

“It Takes Two,” So “What’s Going On?”

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In his paper *A (Moral) Prisoner’s Dilemma: Character Ethics and Plea Bargaining*,¹ Andrew Ingram presents us with an interesting variation on the famous Prisoner’s Dilemma. Ingram’s puzzle offers a change in perspective—a Prosecutor’s Dilemma. Two conspirators scheme to jointly participate in a spree of petty thefts. During one of the petty thefts, they run into misfortune—they are caught. The police and prosecutor wisely suspect that more is going on, but evidence is scant. The prosecutor offers both the following deal: spill the beans, rat out your partner, and get a light(er) sentence. One accepts and one does not. Ingram believes that, in accepting the plea, the snitch has shown herself to be less honest—and less virtuous—than the loyal partner. Ingram argues that, in giving the snitch a lighter sentence than the loyal partner, the plea bargaining system has failed to preserve interests of justice.² Therein lies the puzzle: plea bargaining is an essential part of the criminal system, and yet it is on morally shaky grounds. What is a prosecutor to do?

In my attempt to defuse the puzzle, I begin by briefly recapping Ingram’s argument and pointing to some of its implications. Then, in response, I proffer some worries: I argue that Ingram’s descriptions of the motivations of the criminals are unpersuasive. Next, I argue that when we investigate the prosecutor’s options and the resulting ramifications, it becomes apparent how the prosecutorial tactic of offering the deal to the two conspirators attempts to preserve justice. In particular, I argue that there are many interests to be balanced, and use of the tactic is generally justifiable as an attempt to balance those many interests. Finally, I argue that there are limitations on using the tactic to preserve justice, and I distill basic guidelines for using the prosecutorial tactic that will safeguard the moral foundations of accomplice plea bargaining.

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¹ Andrew Ingram, *A (Moral) Prisoner’s Dilemma: Character Ethics and Plea Bargaining*, 11 OHIO ST. J. CRIM. L. 161 (2013).

² *Id.* at 169.

I. A CHALLENGE TO ACCOMPLICE PLEA BARGAINING

A. *A Tale of a Tactic Gone Awry*

Ingram narrates the following story: Tracy and Louisa are high school acquaintances. They happen to cross paths one day. They get to talking and, once pleasantries are out of the way, they scheme to commit a string of petty thefts. They participate in a number of thefts, and things go swimmingly. And along the way, something else happens: friendship. But this wild ride comes to an abrupt halt. One of their thefts goes wrong and they are caught by the police. A young inspector, call her Nancy,³ with a sharp mind and a lot to prove, suspects that there is more going on. She puts her Advanced Interrogation 301 skills to use and offers each the prisoner's dilemma: if you snitch on the other about the extent of your criminal dealings, then you will get a lighter sentence. Tracy accepts; Louisa refuses. Tracy gets a lighter sentence; Louisa gets the book thrown at her.⁴ So, should we be concerned? Ingram thinks so.

Here are some initial observations and background assumptions: Ingram considers only the situation where the criminals are actually guilty of the more serious conduct—that is, the scheme of thefts. As a result, he does not consider issues relating to the verifiability of the snitch's assertions. I follow suit and assume that the snitch's tattling must come with evidence that conclusively details the criminals' involvement in the more serious conduct.⁵ Next, Ingram states that his analysis is an “assessment of accomplice plea bargaining from the perspective of character ethics.”⁶ Ingram then argues that there is a spectrum of virtue/vice and criminals need not be “uniformly, indistinguishably bad.” That is, “virtue is distributed amongst [criminals] in varying degrees, just as it is in the social

³ This is an homage to Nancy Drew. CAROLYN KEENE, *THE SECRET OF THE OLD CLOCK* (1930) (introducing the character of Nancy Drew).

⁴ Ingram, *supra* note 1, at 164.

⁵ If we assume thusly, notice that if there is no such evidence, then Tracy cannot effectively snitch to satisfy the deal. Thus, the prosecutor need not worry about false confessions or wrong information that would result in the wrongful conviction of Louisa (and, depending on the deal, Tracy) on the more serious conduct. But one could imagine an accused providing false information that convinces the prosecutor of the accomplice's guilt, after the snitch succumbs to interrogation techniques, the specter of a long jail sentence, and the promise of leniency. In a fuller examination of the prosecutor's analysis, this should be factored in. *See infra* note 39.

⁶ Ingram, *supra* note 1, at 1622. I think that Ingram's puzzle may actually proceed in some form even without assuming a character-ethics perspective. Presumably, Ingram thinks that, by snitching, Tracy engaged in a less honest/virtuous/moral action than Louisa. He might endorse the position that, all other things being equal, one who commits less honest/virtuous/moral actions should be punished more. This might seem less intuitive a proposition, because our punishment scheme very apparently violates this maxim regularly. But my reasoning on solving this altered puzzle would be similar to the reasoning set forth below. In any event, as Ingram is the master of the puzzle, I play by his rules.

mainstream.”⁷ Finally, Ingram states that his argument is qualified: he says that the prosecutorial tactic creates a *risk* of objectionably disparate punishment, though in any particular case it may be the more virtuous person who agrees to cooperate with law enforcement.⁸

With this in mind, Ingram observes that actions are tied to character and that the decision to snitch and take a lighter sentence is reflective of a criminal’s character.⁹ Ingram then goes on to say that the person who refuses the plea deal is more honest (or more virtuous) than the person who accepts it.¹⁰ This is because criminal relationships are just like other relationships. They involve and require trust between the criminal conspirators. When a coconspirator confesses and turns state’s evidence against his accomplice, this can be a violation of trust. When one violates a trust relationship, that act is immoral (or at least *prima facie* immoral).¹¹ Then, Ingram makes the move from actions to character. He explains, “Actions are indicative of character because they are manifestations of character, a point recognized by philosophers and lay people alike [T]he fact that virtuous thought, feeling, and action are intertwined makes it correct to draw inferences from actions to traits and [vice versa].”¹² Thus, Ingram reasons as follows: the

⁷ *Id.* Ingram devotes a lot of attention to this point, but I find it uncontroversial.

⁸ *Id.* at 162 n.2.

⁹ *Id.* at 164–65. One might question if all actions speak to the individual’s character. Sometimes we say that an action was “out of character.” Youngjae Lee, *Recidivism as Omission: A Relational Account*, 87 TEX. L. REV. 571, 585 (2009) (discussing actions that are “out of character” and the resulting criminal responsibility). Since Ingram only argues that the tactic causes a “risk of objectionably disparate punishment,” he might respond that actions *usually* relate to character. I flag this issue, but I assume *arguendo* that actions relate to character in the way Ingram suggests. For more on the topic of the resulting criminal responsibility, see NICOLA LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES 66, 68, 71 (Ted Honderich ed., 1988); JEREMY HORDER, EXCUSING CRIME 120 (2007); R.A. Duff, *Choice, Character, and Criminal Liability*, 12 LAW & PHIL. 373, 374–78 (1993); Jeremy Horder, *Criminal Culpability: The Possibility of a General Theory*, 12 LAW & PHIL. 193, 207 (1993); Peter Westen, *An Attitudinal Theory of Excuse*, 25 LAW & PHIL. 331, 332–33 (2006).

¹⁰ Ingram, *supra* note 1, at 164–65. Ingram slides between speaking of honesty and virtue. Ingram states that he is talking about a broad notion of honesty. It is unclear to me whether he means “honest” to be synonymous with “virtuous.” I treat them as distinct terms in that there are virtues other than honesty, but honesty is a virtue. *Id.* at 161–62 n.1.

¹¹ *Id.* at 166. Ingram notes that *prima facie* moral wrongs may ultimately be morally correct actions. *Id.* at 166 n.8. This is close to how I understand the prosecutorial tactic to be justified, although the harm of disproportional punishment might be a *pro tanto* harm, and not merely a *prima facie* harm. See *infra* Part III.

¹² Ingram elaborates, “On the philosophical side, a virtue is traditionally characterized as a habit of thought, feeling, and *action*. The virtuous person is in the habit of performing virtuous deeds because his thoughts and feeling are bent in that direction. He not only understands the reasons why he should act a certain way but feels it to be proper as well. Feeling that something is the right thing to do means taking joy in the task and its accomplishment, and it means being distressed or saddened by seeing it neglected or the opposite done. The fact that she enjoys doing the right thing makes it so that the virtuous person will do so readily and willingly, without having to think the matter over in detail every time. For the virtuous person, doing the right thing is truly a habit in the sense that it is

criminal who snitches violates the trust of his accomplice. On the other hand, the criminal who keeps mum does not violate the trust of his accomplice. These actions are indicative of the criminals' characters: The snitch is dishonest and lacking in virtue; the loyal partner is not.

In light of that, Ingram reasons that the prosecutor's tactic runs afoul of character-ethics considerations. Ingram espouses the principle that, all other things being equal, less virtuous people should be punished more (and more virtuous people should be punished less).¹³ Tracy and Louisa committed the same criminal acts, so there is no reason for differentiation in punishment on this ground. Tracy has shown herself to be less honest and therefore of worse character than Louisa. Yet it is Tracy that receives leniency. Thus, use of this tactic results in a violation of the principle. Nevertheless, Ingram does not call for the abolition of plea bargaining. He recognizes its practical value, for example as an investigatory and prosecutorial tool. So he simply argues that we have to consider this moral cost of plea bargaining in the ledger.¹⁴

B. *Objections to Ingram's Puzzle and Ingram's Counters*

First, Ingram notes that his conclusion might seem curious, as it would seem that cooperating with law enforcement is indeed the ethical course of action. Ingram responds by pointing out that we must take into account the incentives and motivations of Tracy, the snitcher. The decision to cooperate is motivated by the promise of leniency, not the desire for contrition and a respect for justice. This is evidenced by the fact Tracy did not cooperate before the deal—and the resulting leniency—was offered. Thus, Tracy was not more honest or more virtuous than Louisa.¹⁵

Second, Ingram addresses a corollary objection that inferring character from actions might be more complex than he lets on. For example, Tracy and Louisa may be of equal honesty; but it might be that Tracy has an illness—say, diabetes—

done consistently and spontaneously, as if it were an instinct or a reflex.” Ingram, *supra* note 1, at 166–67.

¹³ *Id.* at 167–68.

¹⁴ *Id.* Some might suggest that Ingram was not formulating a puzzle based on such a principle. Rather, Ingram was simply stating that the prosecutorial tactic causes a disproportion in punishment and this disproportional punishment is *prima facie* or *pro tanto* bad. But this bad can be weighed against other results and ultimately justify use of the tactic on a case-by-case basis.

If this is what Ingram meant to argue, then we might think that Ingram's argument is less dashing than it appeared. I understood the force of Ingram's argument as follows: there is a bedrock principle that is being violated by using this tactic, and yet we persist with this morally precarious prosecutorial tactic because of its practical utility. But if Ingram is merely pointing out that the tactic has some bad consequences under certain conditions, and those are often outweighed by good consequences, I am less surprised. Even considering this alternative argument, as shown *infra* in Sections II.A–II.D, I think there are reasons to doubt that the tactic has those bad consequences.

¹⁵ *Id.* at 168.

that would make prison extremely difficult. As such, Tracy’s and Louisa’s actions are not comparable; Tracy’s condition makes her choices, and her deliberations about those choices, different. It might be that if Louisa were in the same place, she would choose the same. Ingram recognizes this pitfall, but says that *ceteris paribus*—that is, “all [other] things being equal”—the less honest person will choose to cooperate with the police.¹⁶

Finally, Ingram addresses the point that his whole discussion concerns character, while the penal system does not; rather, criminal punishment is aimed at a person’s actions, and not a person’s character. Ingram responds that he agrees that a penal system should focus on actions, in that a wrongful act is a necessary condition for punishment. But he thinks that this is compatible with a penal system that also concerns itself with character. As such, character-ethics concerns cannot be dismissed without thoughtful consideration.¹⁷

II. DEFUSING INGRAM’S PUZZLE

Ingram’s puzzle is intriguing, but I think there are strong responses to whether it poses any sustaining moral quandaries. First, I argue that there are plausible alternative explanations for Tracy’s and Louisa’s conduct that deflate the puzzle. Next, I argue that there are many interests to be balanced, and using the tactic is an attempt to balance those interests. When analyzing that choice of offering the deal, there will be different results in the balance of those interests. Ergo, all other things are not equal. As a result, Ingram’s governing principle is inapplicable and thereby not violated.

A. *In Defense of Tracy*

One primary objection is that there is something counterintuitive about Ingram labeling Tracy, who cooperates with the police, as less honest or less virtuous than Louisa. As we have seen, Ingram responds that even though Tracy is cooperating with the government to uncover wrongdoing, she is not motivated by civic duty, but rather by her own selfish interests. Therefore, her action is not indicative of honesty or virtue.

However, consider the following plausible explanation for Tracy’s conduct: Tracy, like everyone else, weighs her competing interests and acts to satisfy them, depending on their strengths. Here, Tracy had a number of interests, some of which were in tension: her duty of loyalty to Louisa, her civic duty, her duty to her family, her self-interest, et cetera. Notice, though, that it is unclear that Tracy

¹⁶ See *id.* at 170.

¹⁷ *Id.* at 177. There is an unstated premise here that we should prefer to take into account character-ethics considerations. The mere fact that character concerns are compatible—or not disruptive—with action concerns does not establish that our system should concern itself with character. I address this issue with more detail *infra*, in Section II.E.

chose some other interest *over* honesty. It could be that Tracy estimated that her civic duty and duty to Louisa—both duties that involve honesty—were in equipoise. It was the other interests—and we can stipulate that they do not involve honesty—that tipped the balance in favor of cooperation with the law enforcement. Under this explanation of the circumstances, we cannot adjudge Tracy to be less honest than Louisa; Tracy was primarily motivated by honesty, but honesty pulled her in two directions, and then her other interests broke the tie and dictated her action. Ingram considers all of this, but he finds it unpersuasive.¹⁸ He states that there is no reason to think that the snitch is just being nudged, because he thinks that most of the time the requisite virtue is nowhere in sight.¹⁹

What Ingram does not consider is that it could be that Tracy was motivated primarily by virtuous interests.²⁰ The other interests in play, and perhaps the ones that tipped the balance, might have been interests that resound in virtues other than honesty, such as the obligation to provide for one's family. Thus, it is similarly unclear whether Tracy was less virtuous than Louisa.²¹

Even considering this, Ingram may hold his ground about his belief about the common motivations of snitches. As Ingram notes, it is an empirical question. Seemingly we are not in a position to resolve that empirical question, but I am willing to assume *arguendo* Ingram's view about the snitch's motivations.

B. *In Scrutiny of Louisa*

Even still, Ingram has overlooked some plausible alternative explanations of Louisa's conduct. Louisa herself may not have been motivated by loyalty or honesty. Louisa might have read up on the Prisoner's Dilemma²² and thought to herself, "If Tracy mirrors my tight-lipped conduct, we'll both make it out Scot-free." To be clear, here Louisa acts loyally, with an expectation of loyalty, not because she values loyalty itself, but because she perceives loyalty as an instrument to accomplish her selfish interests. This of course besmirches the sterling reputation Ingram bequeathed Louisa, but it seems completely plausible. If this is the case—and, given Ingram's cynical view of the snitch's motivations, I

¹⁸ *Id.* at 168.

¹⁹ *Id.* at 174.

²⁰ *Id.* Another explanation is that Tracy's obligation to honesty would have led her to refrain, but her virtuous obligation to her family overwhelmed this obligation. Again, Tracy here might have been motivated primarily by virtuous obligations.

²¹ *Id.* Notice that none of this assumes that Tracy and Louisa are in different situations. Tracy and Louisa might have the exact same circumstances and distresses. Ingram's argument is that their respective actions reveal that Tracy is less influenced by honesty and virtue than Louisa. My point is just that Tracy may be weighing her interests in a way that is primarily influenced by honesty and virtue. This is true even if Louisa is weighing the very same interests (though Louisa will of course weigh them differently).

²² Steven Kuhn, *Prisoner's Dilemma*, in STANFORD ENCYCLOPEDIA OF PHIL. (Spring Ed. 2009), available at <http://plato.stanford.edu/archives/spr2009/entries/prisoner-dilemma/>.

see no reason for him to deny it—then Louisa is no more honest or virtuous than Tracy. In light of all this, I find Ingram's interpretation of the story unconvincing. There are alternate explanations of Tracy's and Louisa's actions that call into serious question whether Tracy the snitch is less honest (or virtuous) than Louisa.

C. *Tinkering with the Facts?*

At this point, one might object that I am unfairly tinkering with Ingram's story.²³ To clarify, I do not argue that Ingram's interpretation of the hypothetical is implausible or impossible. My argument is that Ingram's description may not be one that describes most, or even very many, cases. Thus, the relationship between Tracy's and Louisa's conduct may not give us the insight into their respective characters that Ingram thinks it does.

Recall that Ingram argues that the tactic creates a risk of objectionably disparate punishment. What does Ingram mean by this? I submit that he cannot simply mean that it is possible that, when using this tactic, objectionably disparate punishment will result. Our criminal justice system—and any justice system ever put into effect—risks mistakes. It might be better that ten guilty go free than one innocent punished, but few would say it is better that 1,000,000 guilty go free than one innocent punished.²⁴ And with enough trials, an innocent will wrongly receive punishment. So, if Ingram is merely pointing out that use of the tactic could possibly result in relatively unequal punishment, in terms of character or otherwise, we would happily assent to that point, yet think it unsurprising and uninteresting. Thus, I think for his argument to be forceful Ingram must mean that use of this tactic *engenders* this risk, because it is blind, perhaps willfully, to some information that bears relevance to ensuring proportional punishment. Because it is not clear that Ingram's description is probable or common, I argue that he has not shown us any particularly relevant information about the characters of Tracy and Louisa that the prosecutorial tactic fails to account for. Of course, there may be situations that fit Ingram's story exactly. As argued below, even there, I argue that use of the tactic may be completely justified.²⁵

D. *All Other Things Being Equal and the Risk of Disproportionate Punishment*

Ingram actually considers a similar, but distinct, objection: Tracy and Louisa might have been in different circumstances, such that Tracy's and Louisa's actions

²³ But while we are on the subject of questioning the hypothetical, we could also ponder whether in most criminal-accomplice scenarios there truly is a trust relationship. One of the Journal Editors raises this point with Ingram. Ingram, *supra* note 1, at 7 n.7. Again it is an empirical question, but my intuition is that criminal accomplices know that when the curtain drops, it is, in the words of the Three Stooges, "All for one. One for all. Every man for himself."

²⁴ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 74 (4th ed. 2006) (discussing the famous Blackstone aphorism).

²⁵ See *infra* Part III.

are not comparable. The situations might not indicate their respective virtues, because Tracy might have particularly pressing circumstances that Louisa might have herself succumbed to, had she been in the same position. Ingram agrees, but he says that *ceteris paribus*—that is, “all [other] things being equal”—the less honest person will choose to cooperate with the police.²⁶

What should we make of this *ceteris paribus* maneuver? At first glance, there is something fishy about abstracting away from the facts of a criminal’s situation and then making judgments about that criminal’s character. However, as noted, Ingram is not arguing that it is always the case that the less virtuous person will cooperate with law enforcement. Instead, he is arguing that the prosecutorial tactic “create[s] a risk” of this occurring.²⁷ Thus, through the *ceteris paribus* clause, Ingram means to abstract to what would happen in the general case. Then, if he is right about his descriptions of the motivations at play, this will establish that when this tactic is used, there is a risk of punishing the virtuous more than the vicious. This is a fair motivation for a *ceteris paribus* argument, but the devil is in the details. How exactly does he envision us making the circumstances “equal” to fulfill the *ceteris paribus* clause? Ingram does not tell us exactly what he has in mind. Let us just say that Tracy and Louisa are eerie clones: same family, health, financial situations, et cetera—even the same general system of values. And now let us run the tape: Prosecutor Nancy offers the deal, Tracy accepts, Louisa refuses.

Notice, though, that the strongest objections to Ingram’s assertion still stand: Tracy might have plausibly acted for reasons of honesty, and, beyond honesty, reasons that still sound in virtue. And in a similar vein, Louisa might have plausibly acted for reasons of self-interest that do not sound in honesty or virtue. Thus, it is unclear to me that Ingram has done more than tell us that it is possible that objectionably disparate punishment will result. To be clear, he again has not shown us any particularly relevant information about the respective characters of Tracy and Louisa that the prosecutorial tactic fails to account for. It is possible that Louisa is more virtuous than Tracy, but entirely possible that she is not. As mentioned, Ingram notes the possibility of other explanations of the criminals’ conduct and recognizes it is an empirical question, but he states that he is confident in his understanding of the criminal motive.²⁸ I have noted my dissent, but my skepticism is merely of the agnostic flavor. I do not mean to suggest Ingram is wrong about the motives of the Tracy and Louisa archetypes, but until we get resolution of that empirical question, I do not think Ingram has carried his burden of showing that the prosecutorial tactic ignores relevant information about the criminals’ characters.

²⁶ Ingram, *supra* note 1, at 170.

²⁷ *Id.* at 162 n.2.

²⁸ *Id.* at 173.

E. *Considering Character*

Now Ingram might have one card left. He might protest that the prosecutorial tactic is willfully blind to the most relevant information—it does not take into account character at all. This dovetails with the final objection that Ingram considers, namely that his analysis has proceeded under a character-ethics framework, whereas the penal system is concerned with action and not character. Ingram's response to this objection is that it is no objection at all, since a concern with action is not incompatible with a concern for character. And, turning his argumentative defense into offense, Ingram might suggest that since our penal system's goals are compatible with a concern for character, it is a failing of the prosecutorial tactic to ignore character considerations.

By way of background, the Anglo-American criminal law is generally understood to be motivated by side-constrained consequentialism.²⁹ Under this theory, punishment is motivated by consequentialist interests, but limited by retributivist principles.³⁰ To be clear, this means we punish in order to obtain a better state of affairs, but this is subject to the constraint that we not punish anyone more than they deserve. For the sake of argument, we can agree that side-constrained consequentialism is compatible with a concern for character. But we notice that character-ethics considerations play second fiddle to consequentialist motivations very regularly. Consider Bert and Ernie. They have virtually the same thoughts and (criminal) inclinations. Along comes a bright, grumpy Monday. Bert has breakfast, Ernie does not. Bert and Ernie are on their respective ways to work, when they encounter Oscar and Bhaskar—virtually identical trash-can dwellers on different sides of town. Bert has a sudden bout of rage, and he pummels Oscar to the point of grievous injury. Ernie has the same bout of rage, but after a single punch, he feels weak and quits (as breakfast is the most important meal of the day). Ingram would recognize that the difference in action here does not distinguish

²⁹ Mitchell N. Berman, *On the Moral Structure of White Collar Crime*, 5 OHIO ST. J. CRIM. L. 301, 313 (2007) (characterizing side-constrained consequentialism as the "dominant principle" of American law); Antony Duff, *Legal Punishment*, in STANFORD ENCYCLOPEDIA OF PHIL. (2008), available at <http://plato.stanford.edu/entries/legal-punishment/> (detailing side-constrained consequentialism).

³⁰ I accept this common wisdom, but I suspect that there are retributivist motivations in our penal sanctions. In this section, Ingram also discusses retributivism. In so doing, he characterizes retributivism as focused on the criminal's actions and not his character. This characterization of retributivism occurs to me to be askew. Although the term can be slippery in the literature, most understand "retributivism" to be a theory of punishment that holds that criminal wrongdoers deserve to be punished and that punishing criminal wrongdoers is an intrinsic good. DRESSLER, *supra* note 24, at 16 (discussing retributivism). Understood in this way, retributivism is entirely compatible with a concern for character; it is possible for a retributivist to hold that a criminal wrongdoer deserves punishment *in light* of his bad character, revealed by his criminal wrongdoing. Lee, *supra* note 9, at 579–84 (discussing character-based accounts of recidivism); see also VICTOR TADROS, CRIMINAL RESPONSIBILITY 53 (2005); ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 382–84 (1981); Michael D. Bayles, *Character, Purpose, and Criminal Responsibility*, 1 LAW & PHIL. 5, 7 (1982). But no harm done, for Ingram ultimately agrees.

Bert's and Ernie's characters. Indeed, he says, "[o]n the philosophical side, a virtue is traditionally characterized as a habit of thought, feeling, and *action*."³¹ Bert and Ernie have the same thoughts, feelings, and urges to act—it's just that one has the necessary calories to perform the grievous assault. Both are charged for assault, but Bert gets a harsher punishment. Under our penal system, this result may be justified by balancing the many different consequentialist interests and retributivist limitations, like general and specific deterrence, incapacitation, rehabilitation, respect for private thought, proportional punishment, et cetera.³² This is not surprising or controversial, and indeed Ingram agrees.³³

So, with all that in mind, has Ingram's puzzle exposed a failure to consider adequately concerns of character? I submit not.³⁴ Recall that Ingram's motivating principle is: all other things being equal, criminal punishment should punish less virtuous individuals more, and punish more virtuous individuals less.³⁵

Now, let us revisit Tracy and Louisa. Of course, I have argued that definitive judgments about Tracy's and Louisa's character are greatly exaggerated. But, in charity, let us proceed by granting that Tracy is less honest and less virtuous than Louisa in the way Ingram imagines. I contend that Ingram's puzzle can be explained by the fact that all other things are not equal. The way Ingram has set up the hypothetical, the government has a choice: do not offer the deal and let the two go free on the more serious criminal conduct, or offer the deal and nail at least one of the two on the more serious conduct.

If the government does not offer Tracy and Louisa the deal, then it will allow two criminals to go unpunished for the more serious conduct. This has a number of detrimental consequences—we would lose out on incapacitation, rehabilitation, specific deterrence, general deterrence, et cetera. Contrariwise, if the government does offer the deal, it will result in a number of good consequences—like gaining all the things lost above. To be sure, there will also be some detrimental consequences here too, for example, disproportionate punishment between Tracy and Louisa. Whether the net consequences are good or bad will come down to a case-by-case determination. But what is clear is that all things are not equal.

³¹ Ingram, *supra* note 1, at 166 (emphasis in original).

³² The result is also justifiable under retributivist theories that do not locate desert solely in character. For example, if the retributivist theory locates desert in conduct—that is, one deserves punishment in light of his conduct, regardless of his character—then this result is justified, as Bert's conduct was worse than Ernie's. Of course, one could question whether Bert and Ernie should be punished differently, but my point here is a descriptive one.

³³ Ingram, *supra* note 1, at 177.

³⁴ This analysis depends on my interpretation of Ingram's argument, as discussed *supra* note 14. Under the alternative interpretation I suggest there, this part of my argument is inapplicable. In its place, I would argue that our penal system is able to adequately consider concerns of character. This is described in Part III and, in particular, *infra* note 38 and accompanying text.

³⁵ Ingram, *supra* note 1, at 170–71.

Therefore, the antecedent of Ingram's motivating principle is not satisfied and the principle is not violated.

One might protest that I have mangled the puzzle, as the puzzle critically assumes that our penal system was motivated primarily by character ethics. But similar reasoning applies even in the character-ethics calculation: if the government does not offer the deal, then it will be allowing vice to go unpunished—Tracy and Louisa get off for the more serious conduct. If the government does offer the deal, and it is accepted by Tracy, vice will be punished with respect to Louisa, but there will be a relative inequality between Tracy and Louisa. All other things are again not equal, so the antecedent of the principle goes unsatisfied, the principle is inapplicable, and thus the principle is not violated.

To be clear, all I have shown at this point is that Ingram's puzzle about the prosecutorial tactic has been defused. Ingram's puzzle rests on the following principle: all other things being equal, criminal punishment should punish less virtuous individuals more, and punish more virtuous individuals less. But the prosecutor's choice between offering the deal and keeping mum does not leave all other things equal. Thus, the principle is inapplicable to his hypothetical, and the principle is not violated. There still remain questions about whether and when using the prosecutorial tactic is justified.

III. JUSTIFYING THE TACTIC AND DISTILLING FOUNDATIONAL GUIDELINES FOR THE TACTIC'S USE

The prosecutor's deal is generally justifiable, but there are circumstances under which use of the tactic would be improper. I have just argued that Ingram's riddle is solved when we consider the prosecutorial tactic as a tool to balancing the many different interests of justice. If we consider the scenario under a side-constrained consequentialist theory of punishment, those different interests include *inter alia* incapacitation, rehabilitation, general deterrence, specific deterrence, and proportional punishment. Depending on whether the government offers the deal or not, these interests will be satisfied differently. All other things will not be equal, and so the principle does not apply.

Now, whether the government should offer the deal or not depends on the balance of the interests. This is of a course a case-by-case, fact-dependent analysis. But one important point is that proportional punishment is an interest of justice to be balanced. Ingram recognizes this when he says we must weigh the moral cost of plea bargaining in deciding if it is justified.³⁶ Let us now investigate the weight of proportional punishment and the balance of the various interests at play.

In terms of side-constrained consequentialism, proportional punishment affects multiple considerations. First, it may relate to consequentialist goods to be maximized. This depends critically on the brand of (side-constrained)

³⁶ See *supra* note 14 and accompanying text.

consequentialism and, specifically, what are the goods to be maximized. But as one general example, proportional punishment can relate to general deterrence; when the public sees criminals punished sensibly and predictably, the public is better equipped and incentivized to follow the rules. Second, proportional punishment may relate to the limitation on punishment according to negative retributivist principles. The most important principle is, "One should not be punished more than he deserves." In determining what punishment one deserves, relative punishments may be relevant. For example, if a criminal receives a punishment worse than others, this might be a declaration that his action is worse than theirs. That statement itself is part of the criminal's punishment.³⁷ Thus, we may have to consider the severity of that statement in adjudging whether the criminal is receiving his just deserts. Also, what about character? Most generally, proportional punishment (and reward) of character incentivizes good character, which relates to good consequences; at the same time, proportional punishment of character concerns retributive limitations insofar as character is connected to desert.³⁸

Proportional punishment, and the lack thereof, comes in degrees. There is highly disproportionate punishment and there is marginally disproportionate punishment, and shades all between. Marginally disproportionate punishment may have no bad consequences at all; the difference in punishment could be so little that people do not even notice. And marginally disproportionate punishment might not affect a criminal's just deserts. If we agree that petty thieves deserve thirty days of incarceration, but thieves often get out in twenty-eight days, we might still assert that the thirty-day incarceration was just. In contrast, highly disproportionate punishment can be extremely damaging. It can result in terrible consequences—it can cause total loss of faith in the penal system, perhaps leading to revolt, unrest, and behavior inconsistent with our norms. And it can also raise serious questions about desert: we might be willing to agree, in the abstract, that a thief deserves twelve years of incarceration; but upon seeing many thieves receive only three years of incarceration, we might be concerned that it would exceed a particular thief's just deserts to incarcerate him for twelve years.

The particular rules governing how to weigh the consequentialist interest of proportional punishment, the retributive limitation on proportional punishment, and the other interests floating around are surely difficult to enunciate and relate, even when all the facts are filled in. As a broad, structural point, in a side-constrained consequentialist penal system like our own, the prosecutor must weigh the disproportion in punishment as an interest in justice against consequential interests and the retributive limitations on punishment. Ergo, there are two parts to

³⁷ DRESSLER, *supra* note 24, at 19 (discussing the expressive theory of punishment).

³⁸ But suppose character is not directly related to desert; suppose rather that desert is related directly to the actions actually committed. If Thelma and Louise commit the very same acts, but we punish Thelma worse for having a worse character, we might be violating a retributivist limitation on punishment!

this inquiry: First, when considering proportional punishment as a consequentialist interest, if relative inequality in punishment results in net bad consequences—outweighing the good consequences from using the tactic—the prosecutor must refrain from offering the deal. Second, when considering proportional punishment as a negative retributive interest, if relative inequality in punishment results in an individual being punished more than he deserves, then the prosecutor must refrain from offering the deal.³⁹ If both hurdles are crossed, the prosecutor may offer the gambit. Of course, the efficacy of the tactic—the likelihood that the snitch will tattle—will likely be tied to higher disparity in punishment. The less punishment offered the more likely the snitch will accept the deal. The prosecutor is tasked with navigating these difficult waters.

Let us now revisit Tracy and Louisa. Suppose the more serious conduct carries a sentence of ten years. Consider two potential versions of the prosecutor's tactic: first, if Tracy cooperates, she gets seven years; and, second, if Tracy cooperates, she receives a month of incarceration. Under the first, the disproportion is not insignificant, but not intolerable. Seven years is a long time, Tracy will be incapacitated and specifically deterred, and we will get some general deterrence as well. The three-year difference might raise some questions about what Louisa deserved.⁴⁰ But these are not overwhelming worries. Overall, this deal seems like an acceptable balancing of the relevant interests.⁴¹ Contrastingly, the second disparity is highly disproportionate. We get little incapacitation and specific deterrence of Tracy, we might dent general deterrence to some extent because of the story of Tracy's light sentence,⁴² and the difference between Tracy's and Louisa's punishments is sufficient to raise serious questions about Louisa's treatment. The positive results from offering the deal to Tracy are seemingly not

³⁹ As discussed earlier, I do not consider the risk that the information provided by the snitch might wrongly convict the accomplice. *Supra* note 5. But there is surely some risk of this in the real world. One way to minimize this risk is to require more evidence/corroboration from the snitch. However, the more evidence/corroboration required, the less likely the snitch will be to comply, even if the snitch is telling the truth. This will decrease the effectiveness of the deal and result in bad consequences. Indeed, it is quite difficult to measure this risk of false information; it is hard to determine that a snitch's information implicating an accomplice is false, and it is all the more difficult to determine the frequency of such cases. Because of the importance of plea bargaining in the penal system, I think this is an interesting issue for future research.

⁴⁰ Ingram might even suggest that the disproportion is more than three years, because Tracy has a worse character than Louisa, and thus should be punished worse.

⁴¹ The real hurdle will be whether such mitigated punishment would incentivize Tracy to accept the deal. Three years would be a sufficient incentive, in my opinion, but only Tracy knows the answer to that question.

⁴² When stories of such large disparities in punishment become known, they have the potential to erode confidence in the proper functioning of the penal system by diminishing would-be criminals' perceived chance of being apprehended and punished appropriately for criminal conduct.

worth the detriment it would cause to both consequentialist interests and preserving retributive limitations.⁴³

Thus, in summation, I argue that the prosecutor's tactic, when sagely utilized, is generally justifiable. The question is simple in form but complex in application: Does using the tactic balance the interests of justice properly? Under a side-constrained consequentialist theory of punishment, we must inquire whether using the tactic results in net good consequences, without violating negative retributive limits on punishment by punishing one more than they deserve. This analysis is fully equipped to take into account character, insofar as proportionate punishment of character relates to good consequences and retributive limitations.

IV. CONCLUSION

Plea bargaining has become an invaluable tool for prosecuting criminals, yet, at the same time, it is not without controversy. Andrew Ingram has pointed us to one potential worry in accomplice plea bargaining: where two equal accomplices are offered the opportunity to cooperate against the other in exchange for leniency, the one who accepts this offer may be the less honest, and the less virtuous. In response, I have contended that this puzzle is not all too worrisome. First, I argued that Ingram's description of the motivations of the criminals are not clearly common or probable, and thus he has failed to show that using the tactic creates a risk of objectionably disproportionate punishment. Then I argued that when we investigate the prosecutor's options and the resulting ramifications, it becomes apparent how the prosecutorial tactic attempts to preserve justice. In particular, there are many interests to be balanced, and use of the tactic is generally justifiable as an attempt to balance those many interests. Finally, understanding this role of the prosecutorial tactic to preserve justice, I have argued that there are limitations on using the tactic, and I have distilled basic guidelines for using the prosecutorial tactic that will safeguard the moral foundations of accomplice plea bargaining. These basic guidelines can be summed up in the following maxim: Do not miss the forest for the trees, but do not forget that the tree is part of the forest.

⁴³ I am certain that opinions will differ on my particular examples. The examples are merely intended to convey the methodology of the analysis.