Can Prosecutors **Temper the Criminal Code** by Bringing **Factually Baseless Charges** and by **Charging Nonexistent Crimes**?

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FOR REASONS THAT MERIT AS MANY AS TWO CHEERS BUT RAISE CONCERNS, PROSECUTORS, DEFENSE LAWYERS, AND JUDGES IN SOME STATES CIRCUMVENT CRIMINAL LAW IN THE NAME OF SEEKING FAIRER OUTCOMES.

BY DARRYL K. BROWN

In what ways, if any, can prosecutors legitimately use their charging power to resist or circumvent legislative policies that are codified in criminal statutes? One way they do so is relatively familiar and largely uncontroversial. It is not hard to find examples of prosecutors using their discretion to charge some offenses that apply to a defendant's conduct rather than others in order to avoid triggering either mandatory sentences or collateral consequences that are triggered by convictions for specific crimes.

My focus will be a second, very different kind of prosecution practice for circumventing the limits of state criminal laws, a tactic that is both more controversial and less familiar—somewhat surreptitious yet perhaps quite widespread. This practice, in fact, comes in two forms. One is charging factually baseless crimes—that is, filing criminal charges that prosecutors lack the evidence to prove because defendants did not, in fact, commit them. The other is charging "nonexistent" offenses—crimes that are not, in fact, legally valid or recognized offenses at all under state law. Both of these practices occur—sometimes quite openly—in several states.

Yet both pose a fundamental challenge to core rule-of-law components: that the legislative branch has the sole power to make the laws; that law restricts the scope of executive power because prosecutors can act only on the basis of duly enacted criminal laws; and that, even under available laws, criminal prosecutions commence only when officials have some evidence that a suspect has, in fact, violated a valid criminal offense.

Broadly speaking, two sources of law impose those limits: (1) constitutional separation of powers, pursuant to which the legislature has exclusive power to make law; and (2) the legality or *nulla poena sine lege* principle (no punishment without law), which constrains the state's power over individuals, especially through the prohibitions on *ex post facto* laws and laws that are too vague to provide adequate notice of their meaning.

In many states, however, these two black-letter boundaries on the government's power to prosecute and punish have exceptions. Prosecutors sometimes proceed against defendants for "baseless" offenses—crimes defined in the state code, but which they lack the evidence to prove. Moreover, trial courts convict and sentence in such cases despite the government's failure of proof. They do so usually with no subterfuge, as appellate courts affirm those convictions. Likewise, in some states, appellate courts have endorsed convictions for "nonexistent" offenses—"crimes" that are not in the state code and so not, as a matter of law, crimes at all.

When legal scholars have addressed factually baseless charges and nonexistent crimes, they uniformly condemn both practices. But in some jurisdictions, the criminal bar and bench openly defend one or both practices. Appellate courts in several states continue to approve of one or both. And, in Ohio, a recent proposal to amend the state criminal procedure rules explicitly to prohibit convictions without a factual basis was defeated after public objections from the state prosecutors' association and some state judges. Although I long ago moved from the practitioner to the scholarly side of the divide, I nonetheless here will join the lawyers and judges on this one, with qualifications, and argue in defense of factually baseless convictions in particular.

There are certainly grounds to worry about a practice that challenges core rule-of-law principles, but I will make the case that, for baseless convictions at least, the departure is less than it seems, and that this innovation can serve legitimate public purposes. Even though these tactics nominally expand prosecutorial power, they generally serve defendants' interests. Closely considered, factually baseless criminal convictions seem often to function as improvised responses to deficiencies in state criminal codes and sentencing laws, at least in the eyes of those who know the system best. They might even be interpreted as implicit protests by the criminal justice actors who know best how criminal law works in practice.

Illustrations by Sam Ward

State Law on Factually Baseless and Nonexistent Offenses

Judicial approval of criminal convictions without proof that a defendant violated a valid statutory offense are found in two distinct lines of cases: (1) those affirming convictions under a criminal statute for which prosecutors cannot prove a factual basis, and (2) those affirming convictions for "nonexistent" or "hypothetical" offenses that do not exist—i.e., are not valid crimes—in state law. Both variants are recognized in several states. Courts have expressly condoned factually baseless convictions in Delaware, Kansas, Maryland, Michigan, New Mexico, New York, Ohio, Washington, and Wisconsin. Appellate decisions explicitly affirm convictions for nonexistent, hypothetical, or invalid crimes in Delaware, Illinois, Kansas, New Hampshire, New York, and Ohio.

The catch is that courts sustain these sorts of convictions only when they result from guilty pleas, usually pursuant to a plea bargain. Even states doing so uniformly hold that convictions for the same nonexistent offenses are invalid when they result from jury verdicts. (Juries are occasionally led to convict for nonexistent crimes on the basis of erroneous instructions that misdescribe the law of codified offenses.) It is hard to imagine how the courts could proceed otherwise in this respect: To allow a jury or judge to convict a defendant at trial without finding a factual basis for guilt beyond a reasonable doubt would be unconstitutional. To be sure, confining this body of law to guilty-plea cases is a substantial *conceptual* limit on factually and legally baseless convictions, but it is not a significant *practical* one. In all U.S. jurisdictions, fewer than one in ten convictions are achieved through trial. Plea bargaining, as the Supreme Court has famously observed, "is not some adjunct to the criminal justice system; it *is* the criminal justice system."

To be clear, it seems that most U.S. jurisdictions do not endorse factually or statutorily baseless convictions. Both practices are barred in federal courts. Appellate courts in some states consistently reverse plea-based as well as trial-based convictions for nonexistent offenses. Let me summarize the situation by saying that enforcement of convictions for nonexistent crimes or without factual proof is widespread but not a practice to which most states adhere. That split among the states sharpens the question: given that most states seem to find no reason to tolerate factually or legally groundless convictions, why do so many continue to enforce and rationalize them?

The Case for Factually Baseless Charges in Plea Bargains

Unlike convictions for nonexistent offenses, factually baseless charges, in this context, are usually crafted by the parties and accepted by trial courts intentionally rather than inadvertently. Justifications offered by courts and lawyers for this practice boil down to three arguments. One is a familiar argument of expediency: the criminal justice system needs to resolve most prosecutions by guilty pleas, and without the option to reach plea agreements on charges that do not match the defendant's factual conduct and circumstances, fewer prosecutions would be resolved by guilty-plea agreements. The second is implicit in the first: sometimes a defendant *wants* the option to plead guilty to a factually baseless charge, because it provides an advantage over the alternatives. Third, the common law that states have devised for factually baseless pleas ensures (at least as much as the criteria for ordinary guilty pleas do) that defendants convicted in this manner are not innocent or unduly sanctioned, because courts must find a factual basis for greater, "related" charges—typically the originally filed charge.

The expediency rationale merits skepticism. Courts and prosecutors frequently worry that any regulation of plea bargaining will impede its efficiency and overburden criminal courts. But there is little beyond anecdotal evidence to support claims that baseless pleas contribute significantly to efficient case dispositions. Although there are too many variables for firm empirical conclusions, what data exist on states' criminal case clearance rates, trial rates, and guilty-plea rates suggest there to be little difference between states that rely on factually baseless guilty pleas and those that do not.

The stronger arguments for baseless pleas are those grounded in the appropriateness—in the view of the parties and the court—of the conviction and sentence. A survey of baseless-conviction cases suggests that they often result in more favorable outcomes for defendants than any alternatives—dispositions of which prosecutors approve, since they engineered them by filing the factually baseless charge. The fact that these sorts of convictions are both deliberately crafted by parties and approved by trial courts points to underlying deficiencies in state criminal codes and sentencing laws. Baseless guilty pleas are an improvised means of working around those deficiencies and rendering more just criminal dispositions.

Some examples of factually baseless convictions clarify the point. Consider a Wisconsin case from the early 2010s, *State v. Jackson*. After the defendant was charged with battery and related offenses, his bail was set at $2,500, with the condition that he have no contact with the state's

primary witness. Unable to post $2,500, Jackson was not released on bail. But he did make a threatening phone call to the state witness. For this he was charged with intimidating a witness and bail jumping. In exchange for Jackson's agreement to plead guilty to bail jumping (a class H felony), the prosecution dropped the more serious charge of witness intimidation (a class G felony). Jackson's phone call to the witness gave the prosecution a factual basis for witness intimidation, defined as attempting to "prevent or dissuade any witness from attending or giving testimony at any trial." But the state lacked evidence of bail jumping, which is defined as an intentional failure to comply with the terms of his or her bond by anyone "*having been released from custody*." Jackson was never released from custody. What, then, is the factual basis for his guilty plea to that charge?

The standard answer in jurisdictions that recognize baseless pleas is twofold. One is that the defendant consented to be convicted for the offense and gained something from it, such as a lesser sentence or dismissal of charges. The second is that the trial judge can accept such a guilty plea only if she finds a factual basis for the *different*, greater charge (here, witness intimidation) of which he was *not* convicted. An important point here is that the guilty-plea charge is not a lesser-included offense of the greater offense, which the court dismissed. A factual basis for the greater offense would necessarily provide a basis for the lesser-included offense. Instead, courts substitute an equitable assessment focused on whether the two offenses are sufficiently "related" that conviction on the baseless charge is deemed fair. Courts describe this standard more as *recognizing* than *authorizing* the practice of negotiating guilty pleas to offenses that defendants did not actually commit.

States that permit baseless convictions do so across the full range of crimes, from the most serious felonies to minor crimes. The defendant in another recent Wisconsin case, *State v. Morales* (Wis. App. 2017), was charged with first-degree attempted homicide for assaulting his victim by punching him and—holding a pencil in his fist—causing puncture wounds. Morales eventually pleaded no contest to aggravated battery, a lesser felony without a clear factual basis. Attempted homicide requires intent to kill but not injury to the victim; aggravated battery requires causing great bodily harm. But the court convicted Morales of the latter offense based on the state's evidence for the greater offense (Morales's intent to kill), leaving unanswered whether the victim suffered "great bodily injury." In *State v. Majors*, a 1980 case from the Washington Supreme Court, a defendant charged with first-degree murder pleaded guilty to second-degree murder—for which there was ample factual basis—and to being a habitual criminal, for which there was not. Habitual-criminal status (which increased Majors's sentence beyond second-degree murder) requires two prior convictions, for which the state apparently lacked proof. But the clear factual basis for the murder offense, and Majors's consent to the plea bargain, were sufficient.

A disproportionate number of reported baseless convictions involve sexual assault crimes. In a Maryland case, *State v. Rivera* (Md. App. 2009), the defendant was charged with five serious felony counts of child sexual abuse. To avoid evidentiary challenges at trial, forcing the victim to testify and triggering deportation proceedings for the defendant, the prosecution and defense reached an agreement that the felony charges would be dismissed after the defendant pleaded guilty to one newly filed misdemeanor for "contributing to

a condition rendering a child in need of assistance." The Maryland court affirmed the conviction even though the state provided no basis for finding the misdemeanor's elements that "court intervention [for the victim] is needed" and that "the child's custodian is unwilling or unable to provide the proper care."

On the one hand, the fairness to defendants in this practice is apparent. Even for factually baseless guilty pleas, courts still make a factual basis finding that the defendant committed *some* offense. Conviction on a factually baseless offense always rests on a finding about a greater offense. Courts still (as they must) confirm that guilty pleas are knowing and voluntary, and that defendants are aware of the plea bargain terms. The requirement that courts find a factual basis for guilty pleas before accepting them and convicting defendants may be too lax generally. But it is not *laxer* in baseless-plea cases; it is simply focused on a greater offense for which the defendant will not be convicted.

On the other hand, there remains something fundamentally disconcerting about convicting people of crimes that they did not commit, even if it is done in exchange for *not* convicting them of other crimes that they probably did commit. Most U.S. jurisdictions refrain from this practice. What is the appeal for those that do not? It cannot simply be that the state is convinced the defendant committed the greater crime but cannot prove it. If the state lacks sufficient proof, it doesn't get to convict. And assuming that defendants can recognize the state's weak case, they should be uninterested in pleading guilty to anything. Most if not all of these cases should be ones in which the state has a good chance of proving its case at trial but seeks a plea agreement for familiar reasons—a certain conviction in much less time, for much less expense, and much less burden to victims and witnesses.

This point leads to the insight that baseless pleas are a signal that the state's criminal code or sentencing laws are deficient in some respect—too rigid or insufficiently fine-grained in the distinctions they authorize among offense definitions and sentencing options. In effect, baseless pleas are a collective criticism of—or a protest to—state legislatures that is made in unison by judges, prosecutors, and defense attorneys. The professionals who know best how well the criminal code and sentencing laws operate—on the ground, in trial courts, when applied to actual defendants and criminal conduct—are declaring, through baseless guilty-plea agreements, that the punishments available in the code don't always fit the crime.

Not all baseless pleas appear to be prompted by overly rigid criminal codes. In child abuse cases and sexual assault cases in particular, the greater motivation is likely the difficulty of proving well-grounded charges and the trauma that victims would face from testifying. But in many of the examples above, baseless charges appear to serve as a means to provide a somewhat lower sentencing range than is available under the original charge, and perhaps a charge a defendant finds somewhat more palatable. That seems to describe, for example, *Morales*, reducing attempted homicide to aggravated battery, and *Majors*, enhancing a second-degree murder sentence with a groundless habitual-criminal finding, instead of proceeding on first-degree murder charges. Whether the motivation for a different sentencing range is simply to induce a guilty plea, or whether it represents a disposition that prosecutors and judges genuinely view as more appropriate than the harsher outcome for

provable charges, the point is the same. Legislatures bear some of the blame for the fact that prosecutors and courts resort to this less-than-ideal practice.

Convictions for Nonexistent Offenses

Prosecuting people for *nonexistent* offenses—crimes that do not exist in a jurisdiction's laws—would seem more problematic. It is one thing to convict a person of an actual crime based on his guilty plea combined with a factual basis for a different actual crime that is related but more serious. It is another to convict a person of a "crime" that can be found in no statute or common law. What are elements of a hypothetical offense? What sentencing laws apply to it? *Factually* baseless convictions at least respect the legislature's exclusive power to define crimes, even if they evade its constraints through an equitable doctrine that substitutes proof of one offense for another. Nonexistent offenses, by contrast, seem an act of collusion between courts and prosecutors to usurp the legislature's lawmaking authority, which is roughly the conclusion of courts in states that reject nonexistent-crime convictions. Yet appellate courts in several states are surprisingly sanguine about convictions and sentences based on nonexistent crimes, even when they recognize that the offense contradicts legislative intent.

The conceptual affront to the rule of law posed by nonexistent crimes is somewhat greater than the practical one. There are no reported prosecutions for wholly imagined offenses along the lines of "wearing purple clothing on Sunday" or "showing support for the Georgia Bulldogs within the state of Tennessee." All are somehow related to codified offenses. The majority of these cases seem to be misconceived inchoate versions of specific crimes, such as attempted felony murder or attempted reckless manslaughter. Others seem to be errors arising from somewhat complex statutes, such as "armed violence," which require a certain kind of predicate offense but for which prosecutors charged an ineligible one. A final category involves convictions for statutory offenses that—unbeknownst to the parties and court at the time—were held to be unconstitutional or impliedly repealed. When nonexistent crimes arise in any of these ways, the elements of those offenses, and the applicable sentencing laws, are usually clear enough.

Some prosecutions for nonexistent crimes are clearly unintentional; none of the players recognized that the statute had been invalidated, or they misinterpreted its scope. Others may be intentional efforts to take advantage of the validity of nonexistent-crime convictions achieved through guilty pleas. Repeated cases, in the same jurisdiction, of plea bargains for nonexistent attempted-unintentional crimes suggest that lawyers may recognize that such charges can yield a disposition and sentence all can live with. Courts seem inclined to affirm them for that reason, and in some cases because they are loath to allow a defendant to vacate a conviction from which he benefited when it could leave the state with slim prospects for successful re-prosecution due to the loss of evidence over time.

But the reasons for tolerating convictions for nonexistent offenses are weaker than for factually baseless ones. If many are unintentional errors by lawyers and judges—or, when an offense is held unconstitutional after a conviction on it, simply an effect of bad timing—then nonexistent crimes are not, for the most part, an implicit complaint from prosecutors and trial judges to legislators about the inadequacies of the criminal code. As for defendants unfairly gaining delay in vacating such guilty pleas that they were initially happy to reap benefits from, the response is twofold. One is the standard rule-of-law rationale: legislatures—not courts and prosecutors—can make law, and without a basis in valid law, courts have no authority, or jurisdiction, to impose criminal liability and punishment. The other is instrumental. Prosecutors and judges can avoid the problem in which defendants subsequently prompt courts to vacate the convictions for nonexistent offenses they agreed to by exercising greater care not to charge and convict suspects for nonexistent crimes in the first place.

It is true that the rule-of-law argument applies equally well, or nearly so, to factually baseless convictions. Distinguishing the latter by the fact that they stay within the legislature's criminal code is a somewhat tenuous reed. The best argument, in my view, for giving two cheers for factually baseless guilty pleas and one faint cheer or less for nonexistent-crime convictions relies on the inference about the differences in their practical utility. In general, baseless pleas seem to be deliberate strategies for crafting more lenient outcomes for defendants than the criminal code provides, but outcomes that prosecutors and trial judges, for various reasons, prefer and endorse as well.

Seen in their most favorable light, baseless pleas are a public objection to deficient criminal codes that, implemented without such circumvention tactics, would impose unduly harsh sentences on defendants and unduly heavy burdens on prosecutors, courts, and some victims. Yet it is a rebellious strategy with built-in safeguards: to contravene legislative parameters requires a three-way agreement by prosecutors, judges, and defendants. The precariousness of this justifying story forecloses a full three-cheers endorsement. But the surprisingly resilient practice of factually baseless criminal convictions provides insights into the challenges of doing justice in real-world contexts and crafting criminal justice systems capable of accomplishing that. At a minimum, they merit more thoughtful attention. ■