoid the* Alford *Plea*, 68 MO. L. REV. 913, 916–17 (2003). *But see* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1119 (2008) (arguing that the conventional "innocence problem" with plea bargaining is largely wrong because innocent defendants are better off with the option to bargain).

153. F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 197 (2002).

154. *See, e.g.*, 18 U.S.C. § 3600 (2006) (codifying the Innocence Protection Act of 2004); 28 U.S.C. § 2241 (2006) (habeas corpus); Harris v. Blodgett, 853 F. Supp. 1239, 1247 (W.D. Wash. 1994) (habeas corpus); Innocence Project, Mission Statement, http://www.innocenceproject.org/about/Mission-Statement.php (last visited Apr. 19, 2010) (describing a DNA testing project).

155. Berger v. United States, 295 U.S. 78, 88 (1935); *see* Bailey v. Commonwealth, 237 S.W. 415, 417 (Ky. 1922).

156. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2009).

157. *Id.* R. 3.8(g).

158. *See* Hurd v. People, 25 Mich. 404, 415–16 (1872); Bibas, *supra* note 151, at 1384 (describing the injustice of knowingly convicting the innocent).

they agree to it."[159] Prosecutors, therefore, who are responsible for seeking justice, have a grave responsibility to avoid wrongfully convicting defendants, especially where they know defendants are innocent of the crimes for which they are being convicted.[160]

2. The Defense Counsel's Duty as the Zealous Advocate

The defense attorney's role in the criminal justice system, as the zealous advocate for her client,[161] is to achieve the best possible result for the defendant,[162] regardless of the defendant's guilt or innocence.[163] In the plea bargaining context, therefore, defense counsel has an obligation to seek a bargain where advantageous to the defendant[164] and to adhere to the defendant's choice to accept or reject a bargain offered by the prosecutor.[165] Because defense counsel's role is to be a zealous advocate, she does not have a comparable obligation to the prosecutor to seek justice or ascertain the truth.[166] At the same time, however, defense counsel's zealousness is limited by overriding ethical obligations necessary to the criminal justice process.[167] Regardless of defense counsel's unique position in criminal proceedings,[168] she has an obligation to carry out the representation of her client within the bounds of the law and the ethics rules.[169] In the context of baseless pleas, the relevant bounds of zealous advocacy are the duties of candor toward the court and truthfulness to third parties, which require that

---

159. Bibas, *supra* note 151, at 1384.

160. *See Berger*, 295 U.S. at 88 ("It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

161. *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-19, 7-23 (1980).

162. *See* Lindsey v. State, 725 P.2d 649, 660 (Wyo. 1986).

163. *See* United States v. Wade, 388 U.S. 218, 256 (1967) (White, J., dissenting in part and concurring in part).

164. *See* Strozier v. Hopper, 216 S.E.2d 847, 849–50 (Ga. 1975) ("The most effective assistance counsel can give may be a well-founded recommendation to plead guilty in expectation of a lighter sentence."); Steven Zeidman, *To Plead or Not To Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 894 (1998) (suggesting that defense counsel have a constitutional obligation to persuade their clients to accept favorable plea bargains).

165. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2009); Alschuler, *Defense Attorney's Role*, *supra* note 76, at 1309.

166. *See Wade*, 388 U.S. at 256–58 (White, J., dissenting in part and concurring in part); Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 123 n.15 (1987).

167. *See* BURKOFF, *supra* note 97, § 5:2, at 5-9 to -15 (discussing the bounds of zealous advocacy); Michael Frisch, *Zealousness Run Amok*, 20 GEO. J. LEGAL ETHICS 1035 (2007).

168. *See Wade*, 388 U.S. at 256 (White, J., dissenting in part and concurring in part) (describing how defense attorneys are assigned a "different mission" than prosecutors).

169. *See* BURKOFF, *supra* note 97, § 5:2, at 5-9 to -15; ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4-1.2 (3d ed. 1993) ("But included in defense counsel's obligation to the client is the responsibility of furthering the defendant's interest to the fullest extent that the law and the applicable standards of professional conduct permit.").

the defense attorney avoid acting dishonestly and prevent her client from doing so.[170]

The duty of candor toward the tribunal applies to all lawyers, "including defense counsel in criminal cases," and the defense lawyer's role as an advocate is qualified by her duty of candor to the tribunal.[171] This duty requires that defense counsel "be scrupulously candid and truthful in representations of any matter before a court,"[172] even to the detriment of the duties to advocate for the client and maintain client confidences.[173] This duty to make honest representations to the court through statements or evidence applies even where the representations neither are material to the issue being litigated[174] nor influence the ultimate resolution of the case.[175]

In addition to the duty of truthfulness to the court, defense counsel has an obligation to be truthful to third parties,[176] including downstream users.[177] This obligation prohibits defense counsel from knowingly making false statements of material fact to third parties and also requires them to disclose material facts to third parties when necessary to avoid assisting the defendant in committing fraud.[178] False statements made in court documents, as well as misrepresentations in pretrial negotiations, are considered false statements to third parties and within the realm of this ethical obligation.[179]

Besides her personal duty to be truthful, the defense attorney has an ethical responsibility to prevent her client from engaging in fraud,[180] which includes making false representations to the court,[181] and arguably includes false admissions of guilt.[182] If defense counsel is unsuccessful in preventing the defendant from making false representations to the court, she has an obligation, which relates back to the duty of candor toward the tribunal, to disclose her client's misrepresentation to the court.[183]

---

170. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3, 4.1, 8.4.

171. *Id.* R. 3.3 cmt.

172. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4-1.2 (3d ed. 1993).

173. *See* ANNOTATED MODEL RULES, *supra* note 133, R. 3.3 cmt. 1.

174. *See id.* at 315.

175. *See id.* at 316.

176. *See* MODEL RULES OF PROF'L CONDUCT R. 4.1, 8.4.

177. For a definition of "downstream users," see *supra* note 132 and accompanying text.

178. *See* MODEL RULES OF PROF'L CONDUCT R. 4.1(b). Note the duty of candor toward third parties diverges slightly from the duty of candor toward the tribunal because it is qualified by the duty of maintaining client confidences. *Id.*

179. *See* Am. Airlines, Inc. v. Allied Pilots Ass'n, 968 F.2d 523, 528 (5th Cir. 1992) (holding that a lawyer's submission of fraudulent documents to the court was a false statement of material fact); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370 (1993) (prohibiting lawyers from knowingly misrepresenting facts to judges in pretrial negotiations).

180. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4-3.7(b) (3d ed. 1993).

181. *See id.*

182. *See* Alschuler, *Defense Attorney's Role*, *supra* note 76, at 1305 & n.342.

183. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 98-412 (1998); ANNOTATED MODEL RULES, *supra* note 133, R. 3.3 cmt. 1.

3. The Judge's Ethical Duties as Administrator of Justice

The judge, as symbol and supervisor of the administration of justice, which is the foundation of our democratic state,[184] "plays a central role in preserving the principles of justice and the rule of law."[185] In this role, the judge's foremost priority is to maintain the integrity of the courts[186] and to uphold the public's confidence in the legitimacy of the justice system.[187] To uphold this integrity and confidence, judges have an obligation to maintain judicial integrity, to properly regulate the conduct of lawyers, and to ensure the fairness of criminal proceedings.

a. *Uphold the Integrity of the Judiciary*

The judge's duty to promote the integrity of the courts is "intertwined with the obligation that judges act at all times in a manner that promotes public confidence in the [integrity] of the judiciary."[188] Public confidence in the judiciary is necessary because "judicial legitimacy represents our confidence, trust, and belief in the judicial branch of government, which together provide the main reasons for obeying the law."[189] If the public perceives that judges behave with integrity and are worthy of respect, then the public will obey the law and follow judicial decisions.[190] In fact, "[t]he continuing ability of the courts to function then depends upon public acceptance of their institutional legitimacy . . . . Judicial accountability is absolutely essential to preserving public trust and confidence in our courts."[191] Because the judge is invested with the public trust, she must maintain the highest of ethical standards.[192] To this end, the judge is required to act according to both the Code of Judicial Ethics,[193] which

184. *See In re* Inquiry Concerning a Judge *re* Shenberg, 632 So. 2d 42, 46 (Fla. 1992); Cone v. Cone, 68 So. 2d 886, 888 (Fla. 1953) ("The administration of justice is the most important business of the State.").

185. MODEL CODE OF JUDICIAL CONDUCT pmbl. (2007).

186. *See In re* Del Rio, 256 N.W.2d 727, 753 (Mich. 1977); Harrison v. Wisdom, 54 Tenn. 99, 111 (1872) ("When once a court has lost the charm of integrity and justice, with which it should ever be invested, it forfeits its influence for good, and degrades the majesty of the law.").

187. *See* MODEL CODE OF JUDICIAL CONDUCT pmbl.

188. Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 369 (2008); *see also In re* Greenberg, 280 A.2d 370, 372 (Pa. 1971).

189. Gregory C. Pingree, *Where Lies the Emperor's Robe? An Inquiry into the Problem of Judicial Legitimacy*, 86 OR. L. REV. 1095, 1104, 1107 (2007); *see* Alain A. Levasseur, *Legitimacy of Judges*, 50 AM. J. COMP. L. SUPPLEMENT 43, 45–50 (2002).

190. *See* Pingree, *supra* note 189, at 1107.

191. AM. BAR ASS'N COMM'N ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY 51, 57 (2003).

192. *See* JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS § 1.01 (3d ed. 2000) ("Judges are held to higher standards of integrity and ethical conduct than attorneys or other persons not invested with the public trust."); Howard T. Markey, *A Need for Continuing Education in Judicial Ethics*, 28 VAL. U. L. REV. 647, 656 (1994).

193. *See* MODEL CODE OF JUDICIAL CONDUCT (2000). Nearly every state has adopted a form of the Model Code of Judicial Conduct. *See* SHAMAN ET AL., *supra* note 192, § 1.02.

primarily governs judges, and the rules of professional responsibility, which regulate all lawyers.[194] Inevitably, this requires judges to obey the law,[195] including rules of procedure.[196]

In the plea bargaining context, judges have an obligation to abide by the criminal procedure rules, and this obligation requires that they ascertain whether the plea is voluntary, knowing, and, in many jurisdictions, whether the plea has a factual basis.[197] Where the judge is required by procedural rules to ascertain the factual basis, although the methods used may vary,[198] a judge "should not enter judgment upon a plea of guilty without making such an inquiry as will satisfy [her] that there is a factual basis for the plea."[199]

In addition to procedural requirements, a judge's ethical obligation to avoid behavior prejudicial to the administration of justice prohibits her from deciding cases "by a means other than on the evidence before [her]."[200] The judge's role is "to ascertain whether [her] judgments [are] supported in law and in fact"[201] such that "'the disposition of cases for reasons other than an honest appraisal of the facts and the law, as disclosed by the evidence presented, will amount to conduct prejudicial to the proper administration of justice.'"[202] Therefore, both criminal procedure rules and the ethical codes require that the judge make decisions based on an appraisal of the facts of a case.

b. *Regulate the Bar*

A second responsibility judges have in connection with the maintenance of the integrity of the courts and public confidence in the justice system is to effectively regulate members of the bar.[203] "The admission of an attorney to the practice of law is a judicial function and it is of necessity within the inherent power of the court for the reason of self-protection and

194. *See In re* Callanan, 355 N.W.2d 69, 73 (Mich. 1984); *In re* Greenberg, 280 A.2d 370, 373 (Pa. 1971) ("If we hold the [lawyer's] profession to a standard so high, can we be less exacting with respect to judicial conduct?").

195. *See* Pingree, *supra* note 189, at 1106–07 ("[T]he judge must comply with the law.").

196. *See* Tenn. Dep't of Human Servs. v. Vaughn, 595 S.W.2d 62, 63 (Tenn. 1980) (stating that rules of procedure are "'laws' of this state, in full force and effect").

197. *See supra* Part I.A.1.b.

198. *See supra* notes 61–62 and accompanying text.

199. FED. R. CRIM. P. 11 advisory committee's notes to 1974 amendments.

200. *In re* Daniels, 340 So. 2d 301, 302–03 (La. 1976) (holding a judge's conduct unethical because he decided cases by the flip of a coin instead of on the basis of the evidence).

201. *In re* Crutchfield, 223 S.E.2d 822, 826 (N.C. 1975) (sanctioning a judge for not inquiring into either the factual or legal basis for his decisions).

202. *Id.* (quoting *In re* Diener, 304 A.2d 587, 594 (Md. 1973)).

203. *See* Charles W. Wolfram, *Inherent Powers in the Crucible of Lawyer Self-Protection: Reflections on the LLP Campaign*, 39 S. TEX. L. REV. 359, 362 (1998) (stating that "most state supreme courts also claim the exclusive power to regulate lawyers as the court sees fit").

respectability of the profession."[204] With the authority to admit attorneys, the judge has the authority to regulate attorneys[205] and, along with this, the duty to ensure that attorneys conduct themselves according to ethical standards.[206] In plea bargaining, therefore, although judges cannot themselves participate in plea negotiations,[207] they do have the responsibility to ensure that the attorneys negotiating pleas to cases in their courts are doing so in accordance with attorneys' ethical obligations.[208]

c. *Ensure Fair Criminal Proceedings*

Trial judges have a "paramount duty"[209] to both defendants and the public to ensure fair criminal proceedings.[210] Society has an interest in "obtaining a fair and accurate resolution of the question of guilt or innocence"[211] in criminal cases, and public confidence in courts' resolutions and in the judicial system "depend on full disclosure of all the facts."[212] Judges have a higher obligation than a client's own advocate to ensure a fair process[213] and are empowered with the discretion to carry out this obligation.[214] Therefore, in plea bargains, although the judge is not typically encouraged to participate in the plea bargaining process itself,[215] she is expected to intervene in criminal proceedings to promote just determinations[216] and ensure convictions are made only where guilt is established as required by law.[217] Therefore, once a plea bargain has been negotiated and presented to the court, the judge has considerable latitude in determining whether to accept the bargain and enter a conviction.[218]

---

204. *In re* Bozarth, 63 P.2d 726, 728 (Okla. 1936).
205. *See Ex parte* Secombe, 60 U.S. (1 How.) 9, 13 (1856).
206. *See In re* Lavine, 41 P.2d 161, 162 (Cal. 1935); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 22–33 (1986) (discussing state and federal courts' inherent authority to regulate attorney ethics).
207. *See* Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1059–60 (1976) [hereinafter Alschuler, *Trial Judge's Role*] (describing the trial judge's role in the plea bargaining process as an "independent examiner").
208. *See In re Bozarth*, 63 P.2d at 729 ("All members of the bar are officers of the court and the court must control and assume authority over its officers in the effective administration of justice.").
209. Hoyt v. Lewin, 444 F. Supp. 2d 258, 264 (S.D.N.Y. 2006) (quoting Transcript of Record at 589, People v. Hall, 769 N.Y.S.2d 28 (App. Div. 2003) (No. 10)).
210. *See* Powell v. Alabama, 287 U.S. 45, 52 (1932); United States v. Trapnell, 512 F.2d 10, 12 (9th Cir. 1975).
211. United States v. Nobles, 422 U.S. 225, 238 (1975).
212. *Id.* at 231 (quoting United States v. Nixon, 418 U.S. 683, 709 (1974)).
213. *See* Miller v. Drouin, 438 A.2d 863, 864 (Conn. 1981).
214. *See* McWilliams v. Am. Fid. Co., 102 A.2d 345, 349 (Conn. 1954).
215. *See* Alschuler, *Trial Judge's Role*, *supra* note 207, at 1060.
216. *See* United States v. Corona, 551 F.2d 1386, 1391 n.5 (5th Cir. 1977).
217. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-1.1(a) (3d ed. 2000).
218. *See* FED. R. CRIM. P. 11(c)(3)(A) (providing that "the court may accept the agreement, reject it, or defer a decision").

The power to create and enforce fair procedures to administer justice in the criminal process stems from a judge's duty to ensure fair criminal proceedings.[219] The Supreme Court has recognized that "[j]udicial supervision of the administration of criminal justice in the federal courts implies the [court's] duty of establishing and maintaining civilized standards of procedure and evidence."[220] This power to establish standards of procedure, often called "supervisory powers," is common in state courts as well.[221] In the plea bargaining context, these supervisory powers include the duty to create adequate rules of procedure for the plea bargaining process[222] and to regulate the conduct of prosecutors, police officers, and defense attorneys in plea bargaining.[223] For example, judges have an obligation to ensure that plea bargains are not entered pursuant to misapprehension or coercion[224] and, correspondingly, have created procedural rules such as Rule 11[225] to prevent coercion and assure fairness in the plea proceeding.[226]

II. DEFENSES AND CRITIQUES: THE LEGAL ETHICS AND CRIMINAL JUSTICE POLICY ARGUMENTS MADE FOR AND AGAINST BASELESS PLEAS

Despite the various benefits and accepted use of baseless pleas in certain jurisdictions, some discordant voices have begun to challenge this long-standing practice and the legitimacy of its continued use. Part II explores the conflicting views of baseless pleas taken by various commentators—courts, practitioners, and the media. This part first discusses the criminal justice policy justifications provided by supporters of baseless pleas and then the criminal justice policy and legal ethics arguments made by critics of the practice.

219. *See* Mary Sue Backus, *The Adversary System Is Dead; Long Live the Adversary System: The Trial Judge as the Great Equalizer in Criminal Trials*, 2008 MICH. ST. L. REV. 945, 972.

220. McNabb et al. v. United States, 318 U.S. 332, 340–42 (1943); *see also* 28 U.S.C. § 2072(a) (2006).

221. *See* Jefferey A. Parness & Amy Leonetti, *Expert Opinion Pleading: Any Merit to Special Certificates of Merit?*, 1997 BYU L. REV. 537, 578. *See generally* Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984); John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL'Y 423 (1997).

222. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 4 (1997) ("[T]he *law* that defines what the criminal *process* looks like, the law that defines defendants' rights, is made by judges and Justices.").

223. *See* Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 411–12 (2002).

224. *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 136 (1967); *supra* Part I.A.1.b.

225. *See supra* notes 58–61 and accompanying text.

226. *See* FED. R. CRIM. P. 11 advisory committee's notes to 1966 amendments.

A. *Defenders of Baseless Pleas Cite Criminal Justice Policy Justifications*

Notwithstanding the significant use of baseless pleas by some courts, legal discourse on the practice is relatively sparse. Still, a few courts and other commentators have provided justifications in support of the practice. The New York Court of Appeals has stated that "a defendant may plead guilty to a crime for which there is no factual basis and even plead guilty to a hypothetical crime,"[227] and the Supreme Court of California has refused to confine its plea bargains "within the straightjacket" of factually based offenses.[228] The justifications for this approach include the following: (1) because the client is guilty of some offense, she may plead guilty to any less serious offense even if unsupported by fact; (2) efficiency supersedes the need for a factual basis; and (3) baseless pleas provide a mutually beneficial result that supplants the factual basis requirement.

1. Defendants May Plead to Any Less Serious Offense As Long As the Facts Support Guilt for Some More Serious Offense

The first justification offered in support of baseless pleas is that defendants may plead to any less serious offense as long as the facts support a finding of guilt for some more serious offense. According to this argument, the probable cause for the original charge provides sufficient factual basis and adequate notice to the defendant to support the defendant's baseless guilty plea. In 2005, the Iowa Supreme Court held that baseless pleas were a violation of a prosecutor's ethical duty to bring charges supported by probable cause.[229] Judge Jerry L. Larson, a dissenting judge from this court, however, claimed that the majority, in reprimanding a city prosecutor for entering baseless cowl-lamp pleas,[230] "confuse[d] the concepts of probable cause and a factual basis for the guilty pleas" because only probable cause was needed for a defendant to plead guilty to a charge, not a factual basis.[231] Judge Larson argued that law enforcement's "[p]robable cause for the original arrest . . . was required to bring these traffic offenders into the judicial system. . . . [and] because probable cause supported the original charges, it necessarily supports the lesser ones."[232] He also clarified that if the defendant is willing, the defendant may plead

227. People v. Keizer, 790 N.E.2d 1149, 1152 n.2 (N.Y. 2003) (citing People v. Francis, 341 N.E.2d 540, 543–44 (N.Y. 1975)).

228. People v. West, 477 P.2d 409, 421 (Cal. 1970).

229. *See* Iowa Supreme Court Att'y Disciplinary Bd. v. Howe, 706 N.W.2d 360, 368 (Iowa 2005) (stating that city prosecutor, Bradley Howe, "clearly violated" his ethical obligation to bring charges only where supported by probable cause by charging defendants with factually unsupported cowl-lamp violations).

230. A cowl-lamp plea is a guilty plea entered for a violation of the cowl-lamp statute, which states that "a motor vehicle 'may be equipped with not more than two side cowl or fender lamps [similar to headlights] which shall emit an amber or white light without glare.'" *Id.* at 367 (citing IOWA CODE § 321.406 (2008)). However, cowl lamps have not existed on vehicles "for a considerable number of years." *Id.*

231. *Id.* at 382–83 (Larson, J., dissenting).

232. *Id.*

guilty to any less serious offense, and not necessarily a lesser-included offense, so long as the original citation for which the defendant is brought into the justice system is supported by probable cause.[233]

The Court of Appeals of Wisconsin, positing the same rationale, explained,

> [W]hen a plea is pursuant to a plea bargain, the trial court is not required to go to the same length to determine whether the facts would support the charge as it would if there were no plea bargain. This latter rule reflects the reality that often in the context of a plea bargain, a plea is offered to a crime that does not closely match the conduct that the factual basis establishes. . . . [W]e conclude that in a plea bargain context, the requirements of [the guilty-plea statute] are met if the trial court satisfies itself that the plea is voluntary and understandingly made and that a factual basis is shown for . . . a more serious charge . . . .[234]

Along similar lines, the Supreme Court of California stated that as long as the original indictment provides the defendant with sufficient notice of the type of offense to which she may be offered a plea agreement, there is no need for a factual basis to support the offense to which the defendant actually pleads guilty.[235] As long as the facts support a finding that the defendant committed a criminal offense, she may plead guilty to any less serious offense.

2. Judicial Efficiency Supersedes the Need for a Factual Basis

Another justification offered in support of baseless pleas is that the interest in saving judicial resources outweighs the need for a factual basis in certain cases. The New York Court of Appeals, in allowing a defendant to plead guilty to disorderly conduct when he stole two books from a Barnes & Noble in an orderly way,[236] emphasized that courts are encouraged to accept plea bargains to promote policy interests such as saving judicial resources through avoiding litigation.[237] The court argued that such interests in efficiency and expediency outweigh the need for a factual basis in plea bargains, especially for misdemeanors, and therefore justify courts in accepting baseless pleas.[238]

---

233. *Id.* at 383–84.

234. State v. Harrell, 513 N.W.2d 676, 680 (Wis. Ct. App. 1994) (citing WIS. STAT. § 971.08; Broadie v. State, 228 N.W.2d 687, 689 (Wis. 1975)).

235. *See* People v. West, 477 P.2d 409, 420 (Cal. 1970).

236. People v. Keizer, 790 N.E.2d 1149, 1150 (N.Y. 2003). The defendant, Morgan Keizer, was charged with a misdemeanor for petit larceny and criminal possession of stolen property for allegedly attempting to leave a Barnes & Noble with books he had not purchased, but at arraignment, Keizer pled guilty to disorderly conduct in exchange for a lesser sentence, despite the fact that disorderly conduct was not a lesser-included offense of the crimes originally charged. *Id.* at 1150–51.

237. *Id.* at 1151.

238. *Id.* at 1151–52.

In New Jersey, before a judge-mandated ban on baseless pleas,[239] commentators who supported "215 pleas,"[240] plea agreements frequently used in New Jersey traffic courts that allowed "[m]otorists accused of careless driving, speeding, and other moving violations [to] plead guilty to violating an unrelated statute, known as '215,'"[241] argued that "plea bargaining for traffic offenses was developed for good reason."[242] These pleas were a necessary part of the municipal court system because they "helped avoid huge court backlogs, police overtime costs, and heavy penalties for otherwise law-obeying motorists."[243] Before the ban, government officials warned that "eliminating [baseless] plea-bargaining 'has the potential of bringing the municipal court system to a halt [because] the court will be backlogged forever.'"[244] Even New Jerseyans who agreed with the ban in principle cautioned that "without the plea bargains, many more motorists will contest tickets, leading to crushing caseloads, increased costs for police overtime, and packed courtrooms."[245]

In response to the Iowa Supreme Court's decision to reprimand an attorney for prosecuting baseless cowl-lamp pleas,[246] legal authorities in Missouri decided to review the "long-standing practice throughout [their own state] of reducing moving violations to defective-equipment pleas."[247] When the City Council in Kansas City discovered the prevalent use of these pleas, they issued a temporary ban, which "created a huge backlog of Municipal Court cases, potentially costing the city millions in lost revenue."[248] In addition to expected complaints from judges and

---

239. *See* Michael Booth, *Traffic-Court Plea-Bargain Bill Advances*, 160 N.J. L.J. 1098, 1098 (2000) (reporting that the Administrative Office of Courts in New Jersey issued a directive banning baseless pleas in municipal courts). The legislature in New Jersey responded to the ban by enacting a new law that would allow defendants to plead to a factually based charge while deriving the same benefits from the previously used baseless "215 plea." *See* N.J. STAT. ANN. § 39:4-97.2 (West 2002) (making it "unlawful for any person to drive or operate a motor vehicle in an unsafe manner likely to endanger a person or property"); News Release, Office of the Governor Christie Whitman, Governor Christie Whitman Today Signed the Following Legislation (July 24, 2000) (on file with author) ("The [unsafe driving] bill is a response to an April 24, 2000 directive by the Administrative Office of the Courts clarifying that municipal prosecutors may not accept plea agreements that downgrade traffic offenses unless a factual basis can be shown to support the lesser offense.").

240. *See* N.J. STAT. ANN. § 39:4-215 (penalizing "[a]ny person who fails to obey the directions of a police officer or fails to obey the directional signals or signs provided").

241. Hughes & Kraut, *supra* note 13 (explaining that 215 pleas carried no points against a driver's license and "should apply [for example] to a person who drives on Route 80 if the road is closed because of flooding").

242. Editorial, *Driver-Friendly Plea Deals: Don't Scrap Them Just Because of Abuses*, RECORD (Bergen County, N.J.), May 4, 2000, at L10.

243. *Id.*

244. Hester, *supra* note 11 (quoting Assemblyman Christopher "Kip" Bateman, a representative from Somerset, N.J., and a Bridgewater, N.J., prosecutor).

245. Hughes & Kraut, *supra* note 13.

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

247. Mansur, *supra* note 79.

248. Campbell, *supra* note 10.

prosecutors regarding resources and backlogs, defense attorneys argued that barring these baseless pleas would clog already busy traffic courts and "cost them money."[249] Even the Iowa press, which strongly criticized courts for allowing baseless pleas, confessed that "[t]he reality, however, is court officials don't have the resources to do the job. There are simply not enough judges, prosecutors, courtrooms or hours in the day to prosecute every case. So they make deals and cut corners."[250] Judges recognize that this is a "troubling state of affairs. . . . but if the court system cannot handle the number of cases coming to it, justice [inevitably] suffers."[251]

3. Mutually Beneficial Plea Agreements Justify Baseless Pleas

A third justification offered in support of baseless pleas is that these pleas achieve a mutually beneficial result for all the parties involved in a case and therefore supplant the need for a factual basis. Judge Larson, the dissenting voice on the Iowa bench, argued that DR 7-103(A), the disciplinary rule requiring prosecutors to bring charges only with a factual basis, "was never intended to provide a basis for disciplining a prosecutor under circumstances such as these."[252] He claimed that this rule was intended to discipline prosecutors for coercing guilty pleas by overcharging defendants, so the ethical rule was not violated if it provided leniency to defendants by charging them with less serious offenses.[253]

The New York Court of Appeals similarly found a "jurisdictional defect was implicated when the defendant pleaded guilty to charges equal to or higher than those for which he was indicted," but not when he pleaded to lesser offenses, and especially not to misdemeanors.[254] In fact, the court emphasized that courts are encouraged to accept plea bargains to afford defendants leniency, even if there is no factual basis to support the plea, because it also benefits the court's interest in efficiency.[255]

When asked about "215 pleas,"[256] a municipal prosecutor in New Jersey stated, "'[Y]ou're not there just to hammer someone, you're there to do justice, and sometimes justice means people should get a break.'"[257] Another prosecutor echoed this sentiment by stating, "'If someone can leave [the court] with a learning experience and a deterrent factor, saying "I

---

249. Mansur, *supra* note 79.

250. Editorial, *Courtroom Corruption—Yes, in Iowa: Traffic Plea Bargains Are Legal Extortion*, DES MOINES REG., Feb. 22, 2004, at OP1 [hereinafter *Courtroom Corruption*].

251. *Id.*

252. Iowa Supreme Court Att'y Disciplinary Bd. v. Howe, 706 N.W.2d 360, 384 (Iowa 2005) (Larson, J., dissenting).

253. *Id.* (noting that the rule was also aimed to prevent prosecutors from filing criminal charges to influence civil settlements).

254. People v. Keizer, 790 N.E.2d 1149, 1152 (N.Y. 2003).

255. *Id.* at 1151.

256. *See supra* note 240.

257. Hughes & Kraut, *supra* note 13 (quoting New Jersey municipal prosecutor Rosario Presti).

had to pay a fine," I think we've all done our job.'"[258] Some judges also argue that courts are gaining some accountability and providing some form of justice even if the means are not completely accurate.[259]

A columnist in New Jersey also reported on the mutually beneficial nature of baseless pleas: "The police are happy because their citations stand, albeit watered down. The motorists are happy because they've reduced their fines or limited damage to their driving records. And the judges are happy because their already overburdened dockets aren't further clogged with time-consuming trials."[260] Pat Caserta, former vice president of the Passaic County Bar Association,[261] though reluctantly admitting that a ban on 215 pleas would be legally correct, asserted that "[t]here are a lot of rules that are not enforced to the letter of the law. . . . This is a minor thing, and who is complaining? No one."[262]

B. *Critics of Baseless Pleas Cite Criminal Justice Policy and Legal Ethics Concerns*

Though baseless pleas have received largely unquestioned support, a few dissonant voices have emerged, arguing that baseless pleas raise criminal justice policy and legal ethics concerns. One of the more prominent voices is that of the Iowa Supreme Court, which condemned baseless pleas by reprimanding Bradley Howe, a thirty-year Spencer City prosecutor, for reducing moving traffic violations to cowl-lamp violations without factual bases to support the pleas.[263] In addition to the ethics concern raised by the Iowa Supreme Court that baseless pleas violate prosecutors' probable cause requirement, other commentators have argued that baseless pleas weaken deterrence, threaten public safety, and undermine the integrity of the courts.

1. Criminal Justice Policy Concerns

a. *Baseless Pleas Weaken Deterrence*

The first criminal justice policy argument in opposition to baseless pleas maintains that such pleas weaken the connection of specific crimes with punishment and, therefore, diminish the overall deterrent effect of the criminal law. Commentators have noted that "[t]he utility of the criminal sanction, in terms of deterrence, is contingent upon the actual culpability of the individual on whom it is imposed"[264] because "'[t]he more accurate the

258. *Id.* (quoting prosecutor Philip Tornetta from Bergen County, N.J.).
259. *See* Clouse, *supra* note 1.
260. Hester, *supra* note 11.
261. *See* Passaic County Bar Association, PCBA Officers, http://www.passaicbar.org/officers.php (last visited Apr. 19, 2010).
262. Hughes & Kraut, *supra* note 13.
263. *See* Iowa Supreme Court Att'y Disciplinary Bd. v. Howe, 706 N.W.2d 360, 367–68 (Iowa 2005).
264. Talia Fisher & Issachar Rosen-Zvi, *The Confessional Penalty*, 30 CARDOZO L. REV. 871, 906 (2008).

process of determining guilt is, the less random punishment will be, and so the greater will be the law's deterrent effect.'"[265] The Pennsylvania Department of Transportation (PennDOT), in arguing against baseless "failing to obey a traffic control device" pleas,[266] stated that "[w]hen courts and police cut deals, they tacitly encourage bad driving behaviors, such as speeding, and turn a dangerous habit into a penalty akin to double parking."[267]

Presiding Municipal Judge Joe Locascio from Kansas City expressed a similar concern "that, because of this [baseless plea] policy, people are undeterred from violating the city's traffic code."[268] In Kansas City alone, over 30,000 moving violations are pled down to baseless charges every year,[269] and "[p]roblem drivers keep on speeding, even when their licenses should be suspended or revoked" because there is no consequence for violating the traffic laws.[270]

Insurance companies and law enforcement officials in New Jersey, where the well-known "215 plea" was banned,[271] stated that "215 deals allowed poor drivers to continue their unsafe habits without fear of losing their license or paying higher insurance rates."[272] A spokesman for the Insurance Council of New Jersey said that "[f]rom a broader public policy standpoint, we're concerned that it becomes very difficult to detect and track high-risk drivers" who will stay on the road because they can plead to baseless charges and avoid penalties.[273]

b. *Baseless Pleas Threaten Public Safety*

A second policy argument that results from weakened deterrence is that baseless pleas threaten public safety. In researching Pennsylvania's baseless defective equipment pleas, PennDOT found that "diverting more and more speeders . . . into the no-points catchall. . . . allow[ed] risky drivers to remain on the road for a sustained time with a 'clean' driving record."[274] The traffic data made available to the public is based on convictions, so drivers who have entered baseless pleas have inaccurate

---

265. Henrik Lando, *Does Wrongful Conviction Lower Deterrence?*, 35 J. LEGAL STUD. 327, 328 (2006) (quoting Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1484 (1999)).

266. These pleas are similar to New Jersey's former "215 pleas." *See supra* note 240 and accompanying text.

267. Harry Yanoshak, *Beating the Speeding Ticket*, INTELLIGENCER (Doylestown, Pa.), July 11, 2004, at 1A (quoting Rebecca Bickley, PennDOT's director of driver licensing).

268. Mansur, *supra* note 36.

269. *See id.*

270. *Id.*

271. *See supra* note 239.

272. Hughes & Kraut, *supra* note 13.

273. *Id.*

274. Yanoshak, *supra* note 267.

driving records, and law enforcement officials are then less able to protect against them.[275]

In Kansas City, "bad drivers were allowed to repeatedly reduce speeding or other moving violations to a guilty plea to having defective equipment."[276] Safety advocates in Missouri say that "the practice theoretically allowed dangerous drivers to get away with bad behavior, causing danger to others."[277] Even "[s]erious violations—such as DUIs, racing on city streets, leaving the scene of an accident and fleeing the police—also were pleaded down to 'defective equipment,'"[278] and in fact "only .00169 percent of the defective-equipment pleas in the Municipal Court . . . were based on fact."[279] In 2005, one in every four tickets was baselessly pled down to defective equipment, such that "more than 30,000 moving violations a year in Kansas City simply disappear[ed]."[280] The number of pleas and the effect of "'[a]llowing people who are found to be driving under the influence or fleeing the scene of an accident puts it to a level of a crisis in our judicial system.'"[281]

Reporters from *The Des Moines Register*, a newspaper that closely covered the disciplinary proceedings against attorneys who negotiated cowl-lamp pleas in Iowa, stated that, among other things, there were two "things wrong with this [practice]: . . . It is a lie . . . [and i]t undermines public safety."[282] Recipients of plea bargains to cowl-lamp or defective equipment charges in Iowa were often "reckless drivers getting off the hook and back on the road" by confessing to violations for owning auto parts they had never even heard of.[283]

2. Ethics Concerns

a. *Baseless Pleas Violate Prosecutors' Obligation To Bring Charges Supported by Probable Cause*

In addition to these criminal justice policy concerns, authorities have brought forth two primary ethical concerns with the practice of baseless pleas. The earliest ethics concern was posited by the Iowa Supreme Court, which held that city prosecutor Bradley Howe clearly violated DR 7-

275. *Id.* (suggesting that the traffic data in eighteen magisterial districts in Bucks County and thirty districts in Montgomery County, Pennsylvania, are inaccurate because of baseless plea bargains entered in traffic court).

276. Campbell, *supra* note 10.

277. *Id.*

278. Mansur, *supra* note 79.

279. *Id.*

280. Mansur, *supra* note 36.

281. Mansur, *supra* note 79 (quoting Steve Glorioso, an aide to Mayor Kay Barnes).

282. *Courtroom Corruption*, *supra* note 250 (reporting that baseless pleas are a form of "courtroom corruption" and "legal extortion").

283. *Id.*

103(A),[284] prohibiting prosecutors from instituting charges they know lack probable cause, by charging and prosecuting defendants for violations of the cowl-lamp statute when he knew vehicles have not been equipped with cowl lamps "for a considerable number of years."[285] The court also made clear that the "fact that plea bargains to lesser or related charges are authorized by our rules of criminal procedure" and the fact that all the parties involved acquiesced in the plea agreement was "irrelevant" to the prosecutor's ethical obligation.[286] They argued the unqualified rule "DR 7-103(A) means what it says: prosecutors cannot ethically file charges they know lack probable cause."[287]

An earlier Iowa ethics opinion made the same argument, namely, that "[i]t is improper for a prosecuting lawyer and for a defendant's lawyer to enter into a plea agreement under which a prosecutor files charges that are not supported by underlying facts [even if] the defendant agrees to plead."[288] Likewise, Missouri's legal ethics counselor, despite supporting the use of baseless pleas, confessed that "[Missouri] state court rules prohibit a prosecution based on a falsehood, which . . . is essentially what happens in a [baseless] defective-equipment plea."[289]

b. *Baseless Pleas Threaten the Integrity of Court*

A second ethical argument made against the use of baseless pleas is that they undermine the integrity of the court. When the New Jersey Administrative Office of the Courts issued a directive that barred municipal courts from accepting plea agreements that downgraded traffic offenses unless a factual basis could be shown for the plea,[290] they did so "to 'eliminate practices in some municipal courts that threaten the integrity of

---

284. Iowa Supreme Court Att'y Disciplinary Bd. v. Howe, 706 N.W.2d 360, 368 & n.3 (Iowa 2005) (stating that the "'prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause'" and "'shall not institute or cause to be instituted criminal charges when the lawyer knows or it is obvious that the charges are not supported by probable cause'" (omission in original) (quoting IOWA RULES OF PROF'L CONDUCT 32:3.8(a); IOWA CODE OF PROF'L RESPONSIBILITY DR 7-103(A))).

285. *Id.* at 367.

286. *Id.* at 368. The court distinguished between the prosecutor's ethical duty to have a factual basis for the charge in the original indictment and the need for a factual basis for the offense in the ultimate plea agreement, and chose not to consider "whether guilty pleas to non-moving traffic violations require a factual basis or whether a court accepting such pleas must ascertain whether a factual basis exists [when the charge in the indictment is supported by a factual basis]." *Id.* at 368 n.4.

287. *Id.* at 371. Though not part of the holding of the case, the Iowa court also stated that allowing defendants to plead guilty to crimes with no factual basis was an improper use of prosecutorial discretion. *Id.* at 370–71 (quoting CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.10.3, at 762 (Practitioner's ed. 1986)).

288. Iowa Supreme Court Bd. of Prof'l Ethics and Conduct, Op. 87-13 (1988), *available at* http://www.iowabar.org/ethics.nsf/e61beed77a215f6686256497004ce492/c5ef81db09770e05862564c3004d874d!OpenDocument.

289. *Mansur*, *supra* note 79.

290. *See* Booth, *supra* note 239, at 1098.

the plea agreement process.'"[291] Judge Richard Williams, who promoted the ban, argued that the integrity of the judiciary was being compromised "when motorists swore under oath that they committed acts that had no basis in reality."[292] He argued that "'it is very important for people to have confidence in the court system and to recognize the system is working the way it is supposed to work and that it is fair . . . . There has to be a factual basis for downgrading charges.'"[293]

The Iowa Supreme Court, addressing Prosecutor Howe's filing of cowl-lamp violations without factual bases, similarly stated,

> [W]hen charges are filed that are known to all to be bogus and guilty pleas to those charges are accepted in order to allow defendants to escape the adverse consequences of the offenses they actually committed, there can be only one result: respect for the court system is diminished and the public's confidence in the integrity of the criminal justice system is seriously undermined. While the disposition of a traffic offense in the manner employed here may be the expedient way to dispose of a citation to the satisfaction of the parties involved, it sends the wrong message to the public. It makes a mockery of the justice system when a defendant is punished for violating a statute that he unquestionably did not violate.[294]

The general sentiments of authorities against this practice echo that of an Iowa citizen who said, "These deals should end. Now. Prosecutors who continue to cut deals by making people lie should be removed. Judges should scrutinize plea bargains more closely. And, state officials should find out just how far this spreads."[295]

III. JUDGES AND PROSECUTORS CANNOT ETHICALLY PARTICIPATE IN BASELESS PLEAS

Part III, acknowledging the legitimacy of the criminal justice policy concerns regarding baseless pleas, evaluates the ethical concerns raised by critics of the pleas, as discussed in Part II, and applies the ethics background discussed in Part I to assess baseless pleas in light of prosecutors' and judges' ethical obligations.[296] Though the Iowa Supreme Court properly found baseless pleas unethical under the probable cause rule, its conclusion was not based on the most compelling ethical grounds. Part

---

291. *Id.*

292. Editorial, *Plea Bargaining Traffic Tickets / Good Solution*, PRESS OF ATLANTIC CITY, July 27, 2000, at A10 [hereinafter *Good Solution*].

293. Hester, *supra* note 11 (quoting Winnie Comfort, a spokeswoman for the New Jersey courts).

294. Iowa Supreme Court Att'y Disciplinary Bd. v. Howe, 706 N.W.2d 360, 379 (Iowa 2005). Note, however, that this was unrelated to the court's holding, which was based solely on the violation of the prosecutor's probable cause obligation. *Id.* at 371.

295. *Courtroom Corruption*, *supra* note 250.

296. Although not analyzed in this Note, baseless pleas also raise separation of powers concerns. While the practice may not necessarily establish a constitutional violation, the practice may impede some of the doctrines of a tripartite democracy. *See supra* notes 18, 28 (referencing the legislature's responsibility to define crimes and the separation of powers doctrine as related to defining and adjudicating criminal law).

III.A therefore attends to the Iowa court's argument that baseless pleas are inconsistent with legal ethics because the practice contravenes prosecutors' obligation to bring charges supported by probable cause. Following this, however, Part III.B discusses the more substantial ethical interest implicated by baseless pleas—the integrity of the courts and criminal process—raised by the New Jersey Administrative Office of the Courts. Part III.B first explains how baseless pleas undermine the integrity of the courts and legal profession by institutionalizing deceit in the criminal justice system and defrauding the public. Next, Part III.B argues that baseless pleas challenge the fairness of the criminal process by allowing judges to decide cases in contradiction to the facts and allowing prosecutors to knowingly secure wrongful convictions. Part III notes that although defense counsel also have an ethical duty to avoid deceit, they do not have as clear an obligation to prevent the use of baseless pleas because of their unique role in the criminal process. Part III concludes that, regardless of the interests in efficiency and leniency, judges and prosecutors cannot participate in baseless pleas because these pleas violate judges' and prosecutors' ethical obligations. Finally, this part proposes both an amendment to the probable cause rule, as found in Model Rule 3.8(a), to clarify a prosecutor's probable cause obligation and the adoption of prosecutorial and judicial policies that explicitly prohibit baseless pleas.

A. *Prosecutors Violate the Probable Cause Rule by Participating in Baseless Pleas*

As the Iowa Supreme Court held, prosecutors violate the ethical obligation to bring charges supported by probable cause when they negotiate baseless pleas.[297] Prosecutors are obligated under Model Rule 3.8(a), adopted in nearly every state,[298] to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."[299] The Iowa court correctly found, therefore, that Prosecutor Howe violated the probable cause requirement by charging violations of the cowl-lamp statute when Howe knew there was no factual basis to support the charges.[300] Prosecutors like Howe who change charges in an indictment to offenses unsupported by probable cause clearly violate the ethical obligation of Rule 3.8(a) because this directly contradicts the wording of the rule.[301]

Although the Iowa court limited its analysis to the aforementioned situation,[302] the probable cause requirement of Rule 3.8(a) is also violated in situations where the offenses charged in the indictment are supported by probable cause but the offenses to which the defendant actually pleads are

297. *See supra* notes 284–87 and accompanying text.
298. *See supra* note 113 and accompanying text.
299. MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2009).
300. *See supra* notes 284–85 and accompanying text.
301. *See supra* note 107 and accompanying text.
302. *See supra* note 286.

without a factual basis. The probable cause requirement "carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[303] The prosecutor's duty under Rule 3.8(a) therefore includes a duty not to charge without probable cause and, additionally, not to allow convictions that are without a factual basis.[304] As the comment to Rule 3.8 specifies, the probable cause requirement was created to ensure that a defendant's guilt is based on sufficient facts.[305] When a prosecutor negotiates a plea to a crime that the prosecutor knows is without a factual basis—however documented in the charging instrument—the prosecutor is allowing a decision to be made on the defendant's guilt without a sufficient factual basis, which violates the purpose of the probable cause rule. Baseless pleas, therefore, are a violation of the prosecutor's ethical obligation to prosecute charges only where supported by probable cause.

B. *Baseless Pleas Undermine the Integrity of the Court, Legal Profession, and Criminal Proceeding*

While the Iowa court arrived at the proper conclusion that baseless pleas violate legal ethics obligations,[306] it neither based its decision on the most compelling grounds nor addressed all those involved in a criminal case who should be ethically obligated to avoid baseless pleas. The more persuasive reasoning against baseless pleas is that the practice challenges the legitimacy of the criminal justice system, both by undermining the integrity of the courts and legal profession and by subverting the fairness of criminal proceedings. Additionally, because both prosecutors and judges are responsible for carrying out the administration of justice, they violate their ethical obligations by participating in baseless pleas.

1. Baseless Pleas Undermine the Integrity of the Court and Legal Profession

Prosecutors, as ministers of justice,[307] and judges, as administrators of the justice system,[308] have an obligation to uphold the integrity of the court and the legal profession.[309] Prosecutors meet this obligation by maintaining their duties of candor toward the court, truthfulness to third parties, and truth-seeking.[310] Judges fulfill this obligation by maintaining the public's confidence in judicial integrity and properly regulating the bar.[311] By

303. United States v. Chu, 5 F.3d 1244, 1249 (9th Cir. 1993) (quoting MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. (1984)).
304. *See supra* notes 109–16 and accompanying text.
305. *See supra* notes 115–16 and accompanying text.
306. *See supra* Part II.B.2.a.
307. *See supra* note 100 and accompanying text.
308. *See supra* notes 184–85 and accompanying text.
309. *See supra* Part I.B.1, 3.
310. *See supra* Part I.B.1.
311. *See supra* Part I.B.3.a–b.

entering baseless pleas, however, prosecutors and judges contravene their ethical obligations and violate their duty to uphold the integrity of the courts and the legal profession.

a. *Prosecutors' Participation in Baseless Pleas Undermines the Integrity of the Court and the Legal Profession*

Prosecutors' truth-seeking duty[312] includes obligations to seek factually supported convictions, to act with candor toward the tribunal, and to be truthful to third parties.[313] In negotiating pleas to crimes that they know have no basis in fact, prosecutors are making misrepresentations to the court, defrauding the public, and ultimately derogating the truth-seeking process, which degrades the integrity of the court and legal profession.

Prosecutors have a duty of candor toward the tribunal that prohibits them from knowingly making false statements to the court, bans submission of false evidence, and requires them to take remedial measures to make falsities known to the court.[314] Pursuant to the probable cause requirement, the prosecutor may only prosecute charges supported by a factual basis.[315] Therefore, in submitting a plea agreement to the court, the prosecutor is asserting that there is a factual basis for the offense to which the defendant is pleading. The defendant's voluntary guilty plea, which is taken as a factual admission of guilt, is used as the evidence to support the conviction.[316] In a baseless plea, the prosecutor knows there is no factual basis for the offense being pled to, yet submits the plea to the court, thereby making a false representation to the court. In addition, by encouraging the defendant to accept a baseless plea and make what the prosecutor knows is a fraudulent admission of guilt to the court, the prosecutor is submitting false evidence in the form of the defendant's confession to obtain a conviction. Lastly, by offering the baseless plea and allowing the defendant to plead guilty knowing that the plea is fraudulent,[317] the prosecutor is violating the obligation to take remedial measures to remedy what the prosecutor knows is false evidence and a misrepresentation. These are clearly violations of the duty of candor to the tribunal.

The fact that judges are aware of the falsities does not justify the prosecutor's use of them. Proponents of baseless pleas may argue that, similar to other forms of deception allowed in criminal proceedings,[318] baseless pleas do not violate the duty of candor toward the tribunal because the court knows there is no factual basis for the offense and acquiesces in the defendant's plea. The baseless plea situation, however, is distinguishable from other circumstances where prosecutors are justified in

312. *See supra* notes 124–25 and accompanying text.
313. *See supra* notes 130–34 and accompanying text.
314. *See supra* note 134 and accompanying text.
315. *See supra* note 122 and accompanying text.
316. *See supra* note 60 and accompanying text.
317. *See supra* notes 31–35 and accompanying text.
318. *See supra* notes 144–49 and accompanying text.

engaging in deceptive conduct. In other circumstances, such as the use of undercover investigators or wiretaps, the deception is used to expose criminal activity, such as corruption, that would otherwise be difficult to investigate for the purpose of realizing justice.[319] In a baseless plea, however, the deception is not used to further justice or expose corruption, but rather for the sake of expedience,[320] often at the cost of generating corruption.[321] Further, while other forms of permissibly deceptive conduct are eventually exposed,[322] the deception in baseless pleas stays concealed even after the conviction is made.[323] Therefore, though prosecutors can ethically engage in deception in certain circumstances for law enforcement purposes,[324] baseless pleas are not one of those instances.

In addition to the duty of candor toward the tribunal, prosecutors have a duty of truthfulness to third parties[325] that is violated by participating in baseless pleas. The obligation of truthfulness toward third parties, illustrated by Rule 4.1, which prohibits lawyers from making false statements of material fact to third persons,[326] and Rule 8.4, which prohibits engaging in deceitful or fraudulent conduct,[327] includes a duty to avoid knowingly making misrepresentations to "downstream users."[328] In negotiating baseless pleas, prosecutors violate this duty by securing fraudulent convictions that result in false criminal records, which in turn defraud downstream users, such as the auto insurance company and the department of motor vehicles, which rely on convictions to determine insurance rates or to add points to defendants' licenses[329]—not to mention the employer, lender, and probation officer, who will all rely on the prosecutor's representation that the defendant had a broken taillight instead of a DUI.[330]

In addition to the duties of candor toward the court and third parties that are required by the ethical rules,[331] prosecutors have a professional ethos to seek justice, and in carrying out justice, to seek truth.[332] This truth-seeking duty is clearly illustrated by the ethical values and relevant rules that guide prosecutorial practice. The duties to charge only with probable cause, to prosecute only with sufficient evidence, to provide the defense with exculpatory evidence, and to remedy wrongful convictions all reinforce the basic premise that prosecutors have a duty to seek the truth, not simply to

319. *See supra* notes 145–47 and accompanying text.
320. *See supra* note 31 and accompanying text.
321. *See supra* note 282.
322. *See supra* note 149 and accompanying text.
323. *See supra* notes 274–83 and accompanying text.
324. *See supra* notes 145–46 and accompanying text.
325. *See supra* notes 131–32 and accompanying text.
326. *See supra* notes 131–39 and accompanying text.
327. *See supra* note 131 and accompanying text.
328. *See supra* notes 131–32 and accompanying text.
329. *See supra* note 37 and accompanying text.
330. *See supra* note 278 and accompanying text.
331. *See supra* notes 134, 138 and accompanying text.
332. *See supra* notes 124–25 and accompanying text.

secure convictions.[333] Baseless pleas derogate this truth-seeking process. The prosecutor, in offering a baseless plea agreement, knows that the defendant did not commit the crimes to which the defendant is pleading. This is not only a failure to seek truth, but an effort to hide it. When prosecutors fail to represent the public's interest in seeking truth, they undermine public trust in the integrity of the courts and the legal profession.[334]

b. *Judges' Participation in Baseless Pleas Undermines the Integrity of the Court and the Legal Profession*

Judges, as overseers of the administration of justice, have a foremost duty to promote public confidence in the legitimacy of the justice system[335] and, with this, the obligation to uphold the integrity of the courts and to properly regulate the bar toward that end.[336] By accepting guilty pleas to crimes judges know are without factual basis and allowing prosecutors to negotiate these baseless pleas in violation of legal ethics, judges denigrate the integrity of the court and fail to properly regulate the bar.

Judges promote public confidence in the integrity of the courts by upholding the integrity of the judiciary, which requires at a minimum that judges obey the law,[337] follow both procedural and ethical rules, and maintain the ethical standard expected of other members of the bar.[338] First, where criminal procedure rules require that judges determine the factual basis for the charges to which a defendant is pleading guilty,[339] judges are violating the law by accepting guilty pleas when they know the offenses charged have no basis in fact. Though the methods used to determine a factual basis may vary by jurisdiction,[340] judges in these jurisdictions cannot accept a plea without inquiring into the factual basis and, accordingly, cannot accept a plea they know has no factual basis.[341] Therefore, judges who are required to establish a factual basis for a guilty plea, but nonetheless knowingly accept baseless pleas, violate the procedural rules. This practice casts doubt on their credibility because "judges themselves must obey the law in order to credibly adjudicate allegedly unlawful conduct [of the public]."[342]

Second, judicial ethics demand that judges conduct themselves with the highest level of integrity to promote public confidence in the judiciary and

333. *See supra* note 150 and accompanying text.
334. *See supra* notes 103–04 and accompanying text.
335. *See supra* notes 185–87 and accompanying text.
336. *See supra* Part I.B.3.
337. *See supra* note 195 and accompanying text.
338. *See supra* note 192 and accompanying text.
339. *See supra* notes 57–59 and accompanying text.
340. *See supra* note 62 and accompanying text.
341. *See supra* note 57 and accompanying text.
342. Pingree, *supra* note 189, at 1114.

in the legitimacy of the courts.[343] Judges are held to a higher ethical standard, which includes the obligations of the rules of professional responsibility governing lawyers.[344] If lawyers have an obligation to avoid deceitful conduct that defrauds downstream users,[345] then judges have no less an obligation. In accepting baseless pleas, judges issue convictions for crimes they know were not committed, which defrauds the public and downstream users in violation of judges' ethical duties. In the same way that the prosecutor is obligated not to facilitate fraudulent convictions because of her duty to the insurance company, employer, and others, the judge who accepts a baseless plea for defective equipment rather than a DUI is also responsible to those who rely on the resulting convictions.[346]

In addition to diminishing the integrity of the courts, judges also weaken public confidence in the integrity of the legal profession by allowing prosecutors and defense attorneys to negotiate baseless pleas in violation of legal ethics. Judges are responsible for the ethical conduct of the attorneys they admit to practice law,[347] and especially for the conduct of those practicing in their courts.[348] When judges allow prosecutors and defense attorneys to negotiate baseless pleas, they encourage lawyers to make misrepresentations to the court and empower them to assist defendants in doing so. Judges also allow attorneys to deceive downstream users and the public who rely on the fraudulent convictions that result from baseless pleas. Specifically with regard to prosecutors, by allowing baseless pleas, judges are also sanctioning prosecutors' violation of the probable cause requirement. Therefore, in allowing prosecutors and defense attorneys to negotiate baseless pleas, judges promote the violation of ethical obligations, which is an obvious failure to properly regulate the bar.

2. Baseless Pleas Undermine the Fairness of Criminal Proceedings

In addition to undermining the integrity of the courts and the legal profession, baseless pleas also undercut the integrity of the criminal process—the fairness and accuracy of criminal proceedings. Prosecutors have a duty to seek justice,[349] and judges have a duty, in the interest of justice, to ensure that defendants are afforded a fair process.[350] Baseless pleas, however, contradict these basic duties to seek justice and ensure fairness by allowing prosecutors and judges to knowingly convict defendants of crimes for which they are not guilty, thereby foregoing justice and fair proceedings in favor of expedient convictions.

343. *See supra* note 192 and accompanying text.
344. *See supra* notes 193–94 and accompanying text.
345. *See supra* notes 131–32.
346. *See supra* note 37 and accompanying text.
347. *See supra* note 203 and accompanying text.
348. *See supra* note 208 and accompanying text.
349. *See supra* note 98 and accompanying text.
350. *See supra* Part I.B.3.c.

a. *Baseless Pleas Permit Prosecutors To Secure Wrongful Convictions*

Prosecutors, by facilitating baseless pleas, defy their duty to seek justice by purposefully convicting defendants of crimes they did not commit. Prosecutors have an ethical duty to protect the innocent from wrongful convictions.[351] This duty is reflected in the numerous obligations created to ensure prosecutors prevent and rectify wrongful convictions, including duties to charge only with probable cause,[352] to prosecute only with sufficient evidence,[353] to provide the defense with exculpatory evidence,[354] and to remedy wrongful convictions when exculpatory evidence is discovered.[355] With the abundance of safeguards to prevent and remedy wrongful convictions, prosecutors surely cannot be ethically allowed to intentionally convict people of crimes the prosecutor knows they did not commit,[356] which is essentially what occurs in a baseless plea. Even if the defendant agrees to the wrongful conviction, the prosecutor is not exempt from her ethical obligation to prevent such a conviction.[357] The prosecutor "'represents all the people and has no responsibility except fairly to discharge his duty,'"[358] which can "never be promoted by the conviction of the innocent."[359] However, when a prosecutor negotiates a baseless plea, she is circumventing her duty to the people and dismissing her responsibility to seek justice by knowingly convicting the defendant of a crime for which the defendant is innocent.[360] Regardless of the benefit of leniency to or the consent of the defendant,[361] by entering a baseless plea, the prosecutor is knowingly making a wrongful conviction. This is antithetical to the prosecutor's ethical obligations and prosecutorial role, and exposes the failure of the criminal justice system to provide fair and just proceedings.[362]

b. *Baseless Pleas Violate Judges' Duty To Ensure Fair Proceedings*

Judges, by accepting baseless pleas, violate their duty to ensure the fairness of criminal proceedings by entering judgments they know are in conflict with the facts of the case. Judges have a duty to defendants and to the public to ensure that criminal proceedings result in the "fair and accurate resolution of the question of guilt or innocence."[363] In carrying

351. *See supra* notes 156–57 and accompanying text.
352. *See supra* note 107 and accompanying text.
353. *See supra* note 122 and accompanying text.
354. *See supra* note 157 and accompanying text.
355. *See supra* note 156 and accompanying text.
356. *See supra* notes 158–60 and accompanying text.
357. *See supra* note 156 and accompanying text.
358. Hosford v. State, 525 So. 2d 789, 792 (Miss. 1988) (quoting Adams v. State, 30 So. 2d 593, 596 (Miss. 1947)).
359. Hurd v. People, 25 Mich. 405, 416 (1872).
360. *See supra* note 24 and accompanying text.
361. *See supra* note 11 and accompanying text.
362. *See supra* note 153 and accompanying text.
363. United States v. Nobles, 422 U.S. 225, 238 (1975).

out this duty, judges are granted the authority to create procedural safeguards[364] to supervise the plea bargaining process and are afforded broad discretion in accepting plea agreements[365] to ensure that convictions are based on honest appraisals of the facts.[366] When judges accept baseless pleas, however, they are deciding cases in knowing contradiction to the facts,[367] and often in opposition to the procedural rules requiring a factual basis.[368] Therefore, in accepting baseless pleas, judges disregard their obligation to reject unsupported pleas and fail to protect defendants' and the public's interests in fair criminal proceedings.[369]

Defense attorneys, though also subject to ethical rules, have the primary role of zealous advocate,[370] and thus a principal duty to achieve the best result for their clients.[371] Therefore, while defense attorneys have an obligation of candor to the court[372] and the public,[373] they do not have a comparable duty to prosecutors to seek justice or uncover truth,[374] and therefore do not have a similarly clear or compelling ethical duty to avoid baseless pleas.[375] Despite interests in judicial efficiency and in providing defendants leniency, judges and prosecutors cannot justify the use of baseless pleas that not only raise ethical concerns, but also run in direct opposition to the justice system's core ethical values. These values require judges and prosecutors to uphold integrity, discover truth, and administer justice. Baseless pleas, however, weaken integrity, hide truth, and circumvent justice. Therefore, these pleas cannot be condoned, much less encouraged, by judges and prosecutors.

C. *Proposals To End the Unethical Use of Baseless Pleas*

Although adherence to currently existing ethics standards prohibit prosecutors and judges from participating in baseless pleas, an amendment to the current probable cause rule and the adoption of prosecutorial and judicial policies that clarify court officers' ethical obligations may better prevent the use of baseless pleas and encourage prosecutors and judges to fulfill their ethical obligations. Rather than imposing sanctions, this Note argues that a simple clarification of already existing ethical responsibilities may adequately resolve this ethical issue.

364. *See supra* notes 219–26 and accompanying text.
365. *See supra* note 218 and accompanying text.
366. *See supra* notes 212, 217 and accompanying text.
367. *See supra* note 24 and accompanying text.
368. *See supra* notes 219–26 and accompanying text.
369. *See supra* note 218 and accompanying text.
370. *See supra* note 161 and accompanying text.
371. *See supra* note 162 and accompanying text.
372. *See supra* note 171 and accompanying text.
373. *See supra* note 176 and accompanying text.
374. *See supra* note 166 and accompanying text.
375. *See supra* notes 163, 166 and accompanying text.

To clarify prosecutors' ethical duty and inhibit the use of baseless plea bargains, Model Rule 3.8(a), the probable cause rule,[376] and the correlated state prosecutorial ethics rules should be amended to set a higher bar for initiating and maintaining criminal prosecutions. The rule should be modified to reflect the general consensus that a prosecutor should file "only those charges which he reasonably believes can be substantiated by admissible evidence at trial."[377] The model rule should, therefore, be changed from its current phrasing that prosecutors shall "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause"[378] to instead state the following:

> The prosecutor in a criminal case shall not . . . [f]ile in court or maintain a charge that the prosecutor knows is not supported by probable cause . . . [nor p]rosecute a charge that the prosecutor knows is not supported by evidence sufficient to establish a *prima facie* showing of guilt . . . [because a] prosecutor has the responsibility . . . . to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.[379]

That language would clarify that prosecutors are prohibited not only from initiating charges unsupported by probable cause, but also from continuing to prosecute a charge that the prosecutor knows is not supported by a factual basis. This would resolve the issue left unaddressed by the Iowa Supreme Court[380] by specifying that prosecutors cannot allow defendants to plead guilty to crimes with no factual basis, regardless of whether the offense documented in the charging instrument is supported by probable cause.

In addition to amending the probable cause rule, state attorneys general's offices and court administrative offices should adopt policies, similar to the one implemented by the New Jersey Administrative Office of the Courts, which "bar[s] courts from accepting plea agreements . . . unless a factual basis could be shown for the plea."[381] By adopting and adhering to policies that bar baseless pleas, prosecutors and judges uphold their ethical obligations and leave the criminal justice policy concerns to be addressed by the legislature[382] that may, as the legislature did in New Jersey, create new statutes to allow defendants to plead to factually based offenses while deriving similar benefits of expedience and leniency.[383]

---

376. MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2009).
377. NAT'L PROSECUTION STANDARDS Standard 43.3 (Nat'l Dist. Att'ys Ass'n, 2d ed. 1991).
378. MODEL RULES OF PROF'L CONDUCT R. 3.8(a) & cmt.
379. This wording is taken from the probable cause rule adopted by the District of Columbia. *See supra* note 123.
380. *See supra* note 286.
381. Booth, *supra* note 239.
382. *See supra* note 239.
383. *See supra* note 239.

CONCLUSION

Prosecutors and judges have a responsibility to the public to ensure the integrity of the courts and criminal process, which are essential to maintaining the legitimacy of the criminal justice system. Yet, when they knowingly allow defendants to plead guilty to "bogus" charges, "respect for the court system is diminished and the public's confidence in the integrity of the criminal justice system is seriously undermined."[384] So while courts and practitioners continue to exploit baseless pleas in the name of efficiency, they do so at the cost of their own integrity and that of the justice system. It is time to end the "mockery"[385] and end the use of baseless pleas.

384. Iowa Supreme Court Att'y Disciplinary Bd. v. Howe, 706 N.W.2d 360, 379 (Iowa 2005).
385. *Id.*