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TEAM 3 MCLE PACKET*

Trippy Tuesday: Just An Ordinary Day in the Criminal Courts?

The Pressures of Plea Bargaining on Defendants, Defenders, and Prosecutors

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The State Bar of California

Rule 1.4.1 Communication of Settlement Offers (Rule Approved by the Supreme Court, Effective November 1, 2018)

- (a) A lawyer shall promptly communicate to the lawyer's client:
 - (1) all terms and conditions of a proposed plea bargain or other dispositive offer made to the client in a criminal matter; and
 - (2) all amounts, terms, and conditions of any written* offer of settlement made to the client in all other matters.

- (b) As used in this rule, "client" includes a person* who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.

Comment

An oral offer of settlement made to the client in a civil matter must also be communicated if it is a "significant development" under rule 1.4.

Plea bargaining and mass incarceration go hand in hand. We need to end both.

Our legislatures and courts have armed prosecutors with so much power that they can – and often do – determine the trajectory of people’s lives.

Chris Kemmitt and Premal Dharja Opinion contributors

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Picture a criminal trial: Prosecutors grill witnesses on cross-examination, judges rule on objections, defense counsel makes impassioned pleas to the jury, and the jury sifts through the facts before returning a verdict. That might be how many people think the legal system operates.

As the Supreme Court has observed, however, this is not what happens in the real world. Instead, plea bargaining is how the criminal legal system operates. This means, of course, that plea bargaining is a key part of how mass incarceration operates, too.

Plea bargaining lets courts incarcerate people for decades with little accountability. When it comes time to negotiate a plea bargain, it is prosecutors who hold all the power: They control the charges and what to offer based on those charges. They also have the means to increase the chances the other side feels forced to take the offer.

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How prosecutors just got more powerful

Of course prosecution can lead to incarceration, and the United States has an especially problematic record with regard to incarceration. According to the Prison Policy Initiative, "Every single U.S. state incarcerates more people per capita than virtually any independent democracy on earth."

Black people are incarcerated at nearly five times the rate of white people, according to The Sentencing Project.

Simply put, our legislatures and courts have armed prosecutors with so much power that they can – and often do – determine the trajectory of people’s lives, and in the 6th Circuit U.S. Court of Appeals – which is just below the Supreme Court – prosecutors just got more powerful.

Can an engineer act like a cop?: A court gave him immunity.

Here’s the backstory: Ashley Townsend was indicted in federal court in Michigan in 2020 for possessing firearms and controlled substances. Based on the charges and a sentencing enhancement sought by prosecutors, Townsend, if convicted on all charges, would have faced up to 20 years to life in prison.

The prosecution made Townsend a plea offer. Using a process known as charge-bargaining, they offered to drop some charges – reducing his possible sentence to 10 to 25 years – in exchange for a guilty plea. Townsend, like so many others in the U.S. criminal legal system, found himself facing a difficult decision.

But the prosecution, whose duty it is to "seek justice," wasn’t finished.

My colleague was stabbed: Homelessness and peril are much closer to home than you think

Nearly all federal defendants take the plea bargain

Next, they demanded that Townsend waive his right to appeal his conviction, any sentence under 300 months, and almost every other possible path to judicial review of his conviction and sentence. The waiver basically required Townsend to give up rights that he did not know he had to contest his sentence.

If the law changed in Townsend’s favor in the future, for example, the waiver could still keep him stranded in prison. Under the waiver, mistakes that happened in the trial court would never be challenged, prosecutorial misconduct might never come to light, and prosecutors’ power to coerce people into “too good to refuse” deals would continue unfettered.

Townsend, like 97% of federal defendants in 2020, accepted the plea agreement.

The judge who oversaw the case, however, said no. The appeal waiver, he ruled, removed too many of the checks built into the criminal system. Nonetheless, the 6th Circuit not only reversed the trial judge but issued an opinion that expanded the ability of prosecutors to do what they want, while limiting the ability of judges to do anything about it.

Smart on crime: Tempted to push for tough-on-crime policies? You need to meet these 3 people.

Final word doesn't rest with the court

But the courts do not necessarily have the final word on this issue. In 2021, Attorney General Merrick Garland learned that many federal prosecutors, whom he oversees, were seeking similar plea waivers to prevent future claims for compassionate release.

After lawmakers and judges around the country decried the inhumanity of the practice, sparking pointed news coverage of the issue, the Justice Department put an end to it.

The 6th Circuit decision stands in contrast to the Department of Justice's intervention in that instance, and that contrast is important. It's important because of the direction it takes us in as a country.

The fork in the road that our nation faces is not imaginary: Our criminal legal system is destroying millions of lives as we speak, lives that are disproportionately Black and brown.

Rather than starting to end the coercion of plea bargaining and limiting the power of prosecutors, the system empowers them to coerce even more.

We already know where that fork leads, and it is our duty to reject it.

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This is part of a series by USA TODAY Opinion about police accountability and building safer communities. The project began in 2021 by examining qualified immunity and continues in 2022 by examining various ways to improve law enforcement. The project is made possible in part by a grant from Stand Together, which does not provide editorial input.

MAREK: Is plea bargaining in need of judicial reform

Dennis Marek | Local columnist
Nov 26, 2022



Marek

Recently the USA Today newspaper ran an article titled “An end to plea bargaining is critical for justice reform.” One author was a representative of the NAACP Legal Defense Fund, and the other was a part of the Institute to End Mass Incarceration.

So, what is plea bargaining. It is simply the case where the prosecution and defense agree to plea of guilty to a crime rather than have a full trial to determine the guilt or innocence of the defendant. It can be as simple as having a speeder agree to pay a fine and attend a refresher auto safety class in exchange for no moving violation on his license. The defendant waives his right to a trial on the charge of speeding in order to avoid a conviction and a notch on his driver’s license. The state saves the expense and time of a trial.

Or it could be that a person charged with attempted murder agrees to plead guilty to a lesser charge of armed robbery or aggravated battery instead of standing trial where the potential penalty upon conviction is much more severe.

The writers allege that plea bargaining, “Lets courts incarcerate people for decades with little accountability.”

They insist that the power only lies with the prosecutor, as he or she is the one who can charge a defendant with a different or lesser crime. They believe that the prosecutor can negotiate an offer to pressure the defendant to take the deal. Even the sentence can be part of the agreement, although the final arrangement still must be approved by the judge.

The authors also allege that these negotiations lead to the problematic result of massive incarcerations. It is agreed that every single state of the union incarcerates more people per capita than virtually any other independent democracy on earth. The article also stresses that Black people are incarcerated at nearly five times the rate of white people.

Their final point is that our legislatures and courts have armed prosecutors with the power to determine the trajectory of people's lives. Some states have made a part of any such agreement that the defendant also waives any right of appeal from the imposed sentence any time in the future.

I must agree that all the facts that they cite are probably correct. Prosecutors have the ultimate power to charge someone or refuse to, so charge regardless of the facts. America leads democracies with incarcerations and the Black inmate population dwarfs that of whites. But do we actually have more criminals roaming the streets? Let's think about that.

We have recently changed our view of criminal cannabis and have agreed to release many inmates who were convicted or pleaded guilty to some level of possession and sale of certain products. Many foreign countries never had such laws for mere possession. But that does

not apply to burglary, armed robbery, murder, kidnapping or extortion. These kinds of crimes have been crimes everywhere since the world had laws.

So, let's talk about plea negotiation and the power of the prosecutor and if it leads to injustice and over population of our incarceration facilities. I was a public defender for 10 years and had cases ranging from murder, rape, armed robbery, burglary, and to more simple misdemeanors. No doubt, I was faced with such plea negotiations.

The initial offer of compromise always came from the prosecutor. Let's take a small county like Iroquois in central Illinois. Prior to 1973, there was no public defender in the county. Local lawyers were forced to take cases whether they wanted to or whether they had any experience in criminal law. I am sure they wanted a plea, no trial, and back to their civil law practices in most cases.

When I became that county's first public defender, I had a better understanding of criminal law and was more than ready to try cases. I wanted more experience. I am sure I cost that county a lot more trial expense in the 10 years I held that position. I was never comfortable pleading a client that I believed he didn't do.

Why would a prosecutor want to offer such a deal? First, almost every office of prosecutors, be it state or federal, is overwhelmed with cases. They cannot take every case to a jury trial. The right of a speedy trial, in most cases, is within 120 days of arrest and incarceration.

This means that unless the defendant has requested some continuance, the case must be tried within that time or it is dismissed. That is an incredibly short time to

prepare for a major criminal trial and is often the reason for the offer. Another reason to offer a deal is to get the bad guy to waive his right to trial and have some crime admitted and a punishment administered.

The fact is that 97% of the federal criminal cases were resolved the last few years by plea agreements. Only 3% challenged the charges and fought for their innocence.

A second reason for a prosecutor to make an offer of a less serious offense is that he or she senses problems with his or her case. Hesitant witnesses, questionable searches of a premise, or minimal evidence of the guilt of the defendant all count. In these cases, the offer is a less serious offense in exchange for a certainty that the bad guy gets some punished.

Well, you say, if these are such problems, the defendant can always refuse to take the deal and insist on trial. Of course, that is always true. If the defendants are provided with a decent defender who is not afraid of trying the case, then the fear of a trial is reduced. Defendants who take those deals have fear of the trial in most case because they are guilty.

Under our Constitution, every criminal defendant is provided an attorney even if he cannot afford one. Most public defenders are good at their jobs, as are the prosecutors. They can see the evidence, the odds of conviction and the truth or falsity of the defendant's position. Then they can properly advise the defendant as to whether such an offer is legitimate under all circumstances and plainly what the odds of a conviction are. The defendant, and he alone can then make a decision.

envelope of appropriateness when addressing the most serious type of offense, even at the risk of convicting the innocent.

Again, the patterns we identified regarding the types of new evidence and the prosecutors' responses suggest that prosecutors do behave strategically depending on how new information might shift their leverage in the bargaining process. Our analysis suggests that prosecutors seem more reluctant to offer a plea deal when there is a new alibi across all stages of the prosecution process. Yet they are more willing to offer a plea deal when there is a witness misidentification or when a new witness emerges at the pre-adjudication phase of the post-conviction motion.

III. IMPLICATIONS FOR THE LEGITIMACY OF THE PLEA-BARGAINING SYSTEM

The data presented thus support the claim that plea bargaining's innocence problem is real and that it infects the most serious kinds of cases. This in turn raises questions about the plea-bargaining system itself, the motives and behaviors of prosecutors, and the negotiating strategies and postures of defense lawyers.

While plea bargaining has long had its critics, the trial-shadow theory has been invoked to blunt those criticisms by suggesting that plea bargaining does little more than approximate trial outcomes, but in a much less costly way. If trial outcomes are the gold standard, and plea bargaining occurs in the shadow of those outcomes by incorporating the law and expected outcomes to arrive at a bargained-for outcome of approximately equal value, then there is no need to consider serious reforms or the abolishment of plea bargaining. Bibas explains it this way:

The shadow-of-trial argument . . . means there is no need to abolish plea bargains, which resolve most adjudicated criminal cases. If highly proceduralized and regulated trials serve as a backstop to largely unregulated plea bargaining, we do not need new procedural safeguards for pleas because plea outcomes already incorporate the value of trial safeguards. . . . [I]f we assume that police and prosecutors want to get the most bang for their buck, they have incentives to go after the worst criminals who face the strongest evidence of guilt. Conversely, this incentive should steer police and prosecutors away from those who may well be innocent.¹⁰⁸

But if, as the data in this Article suggest, prosecutors in a meaningful proportion of cases are manipulating their bargaining power in such dramatic and powerful ways as to induce probably innocent defendants to

108. Bibas, *supra* note 55, at 2466.

plead guilty, this defense of plea bargaining loses force. The vast menu of options available to prosecutors and the threat of massive injustice too easily can be used to produce lesser, but still serious, injustices. Proof of this reality casts doubt on the legitimacy of plea bargaining, at least as currently practiced in serious cases.

More than fifty years ago, the American Bar Association (ABA) cautioned that disproportionately steep plea discounts could be inappropriate. The ABA's Project on Standards for Criminal Justice Relating to Pleas of Guilty observed:

Assuming that two defendants have engaged in the same conduct under essentially the same circumstances and that the usual presentence information as to the two does not materially differ, is it proper to give a somewhat lower sentence to one defendant because he has consented to enter a plea of guilty? . . . [M]ost judges consider such leniency proper *if the sentence disparity is not unreasonable*.¹⁰⁹

Yet nearly forty years ago, Albert Alschuler surveyed the empirical data and concluded that, when comparing plea outcomes to trial outcomes, "in a great many cases the sentence differential in America assumes shocking proportions."¹¹⁰ Our data reinforce that conclusion today.

In this regard, the rationale adopted by the Supreme Court for approving plea bargaining is worth revisiting. Prior to the 1970s, courts generally disapproved of bargained-for justice, repeatedly proclaiming that convictions produced by bargaining were inherently coercive and constitutionally infirm.¹¹¹ Moreover, the Supreme Court consistently insisted that "the incentives offered in return for a plea must not be so powerful as to remove the defendant's ability to consider the choice and act with 'free will.'"¹¹²

109. AM. BAR ASS'N PROJECT ON STANDARDS FOR CRIM. JUST., STANDARDS RELATING TO PLEAS OF GUILTY 37–38 (1968) (emphasis added).

110. Alschuler, *The Changing Plea Bargaining Debate*, *supra* note 90, at 656; *see, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 358–59, 363 (1978) (upholding the constitutionality of a life sentence following trial even though the defendant had been offered, but declined, a plea deal of five years' imprisonment).

111. For discussions of this history, *see* Alschuler, *Plea Bargaining and Its History*, *supra* note 23, at 7–40; Dervan, *supra* note 1, at 65–82; Dervan & Edkins, *supra* note 3, at 7–15.

112. Dervan, *supra* note 1, at 93; *see, e.g., Brady v. United States*, 397 U.S. 742, 750 (1970) ("[T]he agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant."); *Bordenkircher*, 434 U.S. at 363 ("[A]cceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process."); *see also Machibroda v. United States*, 368 U.S. 487, 493 (1962) ("A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void.").

But as plea bargaining continued to grow in practice and the crush of criminal caseloads made bargaining all but unavoidable, the Court finally capitulated and endorsed plea bargaining as an essential feature of the criminal justice system.¹¹³ In 1970, in *Brady v. United States*,¹¹⁴ the Supreme Court endorsed plea bargaining as a necessary compromise:

For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant’s guilt or in which there is substantial doubt that the State can sustain its burden of proof.¹¹⁵

In so holding, however, the Court cautioned that the constitutionality of the practice might be altered if it became clear that bargaining was producing too much injustice. The Court explicitly addressed the potential innocence problem, stating the following:

This is not to say that guilty plea convictions hold no hazards for the innocent or that the methods of taking guilty pleas presently employed in this country are necessarily valid in all respects. This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial. *We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves.*¹¹⁶

It is now widely accepted that accuracy is a serious concern in plea bargaining and that a system that pressures too many innocents to condemn themselves would be constitutionally suspect. As Lucian Dervan

113. See, e.g., *Santobello v. New York*, 404 U.S. 257, 260 (1971) (“The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called ‘plea bargaining,’ is an essential component of the administration of justice.”).

114. 397 U.S. 742 (1970).

115. *Id.* at 752.

116. *Id.* at 757–58 (emphasis added).

has put it, “The *Brady* Court stated that if the plea bargaining system began to operate in a manner resulting in a significant number of innocent defendants pleading guilty, the Court would reexamine the constitutionality of bargained justice.”¹¹⁷ And Dervan concludes, “[T]here is a significant innocence problem with plea bargaining today. This being the case, the *Brady* safety-valve may not be working and, if so, defendants, both innocent and guilty, are being offered unconstitutional incentives to confess.”¹¹⁸

The data in this Article support that conclusion. The evidence now shows that the time has come to take corrective measures against an intensely coercive process. While some critics of plea-bargaining have long called for abandoning the practice,¹¹⁹ full abolition is nowhere on the horizon, both because plea bargaining has become so entrenched in our system and culture¹²⁰ and because, like discretion itself, it is nearly impossible to stamp it out. Like a bubble in a balloon, squeeze it in one way or place and it will find a way to pop up somewhere else.

IV. POTENTIAL FIXES

Given problems such as those we have identified here, prominent scholars have long advocated abolishing plea bargaining.¹²¹ Assuming that such proposals have no practical chance of being adopted,¹²² we address a different question: Short of abolishing plea bargaining altogether, what steps could system actors take to solve or at least mitigate the innocence problem?

117. Dervan, *supra* note 1, at 57.

118. *Id.*

119. See, e.g., Schulhofer, *supra* note 56, at 2000–09; Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 935–36 (1983); John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 204–05 (1979).

120. In 1971, in *Santobello v. New York*, Chief Justice Burger expressed the prevailing view of plea bargaining in this way: “[P]lea bargaining[]’ is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.” 404 U.S. 257, 260 (1971); see also Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2023 (2006) (“[T]he American criminal justice system, like the civil system, would collapse if even a small percentage of suspects took advantage of these procedures and demanded trials.”).

121. See, e.g., Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, *supra* note 23, at 1180; Schulhofer, *supra* note 56, at 2000–09.

122. For a summary of the arguments asserting that abolishing plea bargaining is not realistic, see Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 609–13 (2005).

A. Greater Judicial Involvement in Plea Bargaining

1. GENERALIZED FAIRNESS REVIEW

In most U.S. jurisdictions, judges are barred from participating in the plea-bargaining process; their role is a purely passive one aimed at ensuring, through a brief colloquy at the plea hearing, that the accused is entering the plea knowingly, voluntarily, and intelligently and that there is a sufficient “factual basis” for the plea.¹²³ While the factual basis inquiry is ostensibly designed to provide some measure of protection against conviction of the innocent, in reality “the factual basis inquiry into the plea is often perfunctory.”¹²⁴ The inquiry typically involves a brief recitation of the allegations—often just a short summary from the prosecutor or a reading of the indictment, information, or complaint—and an inquiry to the defense as to whether those summarized facts are true or can be used as the factual basis.¹²⁵ Even in *Alford* pleas, the standard comes nowhere close to requiring proof beyond a reasonable doubt but rather is “something closer to a ‘high probability of conviction’”¹²⁶ or even a subjective “I-know-it-when-I-see-it” approach.¹²⁷

Accordingly, scholars have argued for greater judicial oversight of the plea-bargaining process. Blume and Helm argue that “the criminal justice system could (and definitely should) require more judicial

123. See FED. R. CRIM. P. 11(b); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1142 (2011); Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1123–34 (1976) (acknowledging the consensus that trial judges should not participate in plea bargaining but arguing that judges should assume a more dominant role).

124. Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMPAR. L. 199, 212 (2006). Christopher Slobogin describes it this way:

While the arraignment judge must find a factual basis for the plea, this requirement can be satisfied merely by asking the parties in charge of evidence production—the prosecutor and the defense attorney—if such a basis exists, and not even that much is required for the facts underlying the sentence.

Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism*, 57 WM. & MARY L. REV. 1505, 1518 (2016) (footnotes omitted). For a discussion of the varied and generally lax standards courts apply when assessing the factual basis for a plea, see Myeonki Kim, *Conviction Beyond a Reasonable Suspicion? The Need for Strengthening the Factual Basis Requirements in Guilty Pleas*, 3 CONCORDIA L. REV. 102, 120–23 (2018).

125. *Santobello*, 404 U.S. at 261–62; see also FED. R. CRIM. P. 11(b)(3).

126. Turner, *supra* note 124, at 213 (quoting John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?*, 126 U. PA. L. REV. 88, 126 (1977)).

127. Barkai, *supra* note 126, at 123.

supervision of the plea bargaining process.”¹²⁸ They suggest, for example, that, “[a]t one end of the spectrum, judges could be authorized to strike the death penalty as a potential punishment if the court thought it was being used only for, or primarily for, ‘plea extraction’ purposes.”¹²⁹ Máximo Langer argues, somewhat more expansively, that courts should recognize that plea bargaining becomes coercive if the threatened penalty for going to trial exceeds “a fair sentence that fits the characteristics of the offense and the offender.”¹³⁰ Similarly, Conrad Brunk suggests that the relevant question is “whether the charge and sentence threatened and imposed” on the defendant who insists on trial are “normal.”¹³¹ Justice Powell, in his dissent in *Bordenkircher v. Hayes*, posited a similar inquiry. Powell argued that, when a prosecutor threatens potentially coercive charges for failure to accept a plea offer, “the question to be asked under the circumstances is whether the prosecutor reasonably might have charged respondent . . . in the first place.”¹³²

As important as these questions are, however, the reality is that judges are not well positioned to assess them, and more problematically, they appear systematically unwilling to do so. Blume and Helm, for example, concede that judicial inquiry into such matters “is likely to do little good. Even assuming a judge acting in good faith, it is difficult to overcome the information-gap problem. How is a judge to know if the prosecutor is acting coercively or vindictively except in the most egregious cases?”¹³³ Moreover, judges likely will resist deviating from the entrenched legal culture that demarcates charging and bargaining decisions as off-limits to the judiciary, instead reserving such decisions to the unfettered discretion of prosecutors.¹³⁴

Noted federal judge Jed Rakoff offers an interesting alternative proposal. Judge Rakoff takes his inspiration from the civil system, in which courts have found a way to engage with the parties in settlement negotiations without putting undue pressure on the parties or running the risk of prejudging, or appearing to prejudge, the cases.¹³⁵ Rakoff notes that,

128. Blume & Helm, *supra* note 2, at 183.

129. *Id.*

130. Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 239 (2006).

131. Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 LAW & SOC’Y REV. 527, 548 (1979).

132. *Bordenkircher v. Hayes*, 434 U.S. 357, 370 (1978) (Powell, J., dissenting).

133. Blume & Helm, *supra* note 2, at 183.

134. *See, e.g., Bordenkircher*, 434 U.S. at 364 (“In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).

135. JED S. RAKOFF, WHY THE INNOCENT PLEAD GUILTY AND THE GUILTY GO FREE 32 (2021).

to preserve judicial objectivity, supervision of settlement negotiations in the federal courts is referred to magistrates or special masters, who then withhold the results to the judges who ultimately preside over the cases.¹³⁶ He suggests rule changes that would permit a similar process in criminal cases:

As I envision it, shortly after an indictment is returned (or perhaps even earlier if an arrest has occurred and the defendant is jailed), a magistrate would meet separately with the prosecutor and the defense counsel, in proceedings that would be recorded but placed under seal, and all present would be provided with the particulars regarding the evidence and issues in the case. In certain circumstances, the magistrate might interview witnesses or examine other evidence, again under seal so as not to compromise any party's strategy. The magistrate might even interview the defendant, under an arrangement in which it would not constitute a waiver of the defendant's Fifth Amendment privilege against self-incrimination.

The prosecutor would, in the meantime, be precluded from making any plea-bargain offer (or threat) while the magistrate was studying the case. Once the magistrate was ready, she would then meet separately with both sides and, if appropriate, make a recommendation, such as to dismiss the case (if she thought the proof was weak), to proceed to trial (if she thought there was no reasonable plea bargain available), or to enter into a plea bargain along lines she might suggest. No party would be required to follow the magistrate's suggestions. Their force, if any, would come from the fact that they were being suggested by a neutral third party who, moreover, was a judicial officer that the prosecutors and defense lawyers would have to appear before in many other cases.¹³⁷

Judge Rakoff harbors no illusions that such a procedure would eliminate all false guilty pleas.¹³⁸ But such a procedure almost certainly would help. Unfortunately, this additional layer of judicial oversight would require resources—including the availability of magistrates or special masters—that might exist in the federal system but likely would not be possible for most cases in most state systems (where, of course, most criminal cases are handled).

So, while enhanced judicial involvement in the bargaining process might help the system assess critical questions about fairness and

136. *Id.* at 32–33.

137. *Id.*

138. *Id.* at 33.

appropriateness, it is hard to see how most courts can be induced or enabled to address those questions effectively. It may be that prosecutors themselves will have to find ways to address these questions more seriously and consistently. We take up this challenge in the final section of this Article.¹³⁹ In the meantime, we turn our attention to other, perhaps more feasible and more narrowly specified, measures that judges realistically can be expected to enforce.

2. ENHANCED FACTUAL BASIS REVIEW

Others have argued that the fairness and accuracy of the plea-bargaining process can be enhanced by demanding more expansive and meaningful “factual basis” review in plea cases.¹⁴⁰ Drawing on examples of judicial involvement in the plea-bargaining process in Germany, Florida, and Connecticut, Jenia Iontcheva Turner argues that “[r]equiring judges to inquire more thoroughly into the facts of the case early, before the parties have agreed on a version of the facts, could minimize the chances that the plea terms are unduly harsh, unduly lenient, or otherwise misrepresent the facts.”¹⁴¹ Turner notes that permitting judges to effectively monitor plea bargains for truth could be accomplished, for example, by providing the complete investigative file to both the judge and defense counsel prior to the plea negotiations, as is done in Germany.¹⁴² Alternatively, Turner and, before her, Albert Alschuler have proposed requiring probation officers to prepare a factually dense presentence investigation report before, rather than after, entry of a plea, which the judge could then use to assess the safety of a conviction.¹⁴³ Turner also suggests that statutes “could simply require disclosure to the judge of the same evidence that the parties would receive under liberal discovery rules.”¹⁴⁴

Similarly, Christopher Slobogin argues for what he calls “hybrid inquisitorialism,” in which “the judge [would] have the authority to demand evidence supporting any pretrial deal and the authority to dismiss weakly supported or duplicative charges.”¹⁴⁵ William Stuntz argues that military courts show how this can be done: “[T]hey review the factual

139. See *infra* Section IV.D.

140. See, e.g., Barkai, *supra* note 126, at 100.

141. Turner, *supra* note 124, at 259–60.

142. *Id.* at 260.

143. *Id.* at 260–61; Alschuler, *supra* note 123, at 1146–47.

144. Turner, *supra* note 124, at 261.

145. Slobogin, *supra* note 124, at 1531.

basis of guilty pleas with great care, and with little deference to the pleas themselves.”¹⁴⁶

Other scholars have suggested that the factual-basis review process can be enhanced to protect the innocent by imposing an explicit standard of proof at the plea hearing. Myeonki Kim argues that no new rules or legislation are required because existing rules can—and *should*—be interpreted to require the judge to find a factual basis by at least a preponderance of the evidence or, preferably, clear and convincing evidence.¹⁴⁷ To facilitate meaningful factual-basis review in a system that requires proof beyond a reasonable doubt, Máximo Langer would require prosecutors to present a sworn affidavit containing a summary of the evidence that would be offered at trial and to “explicitly state her belief that she has enough elements of proof to meet the directed acquittal standard.”¹⁴⁸

At the same time, Kim acknowledges that it is not clear whether imposing a standard of proof “will make much difference.”¹⁴⁹ There is, after all, good reason to believe that factfinders, including judges, often fail to apply standards of proof rigorously.¹⁵⁰ Yet, at the least, such a standard would impress on courts the need to make more than a perfunctory review of the evidence in guilty-plea cases. Moreover, Kim argues that imposing such a standard would “induce prosecutors to develop the weaker cases to meet the specific standard of proof,” thereby leading them either to strengthen their good cases or to discover exculpatory evidence and to dismiss weak cases.¹⁵¹

146. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 302–03 (2011).

147. Kim, *supra* note 124, at 127.

148. Langer, *supra* note 130, at 276–77.

149. Kim, *supra* note 124, at 128.

150. See Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 196–97 (2011) (explaining how cognitive processes such as the “coherence effect” can create confidence inflation that “can boost a mere leaning towards conviction up to a highly confident judgment of guilt that surpasses the requisite threshold for conviction”). Simon also observes that empirical research reveals that “both judges and jurors tend to vote to convict even when they deem the inculpatory evidence to be less than compelling.” *Id.* at 202 n.253 (citing Theodore Eisenberg, Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Waters, G. Thomas Munsterman, Stewart J. Schwab & Martin T. Wells, *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel’s The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171, 186–87 (2005)); see also Findley & Scott, *supra* note 48, at 340–41 (discussing the ways in which cognitive biases dilute the proof-beyond-a-reasonable-doubt standard); Michael J. Saks & D. Michael Risinger, *Baserates, the Presumption of Guilt, Admissibility Rulings, and Erroneous Convictions*, 2003 MICH. ST. L. REV. 1051, 1061–62 (discussing how judges’ knowledge of guilt “baserates”—that is, their knowledge that the vast majority of criminal defendants are in fact guilty—can affect judicial judgments about evidence).

151. Kim, *supra* note 124, at 129.

Not only would heightened factual-basis review have the potential to screen out some innocent defendants, but the very process of strictly reviewing the factual basis—both at the plea hearing and on appeal—also would likely produce the desirable result of increasing the proportion of cases resolved by trial rather than by plea.¹⁵² Stuntz explains that “[t]he surest road to fewer pleas and more trials is to make trials cheaper and pleas more expensive from the prosecutors’ point of view.”¹⁵³ And the easiest way to do this is to demand that trial judges and appellate courts strictly scrutinize the factual basis for the plea. Stuntz explains, “Stringent appellate review, with reversal in cases of what the military calls improvident pleas, would amount to a procedural tax on pleas. Tax anything and one is likely to see less of it.”¹⁵⁴

This enhanced factual-basis review proposal can be refined further to make it more targeted to the innocence problem and hence more feasible from a resource perspective. Wrongful conviction scholars have explored ideas for separate trial processes, or tracks, reserved for cases involving real claims of actual innocence.¹⁵⁵ The proposals are varied, but at their essence they involve mechanisms by which defendants claiming actual innocence would be entitled to invoke special procedures designed to carefully and thoroughly scrutinize the question of factual guilt and protect them from the kinds of faulty evidence that are known to contribute to wrongful convictions.¹⁵⁶ Often, these proposals specify that, in return for invoking these special innocence procedures, defendants might be required to relinquish some of their other rights, particularly those often thought to interfere with the full search for the truth (such as the right to remain silent).¹⁵⁷ Regardless of the merits of such proposals in general,¹⁵⁸

152. *See id.*

153. STUNTZ, *supra* note 146, at 302.

154. *Id.* at 303.

155. *See, e.g.,* Tim Bakken, *Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System*, 41 U. MICH. J.L. REFORM 547, 547 (2008); Samuel R. Gross, *Pretrial Incentives, Post-Conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence*, 56 N.Y. L. SCH. L. REV. 1009, 1010–11 (2011–12); D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1282–83 (2004); D. Michael Risinger & Lesley C. Risinger, *Innocence Is Different: Taking Innocence into Account in Reforming Criminal Procedure*, 56 N.Y. L. SCH. L. REV. 869, 869–71 (2011–12). For a summary and analysis of some of these proposals, see Marvin Zalman & Ralph Grunewald, *Reinventing the Trial: The Innocence Revolution and Proposals to Modify the American Criminal Trial*, 3 TEX. A&M L. REV. 189, 192–93 (2015).

156. *E.g.,* Bakken, *supra* note 155, at 561–66; Risinger, *supra* note 155, at 1311–13; Risinger & Risinger, *supra* note 155, at 871.

157. *See, e.g.,* Bakken, *supra* note 155, at 549.

158. For a critique of such proposals, particularly a critical assessment of the assertion that eliminating the right to remain silent can enhance the search for the truth, see Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y. L. SCH. L. REV. 911, 913, 922–29 (2011–12).

such special screening mechanisms might be readily applicable to the factual-basis review process in guilty plea cases.

Applied specifically to the guilty-plea process, defendants who plead guilty but claim to be innocent could invoke heightened factual-basis review processes by asserting their actual innocence at the plea hearing (or by a prescribed time before the plea hearing). Once the defendant invokes such a process, the judge would be required to undertake a searching inquiry for an adequate factual basis, which would involve an assessment of whether the evidence outlined by the prosecutor would truly be persuasive beyond a reasonable doubt to a jury. To prevent the actual innocence claims from diluting the plea offers prosecutors are willing to make, the prosecutor would not be permitted to withdraw the plea offer after the defendant invokes the heightened factual-basis review process, and the prosecutor would not be permitted to ask the defendant during negotiations if they plan to invoke the process or to condition any plea offers on waiver of the heightened factual-basis review. And if a judge were to find the factual basis wanting, that finding should have preclusive effect, barring further prosecution.

Such a process would simultaneously dissuade prosecutors from making coercively lenient plea offers in weak cases (making it more likely they would just dismiss those cases instead) and permit innocent defendants to take advantage of favorable plea deals without forfeiting their right to be found not guilty by a neutral and impartial magistrate, albeit in a more limited way than would be afforded by a full trial. Moreover, because there is no real dispute about guilt in the vast majority of criminal cases (and hence defendants would have no reason to invoke it in run-of-the-mill cases), this process would reserve the heightened factual-basis review to the limited number of cases in which innocence is really at issue and thereby make the process less resource demanding and hence more feasible.

3. DISMISSING CASES WITH DISPROPORTIONATELY STEEP PLEA DISCOUNTS

Oren Gazal-Ayal proposes instead a partial ban on plea bargaining that prohibits coercively steep plea discounts.¹⁵⁹ Gazal-Ayal notes the objections in the literature to complete bans on plea bargaining—the entrenched nature of the practice and the enormous resource demands of a no-plea-bargaining system.¹⁶⁰ Such considerations, he notes, make a full ban impractical and essentially unthinkable.¹⁶¹ Moreover, a complete ban runs headlong into the reality that many defenders argue that plea bargains

159. See Gazal-Ayal, *supra* note 90, at 2299.

160. *Id.*

161. *Id.* at 2295.

can be beneficial to the accused, whether guilty or innocent.¹⁶² As Scott Howe has put it, “[A]n innocent defendant may prefer the deal, and, certainly, he may prefer the inefficiently lenient one.”¹⁶³ Stated otherwise, Howe argues, “Abolition of plea bargaining would harm innocent defendants by denying them a risk-reducing option.”¹⁶⁴ On the other hand, our data strongly suggest that abolishing plea bargaining might not be much of a disadvantage to innocent defendants, as the defendants in our case cohort who rejected plea bargaining uniformly suffered no harms: in each case, the defendant was ultimately fully exonerated, either by way of dismissal or acquittal.

Gazal-Ayal contends, however, that these arguments about banning plea bargaining largely overlook a key component of the current system of unlimited and largely unreviewed bargaining: the effect that the practice has on prosecutors’ screening decisions.¹⁶⁵ When prosecutors know they can extract a plea even in weak cases simply by making overly generous offers, their incentive to screen out those weak cases diminishes.¹⁶⁶ Because plea bargaining removes a primary disincentive that prosecutors might otherwise have to prosecute weak cases, the practice inherently creates risks for the innocent that simply would not exist if prosecutors were forced to be more selective about which cases they prosecute. Banning bargaining in those weak cases, Gazal-Ayal argues, offsets by far any benefits the innocent might receive by being able to bargain down their exposure on crimes they actually did not commit.¹⁶⁷ As he puts it,

The best way to cope with the innocence problem is to allow plea bargaining only in strong cases and to ban plea bargaining in weak cases. Such a “partial ban” on plea bargains would allow prosecutors to extract guilty pleas when defendants are almost certainly guilty, while forcing them to conduct jury trials when they bring more questionable charges. As a result, the portion of weak cases pursued by prosecutors would decrease substantially.¹⁶⁸

Gazal-Ayal is skeptical about the ability or willingness of judges to engage in meaningful factual-basis review of the evidence to screen out

162. For an argument “that many innocent defendants are better off in a world with plea bargaining than one without it,” see Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1119 (2008). Bowers’s argument, however, explicitly applies primarily to innocent defendants in low-stakes cases. *Id.* at 1119–20.

163. Howe, *supra* note 122, at 633.

164. *Id.*

165. Gazal-Ayal, *supra* note 90, at 2298.

166. *Id.* at 2298–99.

167. *Id.*

168. *Id.* at 2299.

weak cases.¹⁶⁹ Accordingly, he proposes that courts use overly generous plea concessions as a proxy for weak cases.¹⁷⁰ He argues, “[T]he disparity between the expected sentence after a trial conviction and the bargained-for sentence signals the strength of the case. When the plea bargain leads to an exceptionally lenient sentence, the guilty plea should be rejected.”¹⁷¹

While judges surely can detect overly generous plea offers at the extremes, it is not clear that they could be effective at detecting or acting on disproportionate plea offers anywhere but at the margins. Regardless, whatever the merits of such a proposal for general pretrial plea-bargaining practice, this proposal has special appeal for plea bargaining in innocence cases in post-conviction litigation.

First, in these cases, it is not difficult to identify what constitutes an extraordinarily lenient plea offer. The original sentence is known, and the differential can be easily calculated, as this Article has done for these cases in the aggregate. No guessing about what the case would be worth after conviction at a trial is needed.

Second, our data confirm that, at least in these cases, when plea bargaining is taken off the table, in most instances prosecutors respond precisely as Gazal-Ayal hypothesizes: they screen out the cases and dismiss the charges. In our cohort of cases, prosecutors at some point in the post-conviction process offered plea deals (almost always remarkably lenient ones) in 14% of the cases, and defendants *rejected* those plea offers 43.6% of the time. When the plea offer was thus rebuffed, prosecutors dismissed the charges in 79.9% of the cases after a new trial was granted; that is, when unable to induce a plea with generous plea offers, the prosecutors did indeed screen out the vast majority of the cases.

Moreover, forcing prosecutors’ hands in this way (here, by rejecting the plea offers) did not come at a cost to innocent defendants. After a new trial was granted, seven out of the ten cases that rejected a plea deal were ultimately dismissed. The three remaining cases are pending. Excluding the cases still pending, in no case in which a defendant rejected a plea offer after winning a new trial did the prosecutor retry the defendant.

Justice Michael Donnelly of the Ohio Supreme Court goes even further than Gazal-Ayal for that limited group of cases in which the defendant has filed a motion seeking a new trial. Justice Donnelly calls pleas during post-conviction litigation “dark pleas” and contends that they should be banned entirely.¹⁷² He argues, “Plea agreements are designed to resolve pending accusations of criminal acts made by the government. They should not be used to resolve charges that have already been

169. *See id.* at 2300.

170. *Id.*

171. *Id.*

172. Telephone Interview with the Hon. Michael P. Donnelly, Just., Sup. Ct. of Ohio (June 8, 2021).

resolved.”¹⁷³ Why? He answers that question with a rhetorical question of his own: “Why would a prosecutor, who after reviewing a prisoner[']s motion for a new trial, who continues to maintain a good faith basis in the guilt of the prisoner *ever* offer a reduced prison sentence before learning the court[']s ruling on a motion for a new trial?”¹⁷⁴ His answer: “They would not unless they believed that the motion had merit and that the new evidence undermined the original theory of guilt and there was a good chance a new trial would be granted if the evidence warranting the new trial was presented at a hearing in open court.”¹⁷⁵ Moreover, he contends, plea bargaining in the post-conviction litigation process comes “at a time when the government possesses all the negotiation leverage and the prisoner has virtually none.”¹⁷⁶ And he laments that resolving innocence claims through such bargaining “ensures that the evidence supporting the claim of innocence never sees the light of day.”¹⁷⁷

Our data suggest that Justice Donnelly’s concern about the possible prosecutorial motivations underlying plea bargaining and the effect that such bargaining has on the search for the truth in innocence cases may have real merit. A ban on plea bargaining during post-conviction litigation may indeed be warranted. And while some might still object that such a ban would harm innocent defendants who do not want to take the risk of a retrial, our data again suggest that that risk is minimal at best.¹⁷⁸ We acknowledge, however, that our data might be somewhat misleading in this respect, because it may be that those defendants in our pool of cases who accepted plea bargains might have accepted the deals precisely because they had weaker defenses than those who rejected the plea offers; thus, some of them indeed might have been convicted at a retrial.

B. Set Discount Rates

Others have advocated for more judicial oversight by authorizing courts to enforce set discount rates in plea bargaining. Albert Alschuler, for example, has argued that in plea bargaining cases, judges should be required to first determine the sentence that would be appropriate if the defendant had been convicted at trial and then apply a “specific discount rate.”¹⁷⁹ Stephen Schulhofer has similarly proposed that small set

173. Hon. Michael P. Donnelly, *The Dark Plea: A Legal Fiction Produced from Backroom, Off-the-Record Negotiations Which Prevents Truth and Causes Unjust Resolutions* (unpublished presentation) (on file with author).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *See supra* notes 117–20 and accompanying text.

179. Alschuler, *supra* note 123, at 1124.

As is widely recognized, upwards of 97% of all criminal convictions are obtained by plea, not trial.¹⁹⁷ Hence, it is a mistake to view plea-bargained sentences as a special deal, a gift,¹⁹⁸ or even the “escape of the guilty.”¹⁹⁹ To the contrary, in practice they reflect the collective sense of the criminal justice system of what penalties are routinely appropriate.²⁰⁰ A system with fixed ceilings on trial sentences recognizes the true norms in our system and thereby might to some extent legitimize plea-bargained “discounts” as no discounts at all—and along the way ease some of the pressure for imposing the onerous sentences that incorporate the trial penalty and that help to drive mass incarceration.

D. Prosecutor Ethics and Office-Based Standards

In the end, no matter what else changes, it is likely that prosecutors themselves will retain substantial power—likely the greatest power of any actors in the system—to set the terms and scope of plea bargains. Regardless of any other changes that might be made—and especially if no other changes are made—ultimately the fixes for plea bargaining’s innocence problem require prosecutors themselves to take preventive or corrective measures. Whatever other reforms might be appropriate, prosecutors have not only the power, but also a special responsibility to address this problem. In the American system, prosecutors are explicitly charged with responsibility to act not just as zealous advocates to seek convictions, but also to be “ministers of justice” whose overriding concern

197. RAKOFF, *supra* note 135, at 20.

198. See, e.g., Stanley A. Cohen & Anthony N. Doob, *Public Attitudes to Plea Bargaining*, 32 CRIM. L.Q. 85, 97 (1989–90) (citing data showing that a large majority of Canadians oppose plea bargaining because they believe it treats defendants too leniently).

199. E.g., RALPH ADAM FINE, *ESCAPE OF THE GUILTY* (1986).

200. For the contrary perspective, which no doubt represents the prevailing view of plea bargaining and trial penalties, see Howe, *supra* note 122. Howe argues that “[d]efendants receiving post-trial sentences get the deserved punishments for their crimes. Bargained sentences involve the extension of leniency on risk-reduction and utilitarian grounds from the maximum deserved punishment.” *Id.* at 618. Howe does not, however, explain why the post-trial sentence is the deserved sentence; he just posits it and contends that plea bargains represent discounts. *Id.* at 607. Deserved sentences are, of course, socially constructed values, not immutable features of some natural law. (Howe himself acknowledges this, observing that “[n]otions of desert derive from ‘contemporary community morality’” and that it is impossible to “declar[e] a sentence deserved according to any objective measure.” *Id.* at 619–20 (footnotes omitted)). But that just makes it all the more difficult to understand why the abnormality of post-trial sentences would be viewed as “deserved sentences” and not some artifact of the process; because well above 95% of all sentences are bargained sentences, not post-trial sentences, see RAKOFF, *supra* note 135, at 20, Covey is surely correct that those bargained-for sentences have in fact become our socially constructed expression of appropriate or deserved punishment.

is to ensure fairness and reliability in criminal cases.²⁰¹ Making that responsibility even more explicit, since 2008, ABA Model Rule of Professional Conduct 3.8 has imposed on prosecutors a duty to correct wrongful convictions.²⁰²

Rule-makers can adopt even more explicit ethics standards to address this problem, and prosecutors' offices can adopt standards designed to guide their own bargaining discretion. Both can make clear that, when in doubt, prosecutors should dismiss weak cases rather than attempt to salvage old convictions with disproportionately lenient plea offers.²⁰³ In all cases, prosecutors should ask themselves whether they would have pursued the charges at all "in a criminal justice system without plea bargaining."²⁰⁴ At a minimum, prosecutors must continually ask themselves the question Justice Powell posed in his dissent in *Bordenkircher v. Hayes*: whether, in the absence of the coercive powers inherent in plea bargaining, "the prosecutor reasonably might have

201. See MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2020) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); Kenneth Bresler, *Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice*, 9 GEO. J. LEGAL ETHICS 1301, 1301–02 (1996); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 132 (2004); Dana Carver Boehm, *The New Prosecutor's Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence*, 2014 UTAH L. REV. 613, 620–27.

202. See James Podgers, *Righting Wrongs*, ABA J. (Apr. 1, 2008, 8:57 PM), https://www.abajournal.com/magazine/article/righting_wrongs [<https://perma.cc/LA9Q-F3YE>]. Model Rule 3.8 provides, in relevant part:

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

- (1) promptly disclose that evidence to an appropriate court or authority, and
- (2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 2020).

203. See Thomas W. Church, Jr., *In Defense of "Bargain Justice,"* 13 LAW & SOC'Y REV. (SPECIAL ISSUE ON PLEA BARGAINING) 509, 509–10 (1979) ("Abuse of prosecutorial discretion can be lessened considerably if prosecutors promulgate and enforce office standards to guide the plea bargaining decisions of their deputies . . .").

204. Alschuler, *The Changing Plea Bargaining Debate*, *supra* note 90, at 687–88.

charged respondent . . . in the first place.”²⁰⁵ As Albert Alschuler has pointed out, such a standard, if enforced, would get at the heart of the innocence problem, because “it does not seem too naïve to suppose that a prosecutor in a no-plea-bargaining system would have declined to devote substantial resources to a case in which there was only an outside chance of conviction at trial.”²⁰⁶

To ensure fidelity to that principle, prosecutors can and should create systems—mandatory checklists,²⁰⁷ designated devil’s advocates,²⁰⁸ or the like—to ensure that this question gets asked and considered seriously. For example, Blume and Helm suggest various structural reforms to enhance the objectivity of prosecutorial review of innocence claims.²⁰⁹ One way to do this, they suggest, is for prosecutors to use citizen panels to review cases in which defendants pled guilty but maintain their claim of innocence.²¹⁰ This, they contend, would be one way to “extend the historical protection provided by juries to all defendants, not just the 3% who go to trial.”²¹¹ As an alternative, they suggest that in those cases in which innocence-claiming defendants win a new trial, a new prosecutor, one not otherwise invested in the conviction, could be assigned to handle the case after the reversal.²¹² Yet Blume and Helm express profound skepticism of this proposal, noting that “[p]rosecutors are a ‘tight knit group,’ and will be reluctant to earn the ire of their current or former prosecutorial colleagues (or law enforcement officers) by dismissing the charges.”²¹³

Conviction Integrity Units (CIUs) within prosecutors’ offices, if designed properly, offer one promising way to break through the groupthink and role biases that can impede the effectiveness of proposals like those of Blume and Helm. A CIU is a division and a set of procedures within a district attorney’s office established to identify, investigate, and rectify wrongful convictions within the jurisdiction.²¹⁴ Effective CIUs typically have full access to police and prosecutor files and evidence and have management-level authority to review cases; they are staffed with

205. *Bordenkircher v. Hayes*, 434 U.S. 357, 370 (1978) (Powell, J., dissenting).

206. Alschuler, *The Changing Plea Bargaining Debate*, *supra* note 90, at 688.

207. For a discussion of the value of checklists in modifying behavior and improving outcomes in law, medicine, and industry, see Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 *CARDOZO L. REV.* 2215, 2226, 2239–42 (2010).

208. For a discussion of the value of devil’s advocates for overcoming cognitive biases that can lead prosecutors astray, see Findley & Scott, *supra* note 48, at 388–89.

209. Blume & Helm, *supra* note 2, at 181–90.

210. *Id.* at 186.

211. *Id.* at 189.

212. *Id.* at 186.

213. *Id.* (citation omitted).

214. See Scheck, *supra* note 207, at 2248.

attorneys who do not come from the prosecution culture in the jurisdiction (often former defense attorneys or innocence attorneys) and who work closely with public defenders and innocence advocates.²¹⁵ Creating, and then entrusting, those units to respond to post-conviction claims of innocence has real potential for mitigating the guilty-plea innocence problem, at least in the post-conviction context.

CONCLUSION

The data we have collected on post-conviction litigation in innocence cases suggest, as long suspected, that plea bargaining is indeed deeply problematic for the innocent. Our data show that, at least in serious cases,²¹⁶ the extensive charging options and onerous sentencing options available to prosecutors do enable them to manipulate the bargaining process to make it very difficult even for innocent defendants to refuse to plead guilty (or no contest). And they confirm that in a minority—but a meaningful proportion—of such cases, some prosecutors appear to be so determined to preserve convictions that they offer startlingly lenient plea deals, so lenient they run a serious risk of snaring innocent defendants. Viewing these plea offers through the lens of the trial-shadow theory of plea bargaining, we find that these lenient plea offers also suggest that at least some prosecutors manipulate their plea-bargaining advantages to preserve convictions that even they likely recognize are unwinnable at trial—and that may even involve an innocent defendant. Moreover, the data show that a significant proportion of innocence-claiming defendants do indeed succumb to those plea-bargaining pressures and accept these remarkably lenient plea offers, even though the risks of reconviction may not be high. (Recall that all of the innocence-claiming defendants in our dataset who rejected the plea offers were in the end successful in obtaining relief from their convictions.)

A range of reforms is available to alleviate the harmful consequences of this system. Some reforms include increased judicial involvement in reviewing plea bargains; more robust factual basis review; imposing caps on plea concessions; imposing ceilings on trial penalties after plea bargaining fails; banning plea bargaining in post-conviction litigation; and, in the end, changing prosecutorial ethics, institutional structures, and culture to minimize the risk that prosecutors will seek to secure convictions in cases that are unlikely to be winnable at a retrial (or an initial trial). None of these solutions is likely to solve the problem alone; all are worth considering.

215. *Id.* at 2249–50; *see also* Boehm, *supra* note 201, at 618.

216. The data we collected are derived almost exclusively from very serious offenses and hence we cannot know how much they apply to minor offenses.



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**What's Law Got to Do with it? Plea Bargaining
Reform after *Lafler* and *Frye***

Cynthia Alkon

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What's Law Got to Do With It? Plea Bargaining Reform after *Lafler* and *Frye*

By
Cynthia Alkon¹

I. Introduction:

This symposium poses an interesting question: What's left of the law in the wake of ADR? I will address this question in the context of the criminal justice system in the United States. As with civil cases, few criminal cases go to trial. Negotiated agreements through plea bargaining have been the predominate form of case resolution since at least the mid-twentieth century.² As criminal caseloads rose, trial rates decreased, as they did for civil cases.³ Today, only a small percentage of criminal cases go to trial.⁴ Plea bargaining, as with other forms of alternative dispute resolution, is an informal process that operates largely outside the formal legal system. Plea bargains are rarely negotiated on the record in open court. Instead, they are usually negotiated in private between the defense and the prosecution and only announced in open court and on the record once the deal is final and agreed to by all the parties. Does this mean the law is absent in the process? And, does plea bargaining work to undermine the formal criminal codes in the United States? The simple answer is that the formal criminal law provides the framework for how plea bargaining works and also acts as a substantial impediment to serious plea bargaining reform, an impediment that is often not recognized as scholars and practitioners focus on the fact that the plea bargaining process itself operates with few rules and constraints.⁵

As with other dispute resolution processes, plea bargaining grew as a process largely outside the law. Despite being used since colonial times,⁶ it was not until 1970 that the Supreme

¹ Professor of Law, Texas A&M University School of Law. Thank you to Professors Nancy Welsh, Tania Sourdin, and Christopher Drahozal for their thoughtful comments and questions. Thank you to the Yearbook on Arbitration and Mediation for all of their hard work in organizing the 2015 Symposium.

² For example, in 1962 just 15.39% of defendants went to trial in U.S. District Courts, with 53% of those defendants having jury trials, the remaining were bench trials. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL LEGAL STUD. 459, 554 (2001).

³ *Id.* at 492-98.

⁴ 92-97% of resolved criminal cases are resolved through plea bargaining. *Missouri v. Frye* 132 S. Ct. 1399, 1407 (2012).

⁵ An important article arguing for better regulation of plea bargaining is Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117 (2011) (cited in *Lafler v. Cooper* 132 S. Ct. 1376, 1387 (2012)); see also Russell D. Covey, *Plea-Bargaining Law after Lafler and Frye*, 51 DUQ. L. REV. 595 (2013); Darryl K. Brown, *Lafler, Frye and Our Still-Unregulated Plea Bargaining System*, 25 FED. SENT'G. REP. 131 (2012).

⁶ See, e.g., GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 9-10 (2003) (by the nineteenth century plea bargaining was the "dominant means of resolving criminal cases"). See also John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV 261 (1979).

Court recognized plea bargaining as constitutional.⁷ Since 1970, the Court and criminal codes have remained largely silent on the plea bargaining process itself. There are rules surrounding how a defendant should enter his plea of guilty on the record and in open court, but few limitations or rules on how prosecutors or defense lawyers can or should go about negotiating those plea deals.⁸ As a result, plea bargaining critics often focus on the shortage of law regulating plea bargaining and call for new rules and laws to make it a better regulated process.⁹ However, as this article will discuss, plea bargaining is defined by the law, meaning that the law is an important factor, if not the most important factor, in plea negotiations and plea bargaining outcomes. Plea bargaining reform will therefore require substantive criminal law reform. This is not to suggest that substantive criminal law reform is all that is required to address the problems with plea bargaining, but rather that it is a key element that should be part of any meaningful reform effort.¹⁰

Scholars have been highly critical of plea bargaining although it has been a part of our criminal justice system since the founding of this nation.¹¹ One of the earlier debates in plea bargaining scholarship was whether to abolish plea bargaining entirely.¹² A few jurisdictions experimented, without much success, with banning plea bargaining.¹³ Professionals in the criminal justice system are often not as critical of the process as scholars and instead often see plea bargaining as a practical process through which they can manage their high caseloads. Practitioners, therefore, often resist efforts to prevent the use of plea bargaining and find ways to continue plea bargaining cases.¹⁴ Not surprisingly, the need to efficiently manage caseloads is perhaps the most often cited reason for the heavy use of plea bargaining.¹⁵

⁷ *Brady v. United States* 397 U.S. 742, 751-52 (1970).

⁸ See discussion *infra* Section II.

⁹ See, e.g., Bibas *supra* note 5.

¹⁰ For a more detailed discussion of how complex plea bargaining is see generally Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of Lafler and Frye*, 41 HASTINGS CONST. L. Q. 561 (2014).

¹¹ See, e.g., FISHER, *supra* note 6, at 9-10.

¹² See, e.g., Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652 (1981), Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992).

¹³ For a discussion of the bans in Alaska and the Bronx see Douglas D. Guidorizzi, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 774-779 (1998); for an example from another jurisdiction see generally Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265 (1987).

¹⁴ See, e.g., Weninger, *supra* note 13, at 289-311 (judges routinely went around the ban. *Id.* at 306-08).

¹⁵ See, e.g., Alkon, *supra* note 10, at 589-590 ("Judges, prosecutors, and defense attorneys all rely on plea bargaining to manage their caseloads...[and] consider plea bargaining to be an indispensable part of how they do their jobs and manage work-life balance." *Id.*).

Criminal justice reform in the 1970s and 1980s focused on being "tough on crime."¹⁶ As a result, laws were passed in every state, and federally, that increased punishments, added enhancements, and added mandatory sentencing provisions or guidelines.¹⁷ These increased penalties gave prosecutors even more power in the plea bargaining process.¹⁸ The dramatic increase in possible penalties exacerbated a longstanding concern of plea bargaining critics: that the plea bargaining process is coercive and may lead to innocent defendants pleading guilty. This problem became even more of a concern as penalties increased making the consequences of losing at trial worse.¹⁹

A more recent wave of plea bargaining scholarship recognizes that plea bargaining is an entrenched part of the criminal justice system and focuses instead on how to reform it.²⁰ This current wave of scholarship includes those who are critically examining plea bargaining after the Supreme Court started taking a greater interest in the process, starting in 2010 with *Padilla v. Kentucky* when the Court held that defendants have the right to be informed about the collateral immigration consequences of a guilty plea.²¹ Scholarly interest increased again when the Court decided the 2012 companion cases of *Lafler v. Cooper*²² and *Missouri v. Frye*²³ when the Court held for the first time that there is a constitutional right to effective assistance of counsel in plea bargaining.

¹⁶ See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS*, 40-58 (2012).

¹⁷ See, e.g., James Austin, et al., *Unlocking America: Why and How to Reduce America's Prison Population*, THE JFA INSTITUTE 1, 4 (2007), <http://www.jfa-associates.com/publications/srs/UnlockingAmerica.pdf>.

¹⁸ For a more extensive discussion of how the structure of the laws give prosecutors greater power in plea bargaining see Alkon, *supra* note 10, at 586-87.

¹⁹ This is referred to as the trial penalty. See, e.g., Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences after Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 992 (2005) (reporting trial penalties ranging from thirteen percent to four hundred sixty-one percent).

²⁰ See, e.g., Wesley MacNeil Oliver, *Toward a Common Law of Plea Bargaining*, KY. L. J. 2013-2014 at 1; Rishi Batra, *Lafler and Frye: A New Constitutional Standard for Negotiation*, 14 CARDOZO J. CONFLICT RESOL. 309 (2013); Stephanos Bibas, *The Duties of Non-Judicial Actors in Ensuring Competent Negotiation*, 51 DUQ. L. REV. 625 (2013); Covey, *supra* note 5; Nancy J. King, *Plea Bargains That Waive Claims of Ineffective Assistance—Waiving Padilla and Frye*, 51 DUQ. L. REV. 647 (2013); Wesley MacNeil Oliver, *The Indirect Potential of Lafler and Frye*, 51 DUQ. L. REV. 633 (2013); Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150 (2012); Stephanos Bibas, *Taming Negotiated Justice*, Yale L. J. Online (June 20, 2012); Wesley M. Oliver, *The Present and Future of Plea Bargaining: A Look at Missouri v. Frye and Lafler v. Cooper*, 2012 CATOSUP. CT. REV. 257, <http://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2012/9/scr-2012-oliver.pdf>.

²¹ *Padilla v. Kentucky*, 559 U.S. 356 (2010).

²² *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

²³ *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

Much of the most current scholarship on plea bargaining uses these recent Supreme Court cases, most notably *Lafler* and *Frye* to recommend further reforms to plea bargaining.²⁴ However, *Padilla*, *Lafler*, and *Frye*, were all cases in which the Court looked only at the question of whether there was competent assistance of counsel during the client-counseling phase of plea bargaining.²⁵ The narrow focus of the Court in these cases has meant that many commentators and scholars have been similarly focused on the defense lawyer role in plea bargaining or how to provide better defense services.²⁶ Some scholars have focused more generally on the need to reform plea bargaining by adopting more procedural rules.²⁷ Undoubtedly improving defense services and improving the procedural framework are important areas for reform in the plea bargaining process. Yet, the current wave of scholarship often fails to recognize the importance of also reforming the substantive criminal law as a key component to meaningful plea bargaining reform. This is due, in part, to a failure by many critics and commentators to more fully examine bargaining behavior during plea negotiations and to their underlying assumption that plea bargaining is a process that exists outside the law instead of a process that is defined by the existing law.

This article will begin, in Section II, with a brief explanation of the few rules that regulate the plea bargaining process. Section III will examine how plea bargaining works, focusing on how the substantive criminal law impacts bargaining behavior. Section IV will discuss the concern that plea bargaining is often overly coercive and how the substantive criminal law contributes to the coercive atmosphere. Section V will consider the classic article, *The Shadow of the Law: The Case of Divorce*²⁸ and examine whether plea bargaining happens in the shadow of the law. This article will use the shadow of the law concept and build off the analysis from previous articles arguing that while plea bargaining is highly complex, it is time to reexamine how the substantive criminal law impacts plea bargaining behavior and the importance of substantive criminal law reform as part of the overall reform of the plea bargaining process. Section VI will propose that plea bargaining reform efforts should include efforts to reform the underlying criminal law using examples from California's recent changes in the law to explore the kinds of substantive criminal law reform that might contribute to plea bargaining reform.

²⁴ See note 20 for a listing of some of these recent articles.

²⁵ Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L. J. 2650, 2653 (2013).

²⁶ See, e.g., Laurence A. Benner, *Expanding the Right to Effective Counsel at Plea Bargaining*, 27 CRIM. JUST. 4 (2012); Richard E. Myers II, *The Future of Effective Assistance of Counsel: Rereading Cronin and Strickland in Light of Padilla, Frye and Lafler*, 45 TEX. TECH L. REV. 229 (2012); Ronald Wright, *Padilla and the Delivery of Integrated Criminal Defense*, 58 UCLA L. REV. 1515 (2011).

²⁷ See, e.g., Bibas, *supra* note 5; Oliver, *Toward a Common Law of Plea Bargaining*, *supra* note 20; Batra, *supra* note 20.

²⁸ Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979).

II. The Laws Regulating Plea Bargaining

Critics complain that the plea bargaining process operates too informally as there are few rules to regulate how the prosecution and defense negotiate plea deals.²⁹ Historically, the Supreme Court has been more interested in regulating trials and less interested in plea bargaining.³⁰ Despite its widespread use, it wasn't until 1970 that the Supreme Court, in *Brady v. United States*, specifically recognized the constitutionality of plea bargaining.³¹ The Court has held that a guilty plea must be voluntary and intelligent.³² The Court has said this means that the defendant understands what he is doing, acts freely and knowingly, and accepts (or declines) a plea bargain without physical coercion.³³ There are few constraints on how prosecutors approach plea bargaining.³⁴ One exception is that prosecutors should not breach previous agreements.³⁵ For example, the Court remanded a case when the prosecutor failed to stick to the original plea agreement after the defendant entered his plea of guilty³⁶ as to do otherwise would be an "unfulfilled promise" or governmental deception.³⁷ The court has not considered threats of worse punishment or additional charges to be illegal coercion. For example, in *Brady*, the Court decided that the defendant deciding to take the deal to avoid the death penalty was not a violation.³⁸ In *Brady* the Court held that the defendant accepted the deal knowingly and voluntarily, and that a prosecutor's threat to seek the death penalty if the deal was

²⁹ See, e.g., Bibas, *supra* note 5; Susan R. Klein, *Plea Bargaining after Lafler and Frye*, 51 DUQ. L. REV. 559 (2013).

³⁰ See, e.g., Bibas, *supra* note 5, at 1123 ("The law of criminal procedure is primarily a law of trials and preparation for trials.").

³¹ *Brady v. United States* 397 U.S. 742, 751-52 (1970)("[G]uilty pleas are not constitutionally forbidden." *Id.*).

³² *Id.* at 748.

³³ *Id.* at 748-50.

³⁴ See e.g., Angela J. Davis, *The American Prosecutor: Power, Discretion, and Misconduct*, 27-30, 23-SPG CRIM. JUST. 24 (2008) (a general discussion of prosecutorial discretion and why courts defer to prosecutors imposing few rules or constraints on the exercise of their discretion).

³⁵ *Santobello v. New York*, 404 U.S. 257, 262 (1971) (The fact that the prosecutor who made the agreement is no longer handling the case does not change this as "[t]he staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done. That the breach of agreement was inadvertent does not lessen its impact." *Id.* at 262).

³⁶ *Id.* ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Additionally, "appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case...").

³⁷ *Mabry v. Johnson*, 467 U.S. 504, 505 (1984) (distinguishing the facts from *Santobello*).

³⁸ 397 U.S. at 755.

not accepted was not coercive because the death penalty could be lawfully imposed.³⁹ The Court has also held that it is not a violation of due process if a prosecutor threatens to re-indict the defendant with more serious charges if he refuses the plea deal.⁴⁰ In practice, as there are no rules to prevent it, prosecutors can (and do) threaten to add additional charges or enhancements if the defendant does not accept the plea deal.⁴¹ As will be discussed below, prosecutorial threats to add more charges or enhancements puts more pressure on defendants to accept deals as the consequences of failing to do so can be so much more serious.⁴² Threats of additional charges and enhancements increases the concern about the overall coercive atmosphere of plea bargaining including the reality that innocent defendants may plead guilty.⁴³

Just as the Court has had a very narrow reading of what is coercion in the plea bargaining context, the Court has considered plea deals “intelligent” even if the defendant lacks information about the evidence that will be admitted at trial against him or how that may impact his chances of conviction.⁴⁴ In general, under *Brady v. Maryland*, the prosecutor must disclose “evidence favorable to the accused . . . where the evidence is material either to guilt or to punishment.”⁴⁵ *Brady*, did not, however involve a plea bargain and the Court has not specified what evidence must be disclosed before a plea deal. In 2002, in *U.S. v. Ruiz*, the U.S. Supreme Court decided, in part, that a defendant did not have a constitutional right to impeachment information before entering a plea agreement.⁴⁶ This creates a problem in that it may limit the leverage a defendant might have in plea negotiations, as impeachment evidence may help to secure a better deal. It also means that defendants may be accepting plea deals without ever knowing that they have this possible leverage.⁴⁷ So far the Court has not held that there is a defense right to open-file discovery, which means that defendants are often entering guilty pleas without knowing all of the evidence the prosecution may have, including evidence that may increase their bargaining power. There are also, unfortunately, examples of the prosecution failing to turn over

³⁹ *Id.* at 751.

⁴⁰ *Bordenkircher v. Hayes*, 434 U.S. 357, 364–65 (1978). William Stuntz stated, “In retrospect, *Bordenkircher* appears to be one of the great missed opportunities of American constitutional law.” William J. Stuntz, *Bordenkircher v. Hayes: The Rise of Plea Bargaining and the Decline of the Rule of Law* (Harv. Pub. L. Working Paper No. 120, 2005), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract-id=854284>.

⁴¹ See e.g., G. NICHOLAS HERMAN, *PLEA BARGAINING*, 87 (3rd ed. 2012).

⁴² See *infra* Section V.

⁴³ See *infra* Section V; Alkon, *supra* note 10, at 595-605.

⁴⁴ 397 U.S. at 757; see also *United States v. Ruiz* 536 U.S. 622 (2002).

⁴⁵ *Brady v. Maryland* 373 U.S. 83, 87 (1963).

⁴⁶ 536 U.S. at 625.

⁴⁷ For a longer analysis of the problem of lack of defense discovery and a recommendation to adopt open file discovery law see generally Cynthia Alkon, *The Right to Defense Discovery in Plea Bargaining Fifty Years after Brady v. Maryland* 38 N.Y.U. REV. L. & SOC. CHANGE 407 (2014).

exculpatory evidence as *Brady v. Maryland* clearly requires.⁴⁸ Plea bargaining reform proponents, including myself, have called for open file discovery as one procedural rule to better protect defendants to ensure that they have all of the information in the case both to help in the negotiation process and in their decision-making about whether to accept the plea offer or not.⁴⁹

Since 2010, the Court has decided three cases involving plea bargaining that have helped to carve out some minimally better regulation in one part of the plea bargaining process: the client counseling phase.⁵⁰ In *Padilla v. Kentucky*, the Court held that the defendant has the right to be advised by his lawyer about the collateral immigration consequences of his guilty plea and that failure to do so is a violation of the Sixth Amendment right to counsel.⁵¹ In 2012, the Court decided the companion cases of *Lafler v. Cooper*⁵² and *Missouri v. Frye*.⁵³ In *Frye* the Court held that the defendant's sixth amendment right to counsel had been violated when the defendant's lawyer failed to convey a plea offer before it expired.⁵⁴ In *Lafler* the defendant's lawyer conveyed the offer, but wrongly advised his client that the prosecution "would be unable to establish intent to murder" because the victim was shot below the waist (despite being shot four times).⁵⁵ This was so clearly incorrect that the parties on appeal agreed that the advice fell below the required "objective standard of reasonableness."⁵⁶ Based on this poor advice, the defendant turned down a plea deal that was over one-third less than his eventual sentence.⁵⁷

⁴⁸ For example, the prosecution in the Michael Morton case failed to turn over exculpatory evidence, in violation of *Brady*. Michael Morton was wrongly convicted for murdering his wife and served twenty-five years in the Texas prison system. The prosecutor who failed to turn over the evidence, Ken Anderson, was later convicted and sentenced to ten days in jail for the violation of the law. For a longer discussion of the Michael Morton case see Alkon, *supra* note 47 at 419-21.

⁴⁹ See, e.g., Alkon, *supra* note 47; John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437 (2001). For articles more generally recommending open file discovery see Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533 (2010); Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008).

⁵⁰ Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2653 (2013).

⁵¹ *Padilla v. Kentucky*, 559 U.S. 356 (2010). Bibas, *supra* note 5, at 1120 ("With *Padilla*, the Court has now begun to interpret due process and the Sixth Amendment right to counsel to impose meaningful safeguards on the plea process.").

⁵² 132 S. Ct. 1376.

⁵³ 132 S. Ct. 1399.

⁵⁴ *Id.* at 1404.

⁵⁵ *Id.* at 1380.

⁵⁶ *Id.* at 1384 ("In this case all parties agree the performance of respondent's counsel was deficient when he advised respondent to reject the plea offer on the grounds he could not be convicted at trial. In light of this concession, it is unnecessary for this Court to explore the issue." *Id.*)

⁵⁷ *Id.* at 1383-84 (He rejected an offer of 51-85 months in prison (4.25-7.08 years) and was sentenced to 185-360 months in prison (15.4 - 30 years) after the jury convicted him at trial.).

There were no errors in the trial itself, but the Court concluded that the trial did not cure whatever problems may have occurred during the plea bargaining process and specifically said “[e]ven if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence.”⁵⁸ The Court, thereby, recognized the fact that plea deals are often significant discounts from what a defendant will get if they go to trial and are convicted.

Beyond these few constitutional requirements, there are statutory requirements. However, many of the statutory rules simply reflect the constitutional minimums that the Court has established and therefore concentrate on procedural issues.⁵⁹ The rules surrounding plea bargaining do not focus on the negotiation process itself, but rather the formal process of the defendant entering a guilty plea and the court accepting it after the prosecution and defense have agreed on a deal.⁶⁰ For example, Rule 11 of the Federal Rules of Criminal Procedure states what rights a judge must advise the defendant that he is waiving, and that the judge should get the factual basis for the plea.⁶¹ Rule 11 also states that the defendant should be advised about the charges, and the maximum and minimum penalties.⁶² There are also rules concerning what judges can and cannot do, for example, under the Federal Rules, judges cannot “participate” in plea negotiation discussions.⁶³ The rules in state criminal procedure codes regarding plea bargaining also tend to focus more on the form of the guilty plea and procedures surrounding accepting the plea in court.⁶⁴

Many scholars calling for plea bargaining reform focus on the lack of regulation in the plea bargaining process. As Stefanos Bibas observed, “. . . a \$100 credit-card purchase of a microwave oven is regulated more carefully than a guilty plea that results in years of imprisonment.”⁶⁵ Bibas has been in the forefront in calling for better regulations and looking to other possible models such as consumer protection.⁶⁶ Bibas’ recommendations include some specifically aimed at decreasing the potentially coercive atmosphere of plea bargaining. For

⁵⁸ 132 S. Ct. at 1386.

⁵⁹ Bibas, *supra* note 5, at 1124.

⁶⁰ *See, e.g.*, *Boykin v. Alabama*, 395 U.S. 238 (1969) (holding that there needs to be a record to establish that the defendant voluntarily and knowingly entered his plea); Bibas, *supra* note 5, at 1124.

⁶¹ FED. R. CRIM. P. 11(b)(1), (b)(3).

⁶² *Id.*

⁶³ FED. R. CRIM. P. 11(c)(1); for a recent decision holding that a violation of this rule is not grounds to vacate a guilty plea see *U.S. v. Davila*, 133 S. Ct. 2139 (2013).

⁶⁴ *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 26.13 (West 2011).

⁶⁵ Bibas, *supra* note 5, at 1153.

⁶⁶ *See generally* Bibas, *supra* note 5, at 1151-1158.

example, Bibas recommends a “cooling-off period” for any plea deals involving five or more years of imprisonment.⁶⁷ However, as will be discussed below, improving the procedural rules that surround plea bargaining, while important, will not fully address the concern that plea bargaining is unduly coercive because of the pressure prosecutors can put on defendants by threatening to apply the potentially severe penalties written into the criminal codes themselves.

III. How Plea Bargaining Works:

“Plea bargaining is a form of negotiation by which the prosecutor and defense counsel enter into an agreement resolving one or more criminal charges against the defendant without a trial.”⁶⁸ There is no right to a plea bargain which means it is entirely within the discretion of the prosecutor to decide whether to offer a deal.⁶⁹ If there is a plea deal, it is not final unless the judge agrees to accept it.⁷⁰ There are three basic types of plea bargaining: charge bargaining, sentence bargaining and sentence recommendation agreements.⁷¹ In charge bargaining, the negotiation is about whether the prosecutor may agree to dismiss one or more of the charges or to not charge particular offenses in exchange for a guilty plea.⁷² In sentence bargaining the prosecution and defense negotiate about the sentence or punishment.⁷³ Plea negotiations often include both sentence and charge bargaining.⁷⁴ A third form of plea bargaining, sentencing recommendations agreements, is more common in the federal system and is when the prosecutor agrees to recommend a particular sentence to the judge.⁷⁵

⁶⁷ Bibas, *supra* note 5, at 1155. Nancy Welsh suggested a cooling-off period in mediation to help address concerns about coercive mediation practices (“muscle mediation”). Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?* 6 HARV. NEGOTIATION L. REV. 1, 6-7 (2001).

⁶⁸ HERMAN, *supra* note 41 at 1.

⁶⁹ This does not mean that defendants must always go forward to trial, as the defendant may have the option to “plead open” to the court, leaving it to the judge to decide the sentence, with or without the benefit of a pre-arranged plea deal. However, if the defendant pleads open to the court he is “pleading to the sheet” meaning he will have to plead to all charges, as filed, as the judge will not be able to dismiss any charges or enhancements on her own motion. *See, e.g.*, Eric M. Matheny, *The Risks of Pleading Open to the Court*, ERIC MATHENY L. BLOG (Mar. 3, 2012, 12:55 PM), <http://www.ericmathenylaw.com/Criminal-Defense-Blog/2012/March/The-Risks-Of-Pleading-Open-To-The-Court.aspx>.

⁷⁰ HERMAN, *supra* note 41 at, at 109-12 (listing the role of the judge in “finalizing the bargain”).

⁷¹ *See, e.g.*, HERMAN, *supra* note 41 at 1-2.

⁷² For a more extensive list of possible plea bargaining outcomes, see *id.* at 104-06. For purposes of simplicity, this article will often refer to “guilty pleas” and not also include no-contest or Alford pleas. *See e.g.*, HERMAN, *supra* note 41 at 189-91.

⁷³ *See id.* at 1-2.

⁷⁴ *See id.*

⁷⁵ U.S. SENTENCING COMM’N, 2014 GUIDELINES MANUAL [USSG] § 6B1.2(b) (Nov. 2014), available at <http://www.uscourts.gov/guidelines-manual/2014/2014-chapter-6#6b12>.

Depending on the seriousness and complexity of the case, plea negotiations can be simple and fast or complex and drawn out.⁷⁶ Plea bargaining is often a multi-party negotiation as not only must the prosecutor and defense lawyer agree, but also the defendant and the judge, and in some cases the prosecutor's boss.⁷⁷ Victims do not have a formal role, although in many jurisdictions they must be informed about any plea deal.⁷⁸ Police officers also have no formal role, and, unless they are a victim, may not be notified about the deal until after it is concluded (if at all). However, police officers and victims, despite the fact that they have no formal role in the plea negotiation, can informally exert influence over the prosecutor.

Plea negotiations can be as simple as an offer from the prosecutor that is accepted by the defense without any counter-offers. Or the negotiation may involve the defense sharing information about possible defenses and possible motions (such as a search and seizure motion) with the goal being to persuade the prosecutor to reduce the charge or reduce the sentence or both. Plea negotiations are usually conducted off the record, even if the negotiation is in open court. At some point the plea offer may be reduced to writing or the offer may be stated on the record in court.⁷⁹

Because plea bargaining tends to happen in private, it is harder to study and analyze than, for example, trials. Empirical studies of plea bargaining often focus on the outcome of the plea

⁷⁶ See, e.g., HERMAN, *supra* note 41 at 75-87 (describing various plea bargaining tactics including "quick pleas"), 89-109 (describing how plea negotiations are done). In simple cases—such as driving under the influence of alcohol or drug cases—prosecutors and defense lawyers know the "standard deal" in the individual court or jurisdiction. The "negotiation," thus, often simply consists of the prosecutor stating the offer and the defense lawyer confirming that her client accepts the deal. See DOUGLAS W. MAYNARD, *INSIDE PLEA BARGAINING: THE LANGUAGE OF NEGOTIATION* 78 (1984) (referring to these types of plea negotiations as "routine processing" *Id.*, and at 104-07).

⁷⁷ For a discussion about plea bargaining as a multi-party negotiation see Alkon, *supra* note 47 at 413-14.

⁷⁸ For a general description of victims' rights in criminal cases see *About Victims' Rights*, <https://www.victimlaw.org/victimlaw/pages/victimsRight.jsp> (last visited Sept. 6, 2015). For a recommendation of more victim involvement see e.g., STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 150-53 (2012).

⁷⁹ This has become more common after the 2012 cases of *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) and *Missouri v. Frye*, 132 S. Ct. 1399 (2012). For more information on the efforts to place more information on the record regarding plea offers post-*Lafler* and *Frye* see Alkon, *supra* note 10 at 617-18.

negotiation as that is something that is both easier to determine and to measure.⁸⁰ There have, however, been studies of plea bargaining that have attempted to examine the negotiation process in more detail. One such study was conducted in the early 1980s and used conversational analysis to examine how plea bargaining worked and the skills the lawyers used while negotiating misdemeanor cases.⁸¹ One observation from this study was that plea negotiations tend to happen in “spurts and starts” in between other conversations the lawyers are having in court, in between the judge calling cases, and other defense lawyers trying to talk to the prosecutor.⁸² Criminal courts can be chaotic places and misdemeanor courts even more so.⁸³ But, unlike negotiation or mediation of civil cases which may happen far away from the formal trappings of the court system, plea bargaining more often happens in courtrooms and courthouses.

One distinction in plea bargains is between those that are routine and those that are not. Routine plea bargains are those cases in which the prosecution and the defense agree on what the case is worth and “they do not ‘really negotiate.’”⁸⁴ However, as Douglas Maynard noted, a case that is resolved without apparent negotiation “still reflects strategic and systematic negotiational efforts.”⁸⁵ The charge, the facts, and the prior criminal record of the defendant are all a part of the analysis for the defense in determining whether the prosecutor’s first offer is acceptable.⁸⁶ The other type of plea negotiation is one where the defense attorney does not accept the prosecutor’s first offer.⁸⁷ In these cases, Maynard observed, lawyers will typically discuss facts

⁸⁰ For examples of empirical studies examining plea bargaining outcomes focused on whether the type of lawyer (public defender, publicly appointed private counsel or private counsel) makes a difference in case outcomes see, e.g., ROGER HANSON, BRIAN OSTROM, WILLIAM HEWITT, AND CHRISTOPHER LOMVARDIAS, NAT’L CTR. FOR STATE COURTS, INDIGENT DEFENDERS: GET THE JOB DONE AND DONE WELL (1992); James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 22 YALE L.J. 154 (2012); Richard D. Harley, et.al., *Do You Get What you Pay for? Type of Counsel and Its Effect on Criminal Court Outcomes*, 38 J. OF CRIM. JUST. 1063 (2010); Morris B. Hoffman, Paul H. Rubin & Joanna M. Shepherd, *An Empirical Study of Public Defender Effectiveness: Self-Selection by the “Marginally Indigent”*, 3 OHIO ST. J. CRIM. L. 223 (2005); Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* (Nat’l Bureau of Econ. Research, Working Paper No. 13187, 2007), available at <https://www.nber.org/papers/w13187>; Thomas H. Cohen, *Who’s Better at Defending Criminals? Does type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes?* <https://ssrn.com/abstract=1876474>; Michael Roach, *Explaining the Outcome Gap between Different Types of Indigent Defense Counsel: Adverse Selection and Moral Hazard Effects*, (Apr. 2011), <http://ssrn.com/abstract=1839651>.

⁸¹ DOUGLAS W. MAYNARD, *INSIDE PLEA BARGAINING: THE LANGUAGE OF NEGOTIATION*, 1-4 (1984).

⁸² *Id.* at 36.

⁸³ For the classic study of misdemeanor courts see generally MALCOM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979).

⁸⁴ MAYNARD *supra* note 79, at 104.

⁸⁵ *Id.*

⁸⁶ *Id.* at 104-07 (describing several routine plea agreements and why the fact of little discussion does not mean there was no negotiation).

that might show weaknesses in the prosecutor's case and factors about the defendant that might support a more lenient penalty.⁸⁸

The starting point in any plea negotiation is the charges. A defense lawyer will evaluate whether the prosecutor has sufficient evidence to prove the charges, and if there are any weaknesses in the case, these weaknesses will be used to argue for a reduced charge and/or a reduced sentence. For example, if the charge is possession for sale of a controlled substance, the defense attorney may argue that the surrounding circumstances and the amount of the drug will make it difficult for the prosecution to prove beyond a reasonable doubt that the drugs were possessed for sale and that, therefore, the prosecutor should reduce the charge to a simple possession of a controlled substance and that the penalty should also be reduced. Defense lawyers will also evaluate whether there are additional charges or enhancements that could be added that could increase the possible maximum penalty as part of deciding whether the offer is fair. The charge or potential charges are a key starting point because whatever crime the defendant is accused of violating, or could be accused of violating, is what determines the possible maximum penalty.⁸⁹

Defendants who do not accept a plea deal and instead go to trial and lose, can expect to get a higher sentence than they would have gotten through plea bargaining.⁹⁰ This is often referred to as the "trial penalty" and researchers report that defendants who go to trial and are found guilty can receive prison sentences that are over four times higher than those who plead guilty.⁹¹ Stefanos Bibas explains that the "expected post-trial sentence is imposed in only a few percent of cases" which means it is "like the sticker price for cars: only an ignorant, ill-advised consumer would view the full price as the norm and anything less as a bargain."⁹² However, the

⁸⁷ MAYNARD *supra* note 79, at 107. Maynard refers to these types of plea bargains as "adversarial" although later studies suggest that this is not the best term as plea negotiation is often highly cooperative. For studies that look at negotiation styles of criminal lawyers, and found a significant percentage to be rated as "problem solvers" as compared to "adversarial" see Andrea Kupfer Schneider, *Cooperating or Caving In: Are Defense Attorneys Shrewd or Exploited in Plea Negotiations?* 91 MARQ. L. REV. 145 (2007); Andrea Kupfer Schneider, *Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143 (2002).

⁸⁸ MAYNARD *supra* note 81, at 107-08.

⁸⁹ See e.g., JILL PAPERNO, REPRESENTING THE ACCUSED: A PRACTICAL GUIDE TO CRIMINAL DEFENSE, 216-18 (2012).

⁹⁰ For a scathing report on how the trial penalty impacts plea bargaining in felony drug cases in the United States, see generally HUMAN RIGHTS WATCH, *An Offer You Can't Refuse: How U.S. Federal Prosecutors Force Drug Defendants to Plead Guilty* (Dec. 2013), available at http://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0_0_0.pdf.

⁹¹ See Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 992 (2005) (reporting trial penalties ranging from thirteen percent to four hundred sixty-one percent, depending on the state and the offense); Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, at 224-30 (stating that the actual trial penalty could be substantially higher due to the fact that most statistics compare the sentence for similar charges and do not consider the fact that plea bargains often include pleading guilty to a lesser offense than the one originally charged).

⁹² Bibas, *supra* note 5, at 1138.

fact that defendants don't plead out to the maximum, doesn't mean that the maximum possible sentence don't anchor the plea negotiations. As will be discussed later, a defendant's fear of a high maximum sentence can raise concerns of coercion in the plea bargaining process and innocent defendants have plead guilty to avoid the risk of trial and the potentially dramatically higher maximum sentence.⁹³

One empirical study looking at plea bargaining outcomes concluded that the criminal code mattered in terms of plea outcomes and how prosecutors bargained in particular cases.⁹⁴ The more options a prosecutor had under the law to reduce the charges, without reducing to a misdemeanor, the more likely they were to reduce the charges and along with that, the sentence.⁹⁵ Ronald Wright and Rodney Engen concluded that "the substantive criminal law determines the outcome of the criminal process" and that plea bargaining does not mean that the parties "negotiate a customized outcome without regard to the legal rules."⁹⁶ Instead, the law creates "starting points" for the negotiation.⁹⁷ One question was whether prosecutors still exercise wide discretion when there are sentencing guidelines and mandatory sentencing provisions. Wright and Engen examined previous empirical studies that found it was "clear that prosecutors circumvent guidelines through charge bargaining in a sizeable minority of cases."⁹⁸ Wright and Engen also found that to be true in the data they collected. They looked at two factors, the "depth" and "distance" of the criminal code. The "depth" of the criminal code is determined by whether there are a lot, or just a few, charging options for similar facts.⁹⁹ The "distance" is the "relative difference in the sentences that attach to the more- and less-serious charging options."¹⁰⁰ Wright and Engen found that the charges are more likely to be reduced when there is more depth, meaning more options for the prosecutor to choose from. It is less likely if there is a large distance, meaning big differences in sentences.¹⁰¹ This study confirmed that plea bargaining is not a process that takes place outside the legal system but instead is a process that is, as will be discussed below, framed by the substantive law.¹⁰²

⁹³ See *infra* Section IV. See, e.g., Ronald Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 84-86, 100-12, 129-37, 150-54 (2005) (concluding that federal defendants who would have been acquitted at trial plead guilty in increasing numbers due to increased federal prosecutorial power and threats of large penalties for going to trial combined with much better deals for pleading guilty).

⁹⁴ Ronald F. Wright & Rodney Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1939 (2006).

⁹⁵ *Id.* at 1940.

⁹⁶ Wright, *supra* note 94, at 1940.

⁹⁷ *Id.*

⁹⁸ *Id.* at 1947.

⁹⁹ *Id.* at 1939.

¹⁰⁰ *Id.* at 1940.

¹⁰¹ Wright, *supra* note 94, at 1940.

¹⁰² See *infra* Section V.

Bibas observed that until 2010, when *Padilla v. Kentucky*¹⁰³ was decided, the Supreme Court's "world was binary: defendants were either guilty or not guilty" and that the Court "ignored the varieties of possible charges and the gradations of sentences that might fit a crime."¹⁰⁴ The substantive criminal law makes a substantial difference in terms of how plea bargaining works.¹⁰⁵ Prosecutors have the power and discretion to charge any offense that the facts arguably support.¹⁰⁶ Since the 1970s, legislatures in every state, and the U.S. Congress, have increased penalties for crimes, created new crimes, added habitual offender statutes, and increased sentences through enhancements for things like using a gun or committing a crime in a school zone.¹⁰⁷ The changes in the substantive criminal law have given prosecutors more leverage in plea bargaining and made plea bargaining a much higher stakes process for defendants who face significantly higher sentences if they reject the plea offer.¹⁰⁸ As was discussed above, thus far the Supreme Court has shown little interest in sentencing issues in plea bargaining in large part due to the tendency to take "trials as the norm and thus post-trial punishments as the normative baseline."¹⁰⁹ Scholars have also tended to focus more of their attention on better regulating the process of plea bargaining and less on the impact of the substantive criminal law on how plea bargaining actually works.¹¹⁰ However, the substantive criminal law is part of the reason that the plea bargaining atmosphere can be coercive, as will be discussed below.

¹⁰³ 559 U.S. 356.

¹⁰⁴ Bibas, *supra* note 5, at 1128.

¹⁰⁵ For another study concluding that that substantive crime "can catalyze or frustrate plea bargaining" see Kyle Graham, *Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 CALIF. L. REV. 1573 (2012).

¹⁰⁶ HERMAN, *supra* note 41 at 15 (Prosecutors are "given extraordinarily broad discretion in deciding whether to prosecute and what charges to bring, and this discretion is not subject to judicial intervention so long as the charges brought are based on probable cause and the prosecution is not facially discriminatory." *Id.* See, also ALEXANDER, *supra* note 16 at 87 (discussing prosecutorial discretion and the practice of overcharging); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85-105 (1968) (discussing prosecutorial overcharging, based on interviews with prosecutors and defense attorneys in the 1960s, an example that overcharging is not a new practice).

¹⁰⁷ For a discussion of how these changes increase prosecutorial power see Alkon, *supra* note 79, at 585-87.

¹⁰⁸ See, e.g., Albert Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 570-71 (1978).

¹⁰⁹ Bibas, *supra* note 5, at 1127. However, the Court recognized that the defendant who turned down a plea deal due to ineffective assistance of counsel got a worse sentence after trial. *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) ("Far from curing the error, the trial caused the injury from the error. Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence." *Id.* at 1386).

¹¹⁰ For a notable exception, see Wright & Engen *supra* note 94.

IV. Concerns About Plea Bargaining

Critics have expressed serious concerns for decades about how plea bargaining works and about the fact that it is the predominate process to resolve criminal cases in the United States. Those expressing concern about the heavy use of plea bargaining question whether it undermines our adversarial system of justice.¹¹¹ There is also the concern that plea bargaining fails to give victims a voice¹¹² or to offer procedural justice generally.¹¹³ Other concerns are that plea bargaining encourages defendants to “game” the system¹¹⁴ and that it leads to disparate sentencing.¹¹⁵ Critics have also looked at the overall atmosphere and expressed concern that plea bargaining acts as a form of torture¹¹⁶ and is unduly coercive.¹¹⁷ Some have suggested procedural reform to address the concern about undue coercion in plea bargaining.¹¹⁸ Better regulation of the plea bargaining process, including putting greater restrictions on prosecutorial hard bargaining behavior, could help to reduce the pressure placed on many defendants to plead guilty. However, procedural protections alone can’t fully address the problem of coercion as it is often the underlying criminal law, and the possibility of an extremely high penalty, that places pressure on defendants to accept the prosecutor’s offer.¹¹⁹

One concern is that innocent defendants are pleading guilty due to concerns about possibly heavy penalties after trial. For example, seventeen percent of those exonerated in 2013 first plead guilty to the charges.¹²⁰ Overall, out of the 329 DNA exonerations nationwide, thirty-one (or just over nine percent) plead to the crime before being exonerated.¹²¹ This means that we

¹¹¹ See, e.g., William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 80-82 (2006).

¹¹² See, e.g., STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 26, 150-53 (2012).

¹¹³ See generally Michael O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407 (2008).

¹¹⁴ See, e.g., ROBERT A. KAGEN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 85 (2001).

¹¹⁵ See, e.g., Laurie L. Levinson, *Peeking Behind the Plea Bargaining Process: Missouri v. Frye & Lafler v. Cooper*, 46 LOY. LA. L. REV. 457, 471 (2013).

¹¹⁶ John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12 (1978).

¹¹⁷ See, e.g., H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63 (2011).

¹¹⁸ See, e.g., Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2042-50 (2006); see also Bibas, *supra* note 5, at 1155-57.

¹¹⁹ For a more detailed discussion of the overall negotiation atmosphere for plea bargaining, including bargaining imbalances and coercion, see Alkon *supra* note 10, at 594-605.

¹²⁰ Timothy Williams, *Study Puts Exonerations at Record Level in U.S.*, N.Y. TIMES, Feb. 4, 2014, http://www.nytimes.com/2014/02/04/us/study-puts-exonerations-at-record-level-in-us.html?_r=0.

¹²¹ *DNA Exonerations Nationwide*, The Innocence Project (Feb. 7, 2007), <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide>.

know that innocent people are pleading guilty.¹²² One reason that innocent people may plead guilty is because “the offer is too good to refuse”¹²³ which is tied to defendants evaluating the possible maximum compared to the plea offer.¹²⁴ Innocent defendants may also be more risk averse than the guilty and more likely, therefore, to take deals.¹²⁵

Oren Gazal-Ayal and Avishalom Tor examined whether innocent defendants are more likely to take deals.¹²⁶ Gazal-Ayal and Tor suggested that one possible reform to lessen the problem of innocent defendants taking plea deals would be to place restrictions on plea offers.¹²⁷ They suggest to “limit the magnitude of plea discounts or, alternatively, or trial penalties.”¹²⁸ The way they suggest this should be accomplished is that judges should “reject plea agreements that include a sentence that is significantly lower than the sentence expected following conviction by a jury trial.”¹²⁹ Gazal-Ayal and Tor confidently predict that this will “result in plea rejections by those defendants who require deeper discounts in exchange for their guilty pleas” which will reduce the number of innocent defendants who plead guilty.¹³⁰ While this might prevent some of the most extreme examples of hard bargaining, it will also likely result in more trials and more convictions and higher sentences for innocent defendants who might otherwise, at least, have benefitted from a reduced sentence.¹³¹ Gazal-Ayal and Tor do not discuss the need to also reduce mandatory sentencing provisions, sentencing enhancements, or long possible maximum sentences as part of how this proposal might help to reduce the pressure on innocent defendants to plead guilty. As with other scholars who focus on procedural reform, Gazal-Ayal and Tor fail to also examine the underlying criminal law and recommend changes to the law in addition to the procedural changes.

¹²² The overall numbers are probably higher. For a longer discussion see Alkon, *supra* note 10, at 601-03.

¹²³ Covey, *supra* note 5, at 617.

¹²⁴ For an article arguing that innocent defendants may get better deals and that concerns about an “innocence problem” in plea bargaining are “misguided,” see Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1117 (2008).

¹²⁵ For an interesting study finding that innocent people are highly likely to take plea deals, especially in the face of serious consequences if they reject the deal, see generally Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013). *But see* Oren Gazal-Ayal & Avishalom Tor, *The Innocence Effect*, 62 DUKE L. J. 339, (2012) (arguing that “innocents are significantly less likely to accept plea offers that appear attractive to similarly situated guilty defendants.” *Id.* at 339).

¹²⁶ Gazal-Ayal & Tor, *supra* note 125, at 347.

¹²⁷ *Id.* at 395.

¹²⁸ Gazal-Ayal & Tor, *supra* note 125, at 395.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Most of the exonerated were convicted by a jury trial. Simply having a trial is far from a guarantee that the defendant will not be convicted. *See supra* notes 120-122.

On example of how extreme possible sentences can work in the plea bargaining context is the case of Marissa Alexander. Ms. Alexander was charged with aggravated assault with a deadly weapon in Florida.¹³² The case started when Ms. Alexander shot her gun in the air “one time” during a fight with her estranged husband.¹³³ Ms. Alexander’s defense was that on the day in question her husband grabbed her neck and threatened to kill her.¹³⁴ The trial judge, in error, shifted the burden of proof in the “stand your ground” defense to Ms. Alexander during jury instructions.¹³⁵ The jury convicted Ms. Alexander and due to the mandatory “use a gun” law¹³⁶ in Florida, Ms. Alexander was sentenced to twenty years in prison.¹³⁷ Ms. Alexander’s case was overturned on appeal due to an error in the jury instructions and sent back for a re-trial.¹³⁸ Before her first trial the prosecution offered three years in prison in exchange for a guilty plea to aggravated assault (without the gun use allegation).¹³⁹ Ms. Alexander rejected that deal and went to trial. After the appellate court ordered a re-trial, the prosecutor added additional charges of aggravated assault, one for each of her two children who were present, in addition to her estranged husband. Those additional charges made the possible maximum sentence sixty years in prison, as there was a mandatory twenty year “use a gun” allegation with each charge.¹⁴⁰

Ms. Alexander was faced with a decision that is all too typical. She could reject the deal and go to trial on what appeared to be a solid self-defense claim. However, she had already lost at trial (albeit with bad jury instructions). If she lost at trial again, and on all charges, she would be sentenced to sixty years in prison. Or she could take the three year plea deal that the prosecutor eventually offered again. By the time the offer was renewed, Ms. Alexander was just weeks away from completing the three year term.¹⁴¹ Defendants are regularly faced with “time-

¹³² *Fla. Mom Gets 20 Years for Firing Warning Shots*, CBS NEWS (July 15, 2013), <http://www.cbsnews.com/news/fla-mom-gets-20-years-for-firing-warning-shots>.

¹³³ *Id.*

¹³⁴ Aliyah Frumin, *Marissa Alexander Accepts Plea Deal*, MSNBC (Nov. 24, 2014), <http://www.msnbc.com/msnbc/marissa-alexander-accepts-plea-deal>.

¹³⁵ *Alexander v. State*, 121 So. 3d 1185, 1188 (Fla. Dist. Ct. App. 2013).

¹³⁶ FLA. STAT. §775.087.2 (2014) (“... discharged a ‘firearm’ or ‘destructive device’ as defined in s. 790.001 shall be sentenced to a minimum term of imprisonment of 20 years.” *Id.*).

¹³⁷ *Fla. Mom Gets 20 Years for Firing Warning Shots*, *supra* note 132 (“Under Florida’s mandatory minimum sentencing requirements Alexander couldn’t receive a lesser sentence, even though she has never been in trouble with the law before.” *Id.*).

¹³⁸ 121 So. 3d 1185 at 1189.

¹³⁹ Julia Dahl, *Fla. Woman Marissa Alexander Gets 20 Years for “Warning Shot”: Did She Stand Her Ground?*, CBS NEWS (May 16, 2012), <http://www.cbsnews.com/news/fla-woman-marissa-alexander-gets-20-years-for-warning-shot-did-she-stand-her-ground/>.

¹⁴⁰ Morgan Whitaker, *Marissa Alexander Could Face 60 Years*, MSNBC (Mar. 3, 2014) <http://www.msnbc.com/politicsnation/marissa-alexander-could-face-60-years> (the prosecutor stated that the additional charges were necessary due to a change in the law. *Id.*).

¹⁴¹ Frumin, *supra* note 134.

served” or nearly time-served deals or extremely high sentences if they go to trial and lose.¹⁴² As Ms. Alexander experienced, if she was convicted, she could expect to get the maximum. As is no surprise, on reflection, Ms. Alexander decided to accept the plea deal.¹⁴³ What is never explained is why the same act would be worth three years in prison after a guilty plea, but twenty or sixty years after a trial, an example of a significant trial penalty of 566% to 1900%. Simply taking the possibility of the three-year offer off the table, as Gazal-Ayal and Tor suggest as one possible reform, would not have helped Ms. Alexander. She would have been forced to go to trial and risked another jury, even with proper instructions, convicting and sending her to prison for sixty years. However, if the underlying law was changed, and Ms. Alexander was looking at a much lower possible sentence, the risk of going to trial would be that much lower and one that she might have been willing to take.

Ms. Alexander’s case illustrates how the substantive criminal law can be used to create a coercive atmosphere. Prosecutors have discretion to file charges that carry the maximum penalty (or not) and they can decide to add (or not) enhancement allegations, like the “use a gun” enhancement in Florida. However, if the law allows for these charges, it is unrealistic to assume that prosecutors won’t use the charges and that they won’t use them as part of their arsenal to secure guilty pleas.¹⁴⁴

The Marissa Alexander case highlights another problem with mandatory minimums. Although mandatory minimums were intended to ensure that similar acts were punished similarly, in reality, due to plea bargaining, mandatory minimums instead often are only used against those who go to trial or otherwise can’t negotiate around the mandatory sentence. There is no doubt that Marissa Alexander used a gun. There is a question whether the act of firing the gun was a criminal act (an assault). Before trial, the prosecution made plea offers that took the mandatory twenty years in prison for using a gun off the table. After Ms. Alexander’s conviction at her first trial, the judge had no choice, under the law, but to sentence her to the twenty years.¹⁴⁵ Mandatory minimums, either for the existing charge or through enhancements, increase the pressure on defendants to accept plea deals, increase the potential trial penalty, and increase the disparity between defendants who committed otherwise similar acts.

V. Bargaining in the Shadow of the Law:

The now classic article to examine and describe how the substantive law can impact bargaining behavior was published in 1979 and described the bargaining behavior in divorce

¹⁴² See *supra* notes 90-91 and accompanying text.

¹⁴³ Frumin, *supra* note 134.

¹⁴⁴ See e.g., WILLIAM STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 259 (2011) (“...these and similar laws granted prosecutors the power to threaten sentences that neither the enacting legislators nor the prosecutors themselves wished to apply, all as a means of inducing guilty pleas with prosecutor’s preferred sentences attached. The predictable consequence was more easily induced guilty pleas and harsher sentences.” *Id.* at 259).

¹⁴⁵ *Florida Mom Gets 20 Years for Firing Warning Shots*, *supra* note 132.

cases as happening in the “shadow of the law.”¹⁴⁶ The article concluded that there were a number of reasons why the substantive family law mattered in how the parties approached negotiating divorce, custody, and support issues. Years later, in 2004, Stefanos Bibas, critically analyzed plea bargaining scholarship that adopted one piece of the shadow of the law theory, the “shadow of trial.”¹⁴⁷ Bibas concluded that trial outcomes are only one piece of a much more complex dynamic.¹⁴⁸ Bibas argued for the need to recognize these other complexities and not simply look at plea bargaining behavior in the context of trial outcomes.¹⁴⁹ In considering plea bargaining reform it is useful to first explore how the shadow of the law theory may explain plea bargaining behavior to better understand why it is also necessary to reform the substantive criminal law as part of any meaningful plea bargaining reform effort.

A. The Shadow of the Law:

In *Bargaining in the Shadow of the Law: The Case of Divorce*, Robert Mnookin and Lewis Kornhausert examined how the law impacted divorce negotiations “outside the courtroom”¹⁵⁰ and suggested that divorce law did not impose “order from above” but rather provided a “framework” for the negotiations.¹⁵¹ Mnookin and Kornhausert concluded that the existing laws on “custody, alimony, child support, and marital property are all striking for their lack of precision and thus provide a bargaining backdrop clouded by uncertainty.”¹⁵² However, this uncertainty in the law did not mean that the law was irrelevant to the negotiations.

In examining how divorce negotiations worked, Mnookin and Kornhausert identified five factors that they concluded were important in determining the outcome of divorce negotiations. The five factors were: “(1) the preferences of the divorcing parents; (2) the bargaining endowments created by legal rules that indicate the particular allocation a court will impose if the parties fail to reach agreement; (3) the degree of uncertainty concerning the legal outcome if the parties go to court, which is linked to the parties’ attitudes towards risk; (4) transaction costs and the parties’ respective abilities to bear them; and (5) strategic behavior.”¹⁵³

Mnookin and Kornhausert discussed how the substantive law can impact these factors. For example, if custody is determined under a “best interests of the child standard” as compared

¹⁴⁶ Mnookin & Kornhausert, *supra* note 28.

¹⁴⁷ Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

¹⁴⁸ *Id.* at 2469.

¹⁴⁹ *Id.* at 2470-2486.

¹⁵⁰ Mnookin & Kornhausert, *supra* note 28, at 950.

¹⁵¹ *Id.*

¹⁵² *Id.* at 969.

¹⁵³ *Id.* at 966.

to a "maternal-preference rule" or a "joint custody rule" it changes the bargaining power of each parent.¹⁵⁴ Under a rule where mothers are presumed to get custody, fathers will have relatively little bargaining power.¹⁵⁵ Likewise, rules that give fathers more equality in custody, particularly when combined with laws that limit alimony, give fathers more bargaining power.¹⁵⁶

Mnookin and Kornhausert looked at the impact that changes in the law may have on whether the parties reach an agreement. The example that they gave is a proposal to give the custodial parent, whoever it might be, the exclusive right to determine when the non-custodial parent can visit, if at all and joint custody would not be a possibility.¹⁵⁷ The problem with a rule like this, as Mnookin and Kornhausert explained, is that it makes it harder for divorcing parents to agree on custody and reach "initial agreement" as this proposed rule would prevent the parties from agreeing to promises regarding visitation beyond who has custody.¹⁵⁸

Under Mnookin and Kornhausert's analysis, the shadow of the law in the context of divorce cases exists in two pieces: the applicable legal codes and how the courts might decide any divorce case that fails to settle. In looking at the how the law influenced divorce negotiations, Mnookin and Kornhausert used as a reference point what the courts might do and the fact that any divorce case that is not settled through negotiation will go to trial.¹⁵⁹

B. Does the Shadow of the Law Theory Apply to Plea Bargaining?

Twenty five years after the *Shadow of the Law* was published, Stephanos Bibas criticized applying Mnookin and Kornhauser's second piece of the analysis, how the courts might decide a case, to the plea bargaining context.¹⁶⁰ Bibas took issue with scholars who looked at "plea bargaining as just another case of bargaining in the shadow of expected trial outcomes."¹⁶¹ Bibas, concluded that the "shadow-of-trial" model was "far too simplistic" when looking at the relationship between criminal trials and plea bargains.¹⁶² Bibas defined the "shadow of trials" to

¹⁵⁴ Mnookin & Kornhausert, *supra* note 28, at 977.

¹⁵⁵ *Id.* at 978.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 983-85.

¹⁵⁸ *Id.* at 983-85.

¹⁵⁹ *Id.* at 975. (In doing so, Mnookin and Kornhausert identified five reasons why divorcing couples may fail to negotiate an agreement, despite the advantages of negotiated agreements. These reasons are "(1) spite; (2) distaste for negotiation; (3) calling the bluff—the breakdown of negotiations; (4) uncertainty and risk preferences; (5) no middle ground" *Id.*).

¹⁶⁰ Bibas, *supra* note 147.

¹⁶¹ *Id.* at 2465.

¹⁶² *Id.* at 2466-67.

mean “the influence exerted by the strength of the evidence and expected punishment after trial.”¹⁶³ Bibas concluded that plea bargaining is more complex as there are “structural impediments that distort bargaining” such as bad lawyers, the rules surrounding bail, and mandatory sentences.¹⁶⁴ The second big problem, according to Bibas, with applying a shadow of trials theory is that it “assumes that the actors are fundamentally rational” in plea bargaining.¹⁶⁵

Bibas briefly examines the impact that the legal framework has on plea bargaining, but not as Mnookin and Kornhausert did. In the *Shadow of the Law*, Mnookin and Kornhausert discuss not just trial outcomes, but how the substantive law of divorce impacts or could impact, divorce negotiations. Bibas, by focusing on trial outcomes, gives little attention to the first question: how much does the substantive legal framework impact plea bargaining? Bibas rightly points out that trial outcomes are not as important as a shadow of trials theory might suggest in the specific context of plea bargaining as there are many other factors that influence bargaining behavior. In doing so, Bibas recognizes the importance of the substantive criminal law in terms of mandatory sentences and sentencing guidelines that contribute to the “structural skewing of bargains.”¹⁶⁶ As Bibas explains it, mandatory sentencing guidelines and mandatory minimums make it so that punishment is no longer “calibrated” to the “strength of the evidence” as these statutory provisions “act as sledgehammers” that crash down on defendants if the crime was committed under certain circumstances, regardless of the severity of the criminal act.¹⁶⁷ Bibas concludes that the inflexibility of the substantive criminal law impacts plea bargaining and examines how it might encourage cooperation from defendants to get better deals as defendants will “look for ways to smooth out the sharp peaks and valleys” of the substantive laws.¹⁶⁸

Mnookin and Kornhausert’s conclusion that the divorce law provides the framework for divorce negotiations is equally applicable in plea bargaining. As with divorce cases, the substantive criminal law creates “bargaining endowments” for the prosecution and gives them far greater power in plea negotiations. Marissa Alexander’s case illustrates how an extreme possible sentence can give the prosecutor power in the bargaining process to pressure a defendant to accept the deal or face the high sentence. For many laws, such as the mandatory use-a-gun laws in Florida, the legal outcome is not uncertain if the defendant is convicted: the defendant will get the mandatory minimum. There is a degree of uncertainty in how a jury may see an offered defense and whether they will vote to acquit. In such situations, Mnookin and Kornhausert discussed that the decision of whether to negotiate a settlement or not will depend on the how the parties view risk.¹⁶⁹ There is a serious concern that innocent defendants may be more risk averse

¹⁶³ Bibas, *supra* note 147 at 2467.

¹⁶⁴ *Id.* at 2467.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 2488.

¹⁶⁸ Bibas, *supra* note 147 at 2490.

¹⁶⁹ Mnookin & Kornhausert, *supra* note 28, at 975.

than the guilty and more likely, therefore, to take deals, especially if the potential consequences of losing at trial are more serious.¹⁷⁰ Mnookin and Kornhausert also point to the transaction costs and the parties willingness to bear them as one of the factors influencing bargaining behavior in divorce cases.¹⁷¹ As with the above factors, defendants are often at a serious disadvantage as the transaction costs of not taking the deal can include the general unpleasantness of making court appearances and the possibility of spending more time in custody awaiting their trial than the time-served deal.¹⁷²

While any single theory explaining plea bargaining (or any form of negotiation) will undoubtedly over-simplify the analysis of how the process works, it is still useful to analyze whether the shadow of the law applies to plea bargaining. One of Bibas' concerns about the focus on the shadow of trial theory is that by doing so scholars failed to look critically enough at how plea bargaining works and the need for reform.¹⁷³ As Bibas said, if trials are the "backstop" to plea bargaining then "we do not need new procedural safeguards for pleas because plea outcomes already incorporate the value of trial safeguards."¹⁷⁴ However, it is precisely because of the complexities of plea bargaining that it is important to understand the variety of factors that influence bargaining behavior, particularly if the goal is to reform plea bargaining. One of the factors that exerts a strong influence in the parties bargaining behavior in plea negotiations is the substantive criminal law. Therefore it is important to not only look to what additional law or regulation may help improve the plea bargaining process, but to also not overlook the importance of reforming the underlying criminal law as a part of reforming plea bargaining.

VI. Reforming Plea Bargaining After *Lafler* and *Frye*:

As discussed above, the Supreme Court has decided few cases on plea bargaining and even fewer that place limits on the plea bargaining process. Therefore, the 2012 cases of *Lafler v. Cooper*¹⁷⁵ and *Missouri v. Frye*¹⁷⁶ made some observers optimistic that these cases heralded a

¹⁷⁰ See *supra* notes 123-125.

¹⁷¹ Mnookin & Kornhausert, *supra* note 28, at 971-72.

¹⁷² For a longer discussion of the challenges defendants face making court appearances see Alkon, *supra* note 10, at 600-601; Covey, *supra* note 91, at 239-41.

¹⁷³ Bibas disagrees with scholars who adopt the shadow of trial view as "they presume that bargains largely reflect the substantive outcomes that would have occurred at trial anyway, minus some fixed discount." Bibas *supra* note 147, at 2465; for the list of scholars Bibas cites, see *id.* at note 2 (HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 31-32 (1966); Thomas W. Church, Jr., *In Defense of "Bargain Justice,"* 13 LAW & SOC'Y REV. 509, 512-14, 523 (1979); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 309-17 (1983); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992); William M. Landes, *An Economic Analysis of the Courts*, 14 J. L. & ECON. 61, 66-69 (1971); Edward A. Rittenburg, *Plea Bargaining Analytically—the Nash Solution to the Landes Model*, 7 AM. J. CRIM. L. 323, 353 (1979); Robert E. Scott & William Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1910 (1992). *Id.*)

¹⁷⁴ Bibas, *supra* note 147, at 2466.

¹⁷⁵ 132 S. Ct. 1376.

new era and would have a “significant effect.”¹⁷⁷ As I have written elsewhere these cases are likely to have a much more limited impact.¹⁷⁸ However, these cases, have sparked renewed scholarly interest in plea bargaining and may spark renewed efforts to reform plea bargaining.

Nationwide, there is a growing interest in criminal justice reform that cuts across partisan political lines.¹⁷⁹ Much of the interest is focused on decreasing high incarceration rates.¹⁸⁰ This interest is not limited to academics, but instead includes legislators and has already involved some significant changes in state criminal laws. For example, the Sentencing Project reported that in 2014 alone “at least 30 states and the District of Columbia authorized a range of law changes and policies that may address the nation’s scale of incarceration.”¹⁸¹ Although these legislative changes are aimed at decreasing incarceration rates they may have a significant impact on how plea bargaining works. If done right, legislative reforms aimed at reducing incarceration rates could also help to significantly lessen the often coercive atmosphere in plea bargaining.¹⁸²

California is an example of a state that has restructured its criminal law to reduce possible sentences and to reduce some offenses from felonies to misdemeanors. These new laws were not intended to reform plea bargaining, but were instead intended to decrease incarceration rates in the state.¹⁸² Over-crowding in California prisons is so serious that the state has been under a continuing federal court order, since 2009, to reduce its prison population.¹⁸³ The first significant

¹⁷⁶ 132 S. Ct. 1399.

¹⁷⁷ Erwin Chemerinsky, *Effective Assistance of Counsel Now a Right in Plea Bargaining*, ABA JOURNAL (June 4, 2012, 1:45PM), http://www.abajournal.com/news/article/chemerinsky_effective_assistance_of_counsel_now_a_right_in_plea_bargaining/.

¹⁷⁸ See generally, Alkon, *supra* note 10.

¹⁷⁹ See, e.g., Attorney General Eric H. Holder Jr., Address to the Bipartisan Summit on Criminal Justice Reform (Mar. 26, 2015) (transcript available at <http://www.justice.gov/opa/speech/attorney-general-holder-addresses-bipartisan-summit-criminal-justice-reform>).

¹⁸⁰ The United States incarcerates more people than any other country and has the highest incarceration rate in the world. See, e.g., Nicole D. Porter, *The State of Sentencing 2014: Developments and Practice*, THE SENTENCING PROJECT 1 (Feb. 2015), http://www.sentencingproject.org/detail/publication.cfm?publication_id=583&id=156 (The total correctional population [of the United States] of 6.9 million consists of more than 2.2 million people in prison or jail and 4.7 million under community supervision on probation or parole.”).

¹⁸¹ Porter, *supra* note 180, at 1.

¹⁸² This is in contrast to earlier law reform in California, Proposition 8 (A Victims Bill of Rights) which was passed in 1982 and intended, in part, to reform plea bargaining. See CANDACE MCCOY, POLITICS AND PLEA BARGAINING: VICTIMS’ RIGHTS IN CALIFORNIA, 32-40 (1993).

¹⁸³ See, e.g., Alex Dobuzinskis, *Judges Tell California to cut prisoner count by 10,000*, REUTERS (June 20, 2013) <http://www.reuters.com/article/2013/06/20/us-usa-california-prisons-idUSBRE95J17W20130620> (“California...has been under court orders to reduce inmate numbers in its...prison system since 2009, when the same three-judge panel ordered it to relieve overcrowding that has caused inadequate medical and mental healthcare.” *Id.*).

change in the California Penal Code was Proposition 36, which passed in 2012, and amended the three-strikes law.¹⁸⁴ Previously, any defendant convicted of any new felony, if they had two prior convictions for serious and violent felonies, faced a sentence of twenty-five years to life.¹⁸⁵ This meant that if a defendant had two prior convictions for residential burglary and was convicted on a drug possession, or petty theft with a prior, that defendant would be sentenced to twenty-five years to life in prison, unless the case was plea bargained for less.¹⁸⁶ Proposition 36 changed the law by requiring that the new criminal case also be a serious or violent felony. Proposition 36 also included a retroactivity clause, allowing up to 3000 defendants sentenced under the old law to be resentenced.¹⁸⁷

To date, it is not clear how this change in law has changed, or not, plea bargaining practices in California. Under both the old and new law, prosecutors have discretion to file cases as three-strike cases and to “strike strikes” as part of the plea bargaining process. This meant that some cases that could be three-strike cases were reduced in plea bargaining to second-strike cases. For example, a typical three-strike of possession for sale of one rock of crack cocaine alleged as a three-strike case under the old law due to two prior strike offenses could have been reduced in plea bargaining. The prosecution could offer to reduce the case to a second-strike case with a sentence of eight years in prison (compared to twenty-five to life). Defendants who were facing twenty-five to life sentences often jumped at the opportunity to take those reduced sentences. Proposition 36 prevents prosecutors from threatening to add strikes, or offering to take them away, when the new criminal case is not a serious or violent felony. The change in law took away one significant category of possible mandatory minimum sentences and therefore, possibly, one opportunity for prosecutors to threaten higher sentences if a defendant did not take the plea deal. One of the problems with three-strike cases is that they were often “no offer” cases, which means the prosecutor refused to make an offer, often due to office-wide policies.¹⁸⁸ As with other charges, prosecutors can exercise wide discretion on how to handle three strikes cases from the initial charging decisions to the decision of whether to offer a plea bargain. There are no studies yet analyzing the impact of Proposition 36 on plea bargaining in California. The focus has been instead on its impact in reducing the prison population.

¹⁸⁴ CAL. PENAL CODE §667 (West 2012).

¹⁸⁵ The U.S. Supreme Court held this law did not violate the Eight Amendment prohibition against cruel and unusual punishment. *Ewing v. California*, 538 U.S. 11 (2003) (the defendant stole three golf clubs, and the Court held that his sentence of twenty-five years to life was not a violation as “Ewing’s sentence is justified by the State’s public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record.” *Id.* at 29-30).

¹⁸⁶ The law also restricted early release so that defendants sentenced under it served more of their time. On a twenty-five to life sentence a defendant is eligible for release on parole after serving 85% of the twenty-five years. CAL. PENAL CODE §667(c)(5) (West 2012).

¹⁸⁷ David Mills & Michael Romano, *The Passage and Implementation of the Three Strikes Act of 2012 (Proposition 36)*, 25 FED. SENT’G. REP. 265, 267 (2013).

¹⁸⁸ Whether the DA should reduce three-strike cases was a campaign issue for the District Attorney in Los Angeles in 2000. See Mitchell Landsberg, *Garcetti and Cooley in Spirited Exchange on 3-Strikes Law*, L.A. TIMES, Sept. 26, 2000, <http://articles.latimes.com/2000/sep/26/local/me-26844>.

The second change in the law in California is potentially even more far-reaching. Proposition 47 passed in November, 2014, and reduced some felonies to misdemeanors, including drug and property crimes.¹⁸⁹ It also allowed those who have already been sentenced to be re-sentenced under the new law.¹⁹⁰ It is still too early to evaluate the long-term impact. The initial reports seem to suggest that there will be fewer arrests. The old law, as one Deputy Public Defender in Los Angeles, Russell Griffith remarked, "...gave the cops an enormously strong incentive to arrest people because they were cheap statistics."¹⁹¹ Early reports are that arrests are down dramatically for narcotics offenses which are no longer felonies.¹⁹² Overall, in Los Angeles County, narcotics arrests decreased by 30% and overall bookings into the Los Angeles County Jail were down by 23% since the adoption of Proposition 47.¹⁹³ The decrease in arrests has meant that county jail inmates now serve more of their time as the need for early release due to over-crowding has decreased.¹⁹⁴ It is unclear what impact Proposition 47 may be having on plea bargaining. For example, are prosecutors decreasing county jail time offers due to the understanding that an inmate will serve more time on a sixty day sentence than they did in the past?

Another question is what will be the fate of problem-solving courts, such as drug courts, in the wake of this change in law? Possession of controlled substances is now a misdemeanor. Without the threat of a felony conviction, at least some prosecutors are worried that defendants will no longer agree to drug rehabilitation or other treatment as part of a sentence, particularly as the possible sentences are now dramatically lower. As one Los Angeles County District Attorney observed, in such cases, defendants serve little time in the county jail and in "just a few minutes and they're out. You have removed that leverage" of the higher possible sentence.¹⁹⁵

Removing that kind of leverage could make a significant difference in how plea bargaining works, at least in terms of potentially coercive prosecutorial plea bargaining behavior. Proposition 47 removes the option to file certain offenses as felonies. As Wright and Engen

¹⁸⁹ Marisa Gerber, et. al., *Prop 47 Brings a Shift to Longer Time Spent Behind Bars*, L.A. TIMES, Jan. 28, 2015, <http://www.latimes.com/local/crime/la-me-early-release-20150128-story.html#page=1>.

¹⁹⁰ See, e.g., J. Richard Couzens & Tricia A. Bigelow, *Proposition 47: "Safe Neighborhoods and Schools Act"* (Dec. 2014), http://www.adi-sandiego.com/pdf_forms/PROPOSITION_47_by_Couzens_and_Bigelow_December_2014.pdf (a guide for judges, which, in part, explains how to apply the retroactive portions of the law both in terms of re-classifying offenses as misdemeanors and re-sentencing. *Id.* at 23-64).

¹⁹¹ Rory Carroll, *'Doing Life when No One Died': Prop 47 Ends 'Insane' Drug Penalties in California*, THE GUARDIAN, Nov. 28, 2014, <http://www.theguardian.com/us-news/2014/nov/28/proposition-47-california-drug-crime>.

¹⁹² Gerber, *supra* note 189.

¹⁹³ *Id.*

¹⁹⁴ Gerber, *supra* note 189.

¹⁹⁵ Carroll, *supra* note 191.

observed in their study, prosecutors are less likely to reduce charges to a misdemeanor.¹⁹⁶ John Pfaff, who has done extensive empirical work to better understand the causes of mass incarceration in the United States, concludes that the increase in incarceration in the 1990s and 2000s was “driven almost entirely by change in precisely one part of the criminal justice chain—the prosecutor’s decision to file a felony claim.”¹⁹⁷ Removing this option may help to not only reduce incarceration rates overall, but may also help to limit or restrict prosecutors using the potential of harsher charges and penalties as pressure in the plea negotiation process, for at least some categories of crimes.

California’s reforms may influence other states to take similar actions. The key questions for future research include not only whether incarceration rates decrease, but also whether the changes in the law cause changes in plea bargaining and prosecutorial behavior. Are prosecutors filing a lower percentage of cases because they can only file them as misdemeanors?¹⁹⁸ Are trial rates increasing? Increasing trial rates would be one indicator that the pressure to plead guilty has reduced, although arguably an outcome that none of the professionals in the criminal justice system would be anxious to see.¹⁹⁹ Careful study of the impact of these changes in the specific context of plea bargaining, could help to understand what reforms of the underlying criminal law might make sense as part of the process of reforming plea bargaining.

VII. Conclusion

As Malcom M. Feeley observed, during an earlier era when many were calling for plea bargaining reform, “[r]eforms that focus exclusively on one narrow problem without seeing it in the context of the entire system may generate unanticipated consequences even less desirable than the status quo.”²⁰⁰ In fairness, plea bargaining critics in this era who call for procedural reforms are often doing so in ways that are far-reaching and not focused on narrow problems. However, as this article has discussed, they tend to do so without including recommendations to reform the underlying criminal law. This is a key area to not overlook. The possibility of harsh

¹⁹⁶ Wright & Engen, *supra* note 94, at 1940. However, misdemeanor convictions carry serious potential consequences including serious collateral consequences, so a misdemeanor, while a reduction, is not equivalent to a dismissal. See Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, U.C. DAVIS L. REV. 277, 287 (2011).

¹⁹⁷ John F. Pfaff, *The Causes of Growth in Prison Admissions and Populations*, SOC. SCI. RES. NETWORK 1, 3 (July 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1884674. See also Leon Neyfakh, *Why Are So Many Americans in Prison? A Provocative New Theory*, SLATE, Feb. 6, 2015, http://www.slate.com/articles/news_and_politics/crime/2015/02/mass_incarceration_a_provocative_new_theory_for_why_so_many_americans_are.html (“...over the course of the ‘90’s and 2000s, district attorneys just got much more aggressive in how they filed charges.” *Id.*).

¹⁹⁸ See e.g., John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GEORG. STATE UNIV. L. REV. 1239 (2012) (concluding that incarceration rate increases are due in large part to prosecutors filing a larger percentage of cases, when they can file felony charges. *Id.* at 1241).

¹⁹⁹ Managing caseloads is an interest that prosecutors and defense lawyers share. For a longer discussion on shared interests, see Alkon, *supra* note 10 at 609-614.

²⁰⁰ Malcom M. Feeley, *Perspectives on Plea Bargaining*, 13 LAW & SOC’Y REV. 199, 204 (1979).

penalties, combined with prosecutors having the discretionary power to charge the same act as a felony or misdemeanor and to add a variety of sentencing enhancements, contribute to what is often a highly coercive atmosphere in plea bargaining. Plea bargaining is a form of negotiation that most certainly does not exist outside the law, but is instead a process framed by the underlying criminal law. Reformers need to recognize this key part of how plea bargaining works and move beyond focusing primarily on procedural reform to include broader discussions of criminal code reform as part of any effort to reform plea bargaining.

January 22, 2024 **FEATURE**

Fourteen Principles and a Path Forward for Plea Bargaining Reform

Lucian E. Dervan

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Plea bargaining accounts for almost 98 percent of federal convictions and 95 percent of state convictions in the United States. So prevalent is the American plea-bargaining system that the US Supreme Court wrote in 2012 that ours “is for the most part a system of pleas, not a system of trials.” *Missouri v. Frye*, 566 U.S. 134, 143–44 (2012). But this has not always been the case. The American system, it turns out, began as a system of trials, much like that found in the English common law that served as its predecessor. Gradually, however, the concept of plea bargaining took root in the United States and grew in the shadows until, by the latter half of the 20th century, it had come to dominate.

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Dashboard

In-Month Performance

Metric	Value	Change
Open Matter	13	▲ 5.97%
New Matter	10	▲ 5.97%
Closed Matter	8	▲ 2.12%
Turnover Rate	80%	▲ 3.63%
Billed Amount	\$120K	▲ 3.63%

Team Performance

Realization rate: 82.1% (Avg Rate)

Billed and Collected: \$400K (Total Collected)

Month	Billed	Collected	Amount
May 1	\$100,000	\$80,000	75%
May 2	\$100,000	\$80,000	75%
May 3	\$100,000	\$80,000	75%
May 4	\$100,000	\$80,000	75%
May 5	\$100,000	\$80,000	75%

As might be expected from a system that grew in the shadows, plea bargaining evolved without much oversight, regulation, or monitorship by the bar, the courts, or the legislatures. As a result, plea bargaining evolved in different ways from one jurisdiction to another. Further, as plea bargaining gained ground, jurisdictions failed to establish guiding principles or guardrails to ensure that plea practices were appropriate and did not infringe defendants’ constitutional rights, particularly the right to trial found in the Sixth Amendment.

Recently, the American Bar Association adopted a new set of guiding principles crafted to provide an avenue to a more consistent plea-bargaining system and to establish guardrails to help ensure that plea practices are consistent with the Constitution and a thoughtful system of criminal justice. The principles, which cover a host of topics such as the use of impermissibly coercive incentives, the use of pretrial detention in plea bargaining, the provision of adequate discovery before a defendant pleads guilty, and the collection of plea-bargaining data by the courts, are the result of almost four years of work by the ABA Criminal Justice Section Plea Bargaining Task Force. This article tells the story of plea bargaining's rise to dominance, discusses the costs of bargains, and introduces the 14 principles that are now ABA policy and that provide a path forward to a fairer, more transparent, and more just system of criminal adjudication.

The Early Rejection of Bargains

It is not surprising that many people believe plea bargaining has a deep common law history, particularly given how dominant plea bargaining is in today's criminal justice system. But the actual history of plea bargaining reveals that this form of adjudication is a relatively modern American invention that sprang from the need to create a more efficient criminal system in the face of the over-criminalization of the early 20th century. Prior to the 20th century, in fact, courts interpreting the common law were wholly averse to the concept of bargained justice.

In the 1783 English case of *Rex v. Warickshall*, for example, the court examined a case in which the defendant had been offered a "promise of favor" in return for a confession. 168 Eng. Rep 234, 235 (1783). In response, the court wrote, "[A] confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape ... that no credit ought to be given to it." *Id.* This language reflected the importance placed by the common law in the jury trial.

In the United States, the significance of the jury was captured in the Constitution and the Bill of Rights. Of the trial's place in the American

experiment, Thomas Jefferson wrote, “I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.” The combination of these sentiments from the American founders and the existing precedent from the British common law led inevitably to the adoption of language similar to *Warickshall* by the US courts. In *Bram v. United States*, for example, the US Supreme Court considered the appropriateness of incentives to confess. 168 U.S. 532, 584 (1987). The Court concluded that the “true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort.” *Id.*

Despite the strong language in opposition to bargains contained in case law from the 18th and 19th centuries, examples of plea bargaining in the trenches of the American criminal justice system can be found as early as the late 1700s in sporadic geographic locations. For example, according to Professor George Fisher, forms of plea bargaining occurred in liquor law violations in Middlesex County, Massachusetts, during the late 1700s. Professor Dan Canon’s research also identifies early examples of plea bargaining in Massachusetts and, eventually, New England in the mid-1800s.

Despite the use of early forms of plea bargaining in the trenches during this period, the courts continued to adhere to the British and American precedents and their critical view of offering incentives to plead guilty. In the late 1800s, for example, the California Supreme Court wrote, “When there is reason to believe that the plea has been entered through inadvertence ... and mainly from the hope that the punishment to which the accused would otherwise be exposed may thereby be mitigated, the Court should be indulgent in permitting the plea to be withdrawn.” *People v. McCrory*, 41 Cal. 458, 462 (1871). Around the same time, the Wisconsin Supreme Court wrote that plea bargaining is “hardly, if at all distinguishable in principle from a direct sale of justice.” *Wright v. Rindskopf*, 43 Wis. 344, 353 (1877). Yet, despite these precedents, plea bargaining continued to gain a foothold in the American criminal justice system as it began its rise to dominance.

A defining moment in the rise of plea bargaining was the over-criminalization of the early 20th century, particularly once the Prohibition era arrived. During

this period of American history, the number of prosecutions swelled, and courts quickly became overwhelmed. As public officials searched for an answer to this growing crisis of resources, plea bargaining, and the efficiency it might offer, became a potential solution.

In 1931, as the criminal justice system continued to strain under the weight of large dockets, President Herbert Hoover convened the Wickersham Commission to examine crime in America. The Commission's findings included a specific discussion of the plea bargaining already occurring in the trenches and the potential that utilization of this system of adjudication might provide an answer for the whole system.

[F]ederal prosecutions under the Prohibition Act terminated in 1930 had become nearly eight times as many as the total of all pending federal prosecutions in 1914. In a number of urban districts the enforcement agencies maintain that the only practicable way of meeting this situation with the existing machinery of federal courts . . . is for the United States Attorneys to make bargains with defendants or their counsel whereby defendants plead guilty to minor offenses and escape with light penalties . . . Lawyers everywhere deplore, as one of the most serious effects of prohibition, the change in the general attitude toward the federal courts. . . . [T]he huge volume of liquor prosecutions . . . has injured their dignity, impaired their efficiency, and endangered the wholesome respect for them which once obtained.

Nat'l Comm'n on Law Observance & Enf't, *Report on the Enforcement of the Prohibition Laws of the United States* 56 (1931). Although little data are available regarding the widespread growth of plea bargaining in the early 20th century, data on pleas of guilty are available. These data illustrate that between the early 20th century and 1925, the guilty plea rate in federal court rose from 50 percent to 90 percent. Lucian E. Dervan, *Bargained Justice: Plea Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 Utah L. Rev. 51, 59 (2012). Much of this increase is likely attributable to the growth of plea bargaining in the shadows, as observed by the Wickersham Commission.

Despite what appears to be a growing utilization of plea bargaining in the early 20th century, the US courts continued to view such behavior with suspicion. In fact, so inconsistent was the practice of plea bargaining with prior common law precedent that on several occasions the US Supreme Court appeared on the precipice of ruling it a wholly unconstitutional practice. In 1958, for example, the Court took up the case of *Shelton v. United States*. 356 U.S. 26 (1958), *cert. granted*. The *Shelton* case had originated in the Fifth Circuit, where the defendant had requested his plea be set aside as involuntary and coerced. In response, the Fifth Circuit, in granting the motion, wrote:

There is no doubt, indeed it is practically conceded, that the appellant pleaded guilty in reliance on the promise of the Assistant United States Attorney that he would receive a sentence of only one year. The court, before accepting the plea, did not ascertain that it was in truth and in fact a voluntary plea not induced by such promise. It necessarily follows that the judgment of conviction must be set aside and the plea of guilty vacated.

Shelton v. United States, 242 F.2d 101, 113 (5th Cir. 1957). The Fifth Circuit also wrote, “Justice and liberty are not the subjects of bargaining and barter,” a statement strikingly similar to the words written by the Wisconsin Supreme Court in *Wright* in 1877. *Id.* The case then went to the U.S. Supreme Court but was removed by the government prior to a ruling. Some believe this was a result of the Department of Justice counting heads and determining that the Court was likely to agree with the lower court and strike down plea bargaining once and for all. See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 Colum. L. Rev. 1, 37 (1979).

Eight years later in 1966, another case made its way to the US Supreme Court and, once again, the Court’s reluctance to embrace bargaining was on full display. The case, *United States v. Jackson*, 390 U.S. 570 (1968), involved a statute that contained an increased punishment for those convicted by a jury. Although not a plea bargain, the case put before the justices the issue of punishing those who proceeded to trial. In ruling the provision unconstitutional because it placed an “impermissible burden on the exercise of

a constitutional right,” the Court wrote, “It is no answer . . . that federal trial judges may be relied upon to reject coerced pleas of guilty and involuntary waivers of jury trials. For the evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them.” *Id.* at 583. The strength of this language, in combination with the various earlier precedents, would lead many to believe that plea bargaining’s days were numbered in 1968, but they would be wrong.

Brady and Modern Plea Bargaining

Just two years after *Jackson*, the case of *Brady v. United States*, 397 U.S. 742 (1970), made its way to the US Supreme Court. This case finally brought the issue of plea bargaining squarely before the justices. The defendant in *Brady* argued that his plea should be withdrawn because he was coerced into pleading guilty to avoid the possibility of receiving the death penalty. Rather than continue to enforce earlier precedents that prohibited pleas of guilty that resulted from the “flattery of hope” or the “torture of fear,” the Court embraced plea bargaining as a mechanism of efficiency that might free up resources for cases that did proceed to trial.

This decision is striking for its inconsistency with the earlier precedents dating back to English common law, but there are several key elements that led to this result in 1970. First, the passage of time had created an opportunity for plea bargaining to survive review. For example, since the *Shelton* case had been removed from consideration in 1958, five new justices had taken the oath and would decide plea bargaining’s fate. Further, by 1970, 90 percent of cases in the United States were resolved through pleas of guilty. While the exact number that involved plea bargaining is unclear, the Justices must have understood the devastation that would be wrought on the criminal justice system had they ruled the practice entirely unconstitutional.

Second, the Court believed that there was a need for a more efficient method of adjudication given that the court systems continued to be overburdened, just as the courts had been when plea bargaining grew in the trenches in the 1920s. Even the American Bar Association was adopting this line of reasoning

during this period. In 1968, for example, the American Bar Association Standards Relating to Pleas of Guilty 2 (1968) said:

[A] high proportion of pleas of guilty and *nolo contendere* does benefit the system. Such pleas tend to limit the trial process to deciding real disputes and, consequently, to reduce the need for funds and personnel. If the number of judges, courtrooms, court personnel and counsel for prosecution and defense were to be increased substantially, the funds necessary for such increases might be diverted from elsewhere in the criminal justice process. Moreover, the limited use of the trial process for those cases in which the defendant has grounds for contesting the matter of guilty aids in preserving the meaningfulness of the presumption of innocence.

Id. In fact, the need to address the overburdened court systems was particularly pressing in 1970 as a result of the Due Process Revolution of the 1960s and the increasing lengths of trials that resulted.

While the *Brady* decision brought plea bargaining out of the shadows, the ruling did not lead to robust oversight, regulation, or monitorship of this mechanism of adjudication that had come to dominate. Few, if any, significant restrictions were placed on the use or methods of plea bargaining going forward, and different jurisdictions adopted the practice in inconsistent ways. While plea bargaining in the decades following *Brady* offered some of the benefits envisioned by the Court in 1970, such as efficiency, the piecemeal adoption of plea bargaining has also resulted in costs and the development of troubling practices.

For example, while the Court envisioned plea bargaining as a means to direct more resources towards the remaining trials, plea bargaining has actually contributed to the disappearance of the trial itself. By 2022, only 2.5 percent of convictions at the federal level were the result of trials. In some jurisdictions, years have gone by without a single criminal trial taking place.

Another troubling aspect of plea bargaining is the presence of significant sentencing differentials, which are the differences between the sentence someone receives for pleading guilty versus the sentence they receive in return for utilizing their constitutional right to trial. In a 2019 piece on federal sentencing, the author found that those convicted at trial had a two to six times greater likelihood of incarceration and the sentencing lengths were 20 to 60 percent longer. See Brian Johnson, *Plea-Trial Differences in Federal Punishment*, 31 Fed. Sent'g Rep. 256 (2019). Similarly, a Vera Institute Report from 2020 entitled *In the Shadows* noted that the odds of incarceration were 2.7 times greater for those who went to trial and the sentences were 57 percent longer. See Ram Subramanain et al, Vera Inst. of Just., *In the Shadows: A Review of the Research on Plea Bargaining* (Sept. 2020).

The types of sentencing differentials described above also impact defendant decision-making and have led to the phenomenon of false pleas of guilty by the innocent. By the end of 2022, the National Registry of Exonerations had 3,284 exonerations within its dataset, and 25 percent of those involved a false plea of guilty. Of the entire dataset, more than 40 percent are “no-crime exonerations,” which are exonerations where the exoneree was convicted of a crime that never actually occurred. In this category, a startling 48 percent of the cases involved false pleas of guilty by the innocent. See Nat'l Registry of Exonerations, *2022 Annual Report*, at 11 (May 8, 2023).

Modern plea practice has also seen the use of impermissibly coercive incentives to induce defendants to plead guilty beyond the sentence in the case. For example, prosecutors have used threats to indict children, spouses, or other family members to induce pleas of guilty, including in cases where the pleas served to cover up pervasive law enforcement misconduct that would have been revealed at trial. *United States v. Seng Cheng Yong*, 926 F.3d 582 (9th Cir. 2019). In other examples, modern plea practices have included the use of the power of plea bargaining to force defendants to accept inappropriate conditions as part of the deal. In Tennessee, for example, a prosecutor only offered favorable pleas to women in certain abuse and neglect cases if they agreed to forced sterilization. See ABA CJS, *2023 Plea Bargain Task Force Report* (Feb. 22, 2023).

Finally, another example of the impact of an unregulated and unguided system of pleas is that plea bargaining exacerbates existing racial inequality in the criminal justice system. For example, Black defendants in drug cases are less likely to receive favorable plea offers that avoid mandatory minimum sentences. The same was found in gun cases, where Black defendants are more often subjected to charge stacking than white defendants. Further, white defendants who face initial felony charges are less likely than Black defendants to be convicted of a felony, and white defendants facing misdemeanor charges are more likely than Black defendants to have the cases dismissed or resolved without incarceration. *See id.*

Though this is a nonexhaustive list of some of the costs of bargains and troubling practices that have developed, these examples serve to demonstrate the need for better guidance regarding how our system of pleas should operate and what our expectations should be for our system of criminal justice.

The Fourteen Principles

In 2019, in response to such concerns about the plea bargaining system, the American Bar Association Criminal Justice Section created a Plea Bargain Task Force. The Task Force included representatives from various corners of the criminal justice system—the prosecution, defense, judiciary, academy, various politically diverse advocacy groups, and the state and federal systems. The charge to the Task Force was to consider how plea bargaining has developed over time and what advantages and challenges have resulted. The Task Force was also tasked with considering the best path forward and potential solutions to the challenges identified by the group.

During its duration, the task force regularly met to discuss the state of plea bargaining in America and collected and reviewed testimony from experts in the field and those impacted by the plea system, scholarly and legal reports on plea bargaining, state and federal rules of criminal procedure, and other materials. After several years of work, the members of the Task Force jointly created and unanimously endorsed 14 principles. In releasing the principles,

the Task Force also released a fulsome Report discussing the principles, which is available on the Criminal Justice Section's website. *See id.*

In the press release for the report launch, the American Bar Association noted:

The task force recommended several major steps that legislatures, lawyers, judges and court administrators can take to create a more fair and transparent plea bargaining system. "While the plea-bargaining process in the United States is broad and varied, the task force determined that it was vitally important to craft a single set of principles to guide plea practices generally," the report found. "These principles represent our conclusions about how plea bargaining should operate within our larger criminal justice system, a system based on the fundamental constitutional right to trial."

Below are the 14 principles unanimously adopted by the Task Force and which the group determined represented a path forward to a fairer, more transparent, and more just criminal system.

Fourteen Principles from the 2023 Plea Bargain Task Force Report

Principle 1: A vibrant and active docket of criminal trials and pre- and post-trial litigation is essential to promote transparency, accountability, justice, and legitimacy in the criminal justice system.

Principle 2: Guilty pleas should not result from the use of impermissibly coercive incentives or incentives that overbear the will of the defendant.

Principle 3: In general, while some difference between the sentence offered prior to trial and the sentence received after trial is permissible, a substantial difference undermines the integrity of the criminal system and reflects a penalty for exercising one's right to trial. This differential, often referred to as the trial penalty, should be eliminated.

Principle 4: Charges should not be selected or amended with the purpose of creating a sentencing differential, sentencing enhancement, punishment or collateral consequence to induce a defendant to plead guilty or to punish defendants for exercising their rights, including the right to trial.

Principle 5: The criminal justice system should recognize that plea bargaining induces defendants to plead guilty for various reasons, some of which have little or nothing to do with factual and legal guilt. In the current system, innocent people sometimes plead guilty to crimes they did not commit.

Principle 6: A defendant should have a right to qualified counsel in any criminal adjudication before the defendant enters a guilty plea. Counsel should be afforded a meaningful opportunity to satisfy their duty to investigate the case without risk of penalty to their client.

Principle 7: There should be robust and transparent procedures at the plea phase to ensure that the defendant's plea is knowing and voluntary, free from impermissible coercion, and that the defendant understands the consequences of their decision to plead guilty.

Principle 8: The use of bail or pretrial detention to induce guilty pleas should be eliminated.

Principle 9: Defendants should receive all available discovery, including exculpatory materials, prior to entry of a guilty plea, and should have sufficient time to review such discovery before being required to accept or reject a plea offer.

Principle 10: Although guilty pleas necessarily involve the waiver of certain trial rights, there are rights that defendants should never be required to waive in a plea agreement.

Principle 11: An adequate understanding of the collateral consequences that may flow from a guilty plea is necessary to ensure the guilty plea is knowing and voluntary.

Principle 12: Law students, lawyers, and judges should receive training on the use and practice of plea bargaining consistent with the findings and recommendations of [the 2023 ABA Criminal Justice Section Plea Bargain Task Force] Report.

Principle 13: Court systems, sentencing commissions, and other criminal justice stakeholders, including prosecutor offices and public defenders, should collect data about the plea process and each individual plea, including the history of plea offers in a case. Data collection should be used to assess and monitor racial and other biases in the plea process.

Principle 14: At every stage of the criminal process, there should be robust oversight by all actors in the criminal system to monitor the plea process for accuracy and integrity, to ensure the system operates consistent with the Principles in this Report, and to promote transparency, accountability, justice, and legitimacy in the criminal system.

As seen above, the 14 Principles begin in Principle One with a reiteration of the importance of an active docket of criminal trials and the many benefits that emanate from the oversight and accountability trials can provide. The principles then offer several foundational concepts to guide the use of plea bargaining, including making note of the need to prohibit impermissibly coercive incentives. As the Supreme Court stated in 1970 in *Brady v. United States*, plea bargaining cannot result from “mental coercion overbearing the will of the defendant.” Reiterating this important limitation on bargains and ensuring pleas of guilty are voluntary are vital to a healthy criminal justice system. To assist in preventing the use of impermissibly coercive incentives, the principles then discuss several guidelines, including limiting the size of sentencing differentials, advising that charges should not be selected or amended to create a sentencing differential with the purpose of inducing the defendant to plead guilty, and prohibiting the use of pretrial detention as a tool to extract guilty pleas. These principles seek to establish policies and procedures that prevent defendants from being punished simply for exercising their constitutional right to trial.

In Principle Five, the guidelines discuss the importance of acknowledging that people plead guilty for various reasons, including innocent people. This is a fundamental principle recognizing that the powerful incentives present in the plea-bargaining system can lead to false pleas by the innocent, a phenomenon that not only results in an unjust conviction, but that also places the community at risk because the actual perpetrator may unknowingly remain at large to offend again.

The principles next consider the procedural aspects of plea bargaining and plea hearings. To further the goal of ensuring pleas are voluntary, the principles advocate for robust and transparent procedures and for access to qualified counsel. Similarly, the principles address the need for discovery and an adequate understanding of the applicable collateral consequences to ensure defendants are making informed decisions. As part of this discussion, the principles also examine the waivers contained in plea-bargaining agreements and, while acknowledging that some waivers are appropriate, conclude that there are certain rights for which waivers should not be sought as part of the plea-bargaining process.

Finally, the principles end with a discussion regarding mechanisms to improve the functioning and monitoring of the plea system. These principles include encouraging more training from law school onward regarding the manner in which plea bargaining dominates our criminal justice system and the issues and recommendations from the principles and accompanying report. The principles also encourage more data collection to assist actors both within and outside the system in understanding the operation of plea bargaining and to assist in identifying areas where further inquiry would be helpful. The principles conclude by calling for more oversight of the plea-bargaining system. This will serve to both monitor the system and assist in identifying further areas in need of examination and inquiry.

In totality, the 14 Principles seek to operate together to create a path forward towards a fairer, more transparent, and more just system. In August 2023, the 14 Principles were presented to the American Bar Association House of Delegates

in Resolution 502 and were overwhelmingly adopted as the official policy of the association.

Conclusion

Plea bargaining began as an American experiment in efficiency and eventually came to dominate the system it was created to assist. And while plea bargaining offers many benefits when utilized appropriately, the risks and costs of an unregulated, unmonitored, and unguided plea system are significant. Fortunately, the American Bar Association has taken steps to both create and adopt 14 principles that can serve as a guide going forward to address many of these issues. While there is still much work to be done, these 14 principles start us on the journey of creating the plea system we would have created had plea bargaining grown in the light, rather than risen in the shadows.

ENTITY:

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9. Lessen Unfair Pressure to Plead Guilty

Lessen Unfair Pressure to Plead Guilty

RECOMMENDATION

An overwhelming majority of criminal convictions are resolved by plea bargaining. The severity of punishment in the modern criminal legal system can often push people to plead guilty to avoid or be freed from incarceration, not because it is a fair resolution. Discrete changes to the Penal Code can address some of the more unfair aspects of the plea bargaining system.

The Committee therefore recommends the following:

- Allow courts to revisit pretrial detention whenever a prosecutor makes a plea offer.
- Prohibit the use of the same fact for conviction of the offense and imposition of a sentence enhancement.
- Allow juries to consider lesser-related offenses for specified charges.
- Add a presumption for probation to the default sentencing triad.

RELEVANT STATUTES

Penal Code §§ 18(a), 245(a)(2), 1159, 1289, 12022.5

BACKGROUND AND ANALYSIS

In California, as in the rest of the United States, guilty pleas are the dominant process for resolving criminal cases. In counties reporting data to the Judicial Council for Fiscal Year 2021–2022, 75% of dispositions of felony cases were guilty pleas, while around 20% were dismissals. Less than 3% were trials.²²² As this data shows, plea bargaining – when a defendant and prosecutor negotiate a guilty plea to specific charges and sentence instead of having a trial²²³ – accounts for almost all convictions. Defendants who plea bargain typically receive shorter sentences than people convicted at trial.²²⁴

But this system is one where prosecutors sometimes have an unfair advantage, with no benefit to public safety. Several factors, including harsh sentencing laws and pretrial incarceration, can make the risks of going to trial intolerable, giving the prosecutor significant power in plea bargaining.²²⁵ Even innocent people plead guilty: of the more than 3,300 people exonerated since 1989, 25% had pleaded guilty.²²⁶

²²² Judicial Council of California, 2023 Court Statistics Report, Tables 8a & 8b.

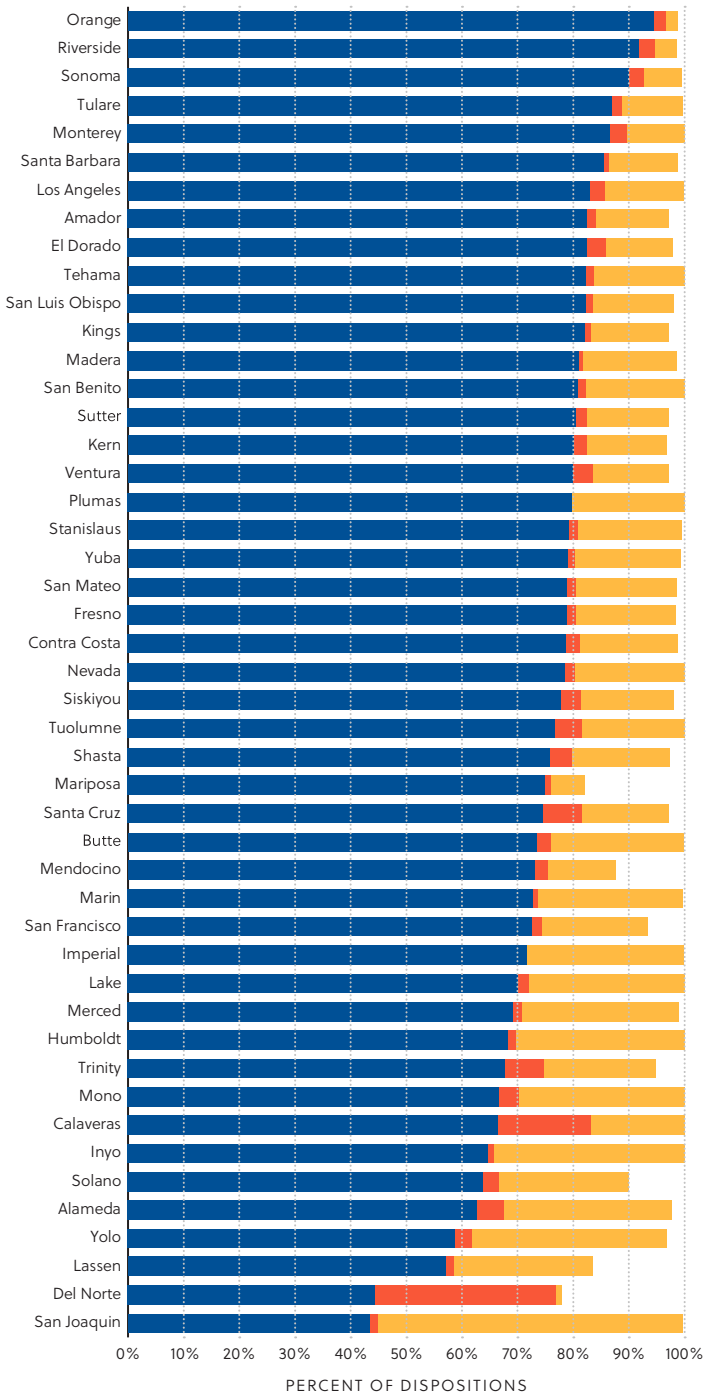
²²³ See Penal Code § 1192.5.

²²⁴ Shawn D. Bushway, Allison D. Redlich, and Robert J. Norris, *An Explicit Test of Plea Bargaining in the "Shadow of the Trial,"* *Criminology*, 52(4): 723–754 (2014).

²²⁵ American Bar Association 2023 Plea Bargain Task Force Report, 16 (February 2023).

²²⁶ The National Registry of Exonerations, *2022 Annual Report*, 11 (May 2023).

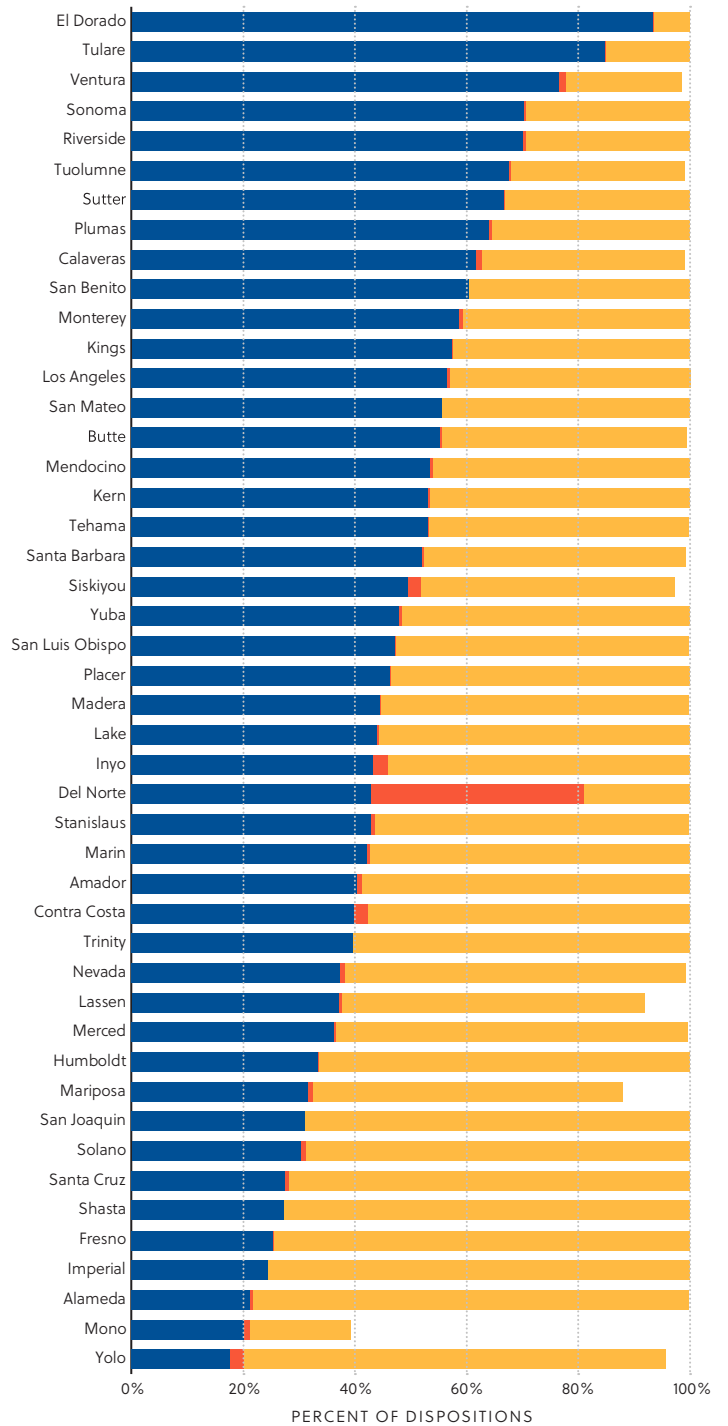
**DISPOSITIONS OF FELONY FILINGS BY PROCESS
(FISCAL YEAR 2019–2020)**



● GUILTY PLEA ● TRIAL ● DISMISSAL

Source: Judicial Council of California, 2021 Court Statistics Report, Tables 8a & 8b. Dismissals: Table 8a columns D & E (“Other,” which is dismissals and transfers) minus Table 8b column F (“Transfers”). Counties are ordered by the percentage of dispositions that are guilty pleas. Court and jury trials are combined. Dispositions that are transfers and felony petitions are excluded. Counties that did not report complete data are excluded.

**DISPOSITIONS OF MISDEMEANOR FILINGS BY PROCESS
(FISCAL YEAR 2019–2020)**



● GUILTY PLEA ● TRIAL ● DISMISSAL

Source: Judicial Council of California, 2021 Court Statistics Report, Table 9a. Counties are ordered by the percentage of dispositions that are guilty pleas. Court and jury trials are combined. Excludes traffic misdemeanors. Excludes bail forfeitures. Counties that did not report complete data are excluded.

As Professor Carissa Byrne Hessick told the Committee, “[P]retrial detention can ... exert a lot of pressure for people to plead guilty, especially if a guilty plea is going to get them out of detention.”²²⁷ Professor Amy Lerman further explained that the emotional and financial hardships a person faces while incarcerated influences their decision making because people will do anything to avoid staying in jail.²²⁸ And as the Committee explored last year, almost any period of pretrial detention is harmful to the incarcerated person and community.²²⁹ Pretrial detention is often the single best predictor of case outcomes: it increases the likelihood of a conviction, the severity of conviction, and the length of a sentence. At the same time, pretrial detention reduces future employment and access to social safety nets.²³⁰

The Committee recognizes, as this data and experience show, that guilty pleas are foundational to the functioning of the criminal legal system but present serious equity issues. Past efforts to ban the practice in California — specifically, a prohibition from 1982’s Proposition 8 on plea bargaining in cases where a serious felony was charged — have failed.²³¹ The goal of the recommendations that follow is to lessen some of the undue pressure to plead guilty in some cases, including by limiting part of the uncertainty of what sentence a court may impose after trial:

- *Revisit pretrial detention.* California law allows bail to be revisited — to both increase or reduce the amount — for “good cause,” which is not otherwise defined. This law should be amended to specify that a presumption of good cause exists when public safety concerns have diminished or further pretrial incarceration is unfair. Specifically, “good cause” should be defined to include: (1) whenever a plea offer is made by a prosecutor, particularly if the offer is to time served or its equivalent or (2) the defendant has been incarcerated for the maximum amount of time, including credits, that they could serve if convicted. The law should also provide that a motion on these grounds can be made by the defendant immediately without notice.
- *Using the same fact for conviction and enhancement.* In some circumstances, the same fact can be used to support an underlying offense and a sentencing enhancement. For example, personally using a firearm during a felony, can add 3, 4, or 10 years to a sentence. While it generally does *not* apply to offenses that necessarily require the use of a gun as an element of the underlying offense,²³² it is permissible when someone is charged with assault with a firearm²³³ — even though the firearm is already an element of the offense.²³⁴ The assault offense is a wobblers with a maximum punishment of 4 years in prison, which means the firearm enhancement can easily double the potential sentence. More than two-thirds of people serving a prison sentence for assault with a firearm had a sentence lengthened by this firearm enhancement.²³⁵ The Penal Code should give guidance in Penal Code section 1385 for judges to presumptively dismiss enhancements when the same fact is punished twice or directly repeal the exception that allows the firearm use enhancement to increase sentences for assault with a firearm.
- *Lesser-related offenses.* Under current law, jurors have the choice to acquit a defendant or find them guilty of the charged offense or a “lesser-included offense,” such as second-degree burglary instead of first-degree burglary.²³⁶

²²⁷ Committee on Revision of the Penal Code meeting on October 2, 2023, Part 2 of 4, 0:07:15–0:07:27. See also Ram Subramanian et al., *In the Shadows: A Review of the Research on Plea Bargaining*, Vera Institute, 11–15 (September 2020); Human Rights Watch, *Not In It for Justice: How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People*, 57 (April 2017); Vanessa A. Edkins and Lucian E. Dervan, *Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences against Pretrial Detention in Decisions to Plead Guilty*, 24 *Psychology, Public Policy, & Law* 204 (2018) (the rate of innocent individuals who pleaded guilty in a psychological study tripled where defendants were held pretrial); Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 *Journal of Law, Economics, & Organization*, 511–542 (2018).

²²⁸ Committee on Revision of the Penal Code meeting on October 2, 2023, Part 2 of 4, 0:13:32–0:14:20.

²²⁹ Committee on Revision of the Penal Code, 2022 Annual Report and Recommendations, 62.

²³⁰ Will Dobbie, Jacob Goldin, and Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence From Randomly Assigned Judges*, *American Economic Review* (2018), 108(2), 203–205.

²³¹ Penal Code § 1192.7(a). A few years after the passage of Proposition 8 in 1982, the California Department of Justice recognized that it only encouraged a shift of discretionary practices to different points in the system because “it is impossible to sharply limit the discretion available to legal actors.” Candace McCoy and Robert Tillman, *Controlling Felony Plea Bargaining in California: The Impact of the “Victims’ Bill of Rights”*, California Department of Justice, 12 (August 1986). See also ABA 2023 Plea Bargain Task Force Report, 12.

²³² Penal Code § 12022.5.

²³³ Penal Code § 245(a)(2).

²³⁴ Penal Code § 12022.5(d). The firearm enhancement can also be applied to “murder if the killing is perpetrated by means of shooting a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict great bodily injury or death.” *Id.*

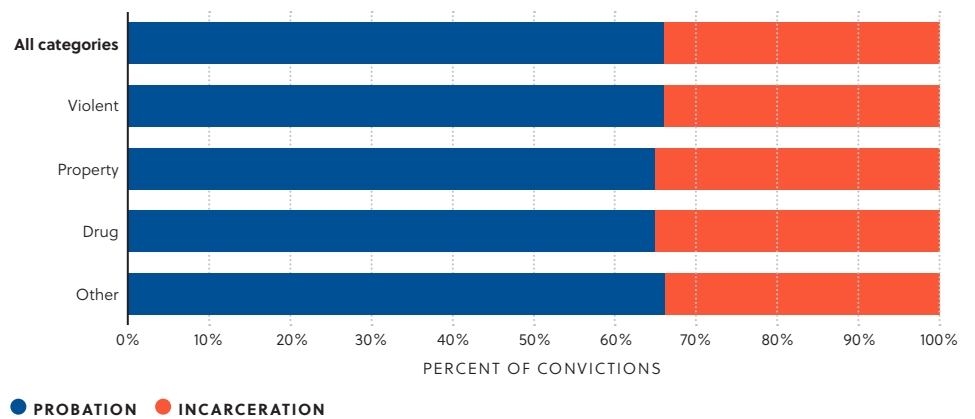
²³⁵ Mia Bird et al., *Sentence Enhancements in California*, California Policy Lab, Table 12 (March 2023).

²³⁶ Penal Code § 1159.

But proof at trial often shows a different offense that is not technically a lesser-included one, such as trespassing instead of burglary. A jury’s inability to consider these lesser-related offenses may drive people to plead guilty because they fear conviction of the more serious offense even though the evidence shows a less serious offense. The Penal Code should allow defendants to request that a jury be instructed on lesser-related offenses when warranted by the evidence.²³⁷ These lesser-related offenses should be limited to specific charges: for example, that brandishing a weapon is a lesser-related of assault with a deadly weapon and that trespassing is a lesser-related of burglary.

- *Presumptive probation.* A default sentencing triad of 16, 24, or 36 months applies to more than 70% of felony offenses defined in California law.²³⁸ While probation is often a permissible sentence for these offenses, the default triad should be updated so that probation is the presumptive sentence, unless the interests of justice require a sentence of incarceration. This would align the Penal Code with the reality that the most common disposition for felony offenses – even for violent crimes – is probation. A period of incarceration in a county jail would still remain as a possible condition of any probation term.²³⁹

FELONY SENTENCE TYPE BY OFFENSE CATEGORY (2022)



Source: California Department of Justice, *Crime in California 2022*, Table 40. Probation includes "probation" and "probation with jail" sentences. Incarceration includes "state institutions" and "jail" sentences.

The Committee’s recommendations are a starting place for improving the current system without attempting to uproot plea bargaining’s position at the core of the criminal legal system.

²³⁷ A version of this policy was in effect from 1984 to 1998, when the California Supreme Court reversed an earlier decision allowing it. See *People v. Birks*, 19 Cal.4th 108 (1998). A bill last year, AB 2435 (Lee), would have restored the ability for defense counsel to ask for lesser-related offenses but it failed passage on the Assembly Floor.

²³⁸ See Thomas M. Nosewicz and Molly Pickard, *Felony Offenses and Sentencing Triads in California*, California Policy Lab (October 2023).

²³⁹ Penal Code § 1203.1(a).

EMPIRICAL RESEARCH

Plea bargaining can exacerbate racial disparities.²⁴⁰ For example, two studies reviewing data from the New York County District Attorney’s office found that after controlling for various demographic and case factors, Black people who enter into plea agreements were 2.1 times more likely than white people to receive jail offers and 1.7 times more likely to receive a plea-to-the-charge offer (i.e. no charge reduction) than white people.²⁴¹

People held in pretrial detention are more likely to plead guilty, to do so earlier in their case, and to receive longer sentences than those who were released. One study, using data from hundreds of thousands of misdemeanor cases in Harris County, Texas, found that people detained pretrial were 25% more likely to plead guilty, 43% more likely to be sentenced to jail, and received jail sentences that were more than double – around 9 additional days – than those of people who were not detained.²⁴²

People may also plead guilty because they fear a “trial penalty” – the difference between a plea bargain and the sentence a person faces or receives after trial.²⁴³ A 2018 report by the National Association of Criminal Defense Lawyers found an average 7 year difference between sentences after trial compared to those imposed after a guilty plea in federal felony cases.²⁴⁴

INSIGHTS FROM OTHER JURISDICTIONS

Many countries, including Germany, Italy, and Spain, do not rely on plea bargaining to the extent the United States does.²⁴⁵ In these jurisdictions, prosecutors are subject to tighter bureaucratic controls, including training, articulated standards and guidelines that dictate the sentencing discount, and robust internal review.²⁴⁶ Criminal law in other countries also provides for less severe penalties than the United States, confining prosecutors within narrower bounds of potential sentences in plea bargaining.²⁴⁷

While in most states defendants are entitled to jury instructions only on lesser-included offenses,²⁴⁸ in at least 4 states – Colorado, Hawaii, Michigan, and Montana – instructions on lesser-related offenses or their equivalent may be required in some circumstances.²⁴⁹ In these states, courts generally require that the evidence at trial establish the elements of the lesser-related offense.²⁵⁰ And in at least one state, Colorado, jury instructions for a lesser-related offense may be requested by the defendant.²⁵¹

Other states, such as Kansas, Kentucky, New Jersey, and North Dakota, provide that the presumptive sentence for certain low-level felonies is probation.²⁵² Some states allow courts to impose a sentence of incarceration if specific aggravating factors are present to justify departing from probation.²⁵³

²⁴⁰ ABA 2023 Plea Bargain Task Force Report, 6.

²⁴¹ Besiki Luka Kutateladze, *Opening Pandora’s Box: How Does Defendant’s Race Influence Plea Bargaining*, 33 *Justice Quarterly* (2016), 413–420; Ram Subramanian et al., *In the Shadows: A Review of the Research on Plea Bargaining*, Vera Institute, 24–26 (September 2020).

²⁴² Paul Heaton, Sandra Mayson, and Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *Stanford Law Review* 711, 747 (March 2017).

²⁴³ National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, 20–21 (2018); ABA 2023 Plea Bargain Task Force Report, 17, 244 *Id.*

²⁴⁴ *Id.*

²⁴⁵ Fair Trials, *Efficiency Over Justice: Insights Into Trial Waiver Systems in Europe*, 8 (December 2021).

²⁴⁶ Ronald F. Wright, *Reinventing American Prosecution Systems*, 46 *Crime & Justice* 395, 402 (2017).

²⁴⁷ *Id.*

²⁴⁸ See 50 A.L.R. 4th 1081.

²⁴⁹ *People v. Rivera*, 186 Colo. 24, 28 (1974); *State v. Kupau*, 63 Haw. 1 (1980); HRS § 701-109(4); *People v. Richardson*, 409 Mich. 126, 135–38 (1980); *State v. Gopher*, 194 Mont.227, 230–31 (1981).

²⁵⁰ *Id.*

²⁵¹ *People v. Rivera*, 186 Colo.24, 28 (1974).

²⁵² See e.g. K.S.A. 21-6604(a)(3) (Kansas); K.R.S. 218A.135 (Kentucky); N.J.S.A. 2C:44-1e (New Jersey); N.D. Cent. Code § 12.1-32-07.4 (North Dakota).

²⁵³ See e.g., N.D. Cent. Code § 12.1-32-07.4.

America Should Adopt the British Solicitor/Barrister Model

[J. Scott Key](#)

(October 13, 2017) <https://scottkeylaw.com/america-should-adopt-british-solicitorbarrister-model/>

Let me tell you about my latest obsession: the British legal system. I came upon this topic by accident. Two weeks ago, I had a two-day hearing in Barrow County, Georgia, with some colleagues. For those of you who do not know much about Georgia geography, Winder is not near my office. And to get there from here requires a Hobson's choice of routes. Either (A) I go through Atlanta traffic on the interstate to work my way there, or (B) I avoid all of that in exchange for a set of two-lane roads where I will inevitably travel behind buses, garbage trucks, or the elderly. A smarter version of me would have stayed in Winder for two nights. But I opted to commute both days. And so I do what I do when I have a bunch of driving, I cash in an [audible](#) credit. And when I truly need the stress relief, I seek out a legal thriller. Mind you, I do not really care if the legal thriller I choose is completely mindless. Indeed, I may ever prefer the mindless variety. I also did not research my choice very well. I searched for my book from the driveway before I left. And I have a very short window of time for such things in the driveway before my wife comes out and throws up her hands in disbelief that I

am in the driveway with the car running for a long period of time.

And so it was that I bought [Nick Stone's *The Verdict*](#). I realized after it was too late that I had downloaded a British legal thriller. But I couldn't fiddle with the phone too much as I had opted for the two-lane route to Barrow County. And the narrator had a pleasing accent. And all this was fine because I was quickly enthralled in the story. And as much as I was enthralled with the story, I was intrigued by how a client with a criminal matter hires legal representation in England. I just finished up the book this week. And I've now watched a documentary on barristers. And I also have a law student this semester who grew up in England who has endured my OCD questions to her about all of this (may God have mercy upon her).

So, I am about to launch into some fairly sweeping opinions with my research on this subject consisting of (1) nearly two decades of experience as an American criminal defense attorney; (2) having listened to a British legal thriller; (3) having read some [John Mortimer Rumpole stories a long time ago](#); (4) having watched a short documentary; and (5) having quizzed a British law student of mine about all of this. Feel free to correct me if you know more than I do on these subjects. I am very aware of the flaws in our system, and I may be blind to the flaws in the alternative.

Flaws in the American System

Here are some of the differences. In America, you get in trouble, and you retain a lawyer. The lawyer is your one stop shop for your representation. You might go to a big firm, but most American criminal defense attorneys are in solo practice or a very small firm (2-3 lawyers tops). If you're in some deep trouble as a CEO in a large company, you might end up in the white collar division of a large law firm. But generally you are going to hire somebody in a small shop. If you cannot afford a lawyer, you may get a public defender of some sort, either from a government office or by appointment. And if you get your lawyer by appointment, it will be a lawyer who takes appointments and who does some retained work — somebody in a small shop as discussed at the beginning of this paragraph. Your lawyer will not prosecute and defend cases at the same time. He may have been a prosecutor in a past life. Or he may one day close up his shop and be a prosecutor. But we do criminal defense the way we do marriage in America. Just as we have multiple spouses here serially (one at a time), so we can either be wedded to the State or to the defense serially. Your lawyer will not have prosecution and defense clients (there might be some exceptions. But this is the general rule).

You will have found your lawyer any number of ways, ranging from the sensible to the absolute lunatic method. The

sensible and more educated client will have sought out a referral from a trusted lawyer, friend, or family member who has some insider knowledge of who the good lawyers are. That is one side of the spectrum. On the other side of the spectrum (may God have mercy on your soul), you will have googled "DUI Hahira Georgia" and have come to find your lawyer that way. In which case, you may have found a great lawyer or you may have found the lawyer who is great at search engine optimization and is not much of a lawyer at all. Or you may hire the guy who wrote Aunt Jeana's will. Or the lawyer may have **found you** after purchasing the police blotter from the day you were arrested and directly soliciting you (I cannot invoke God's blessings if you go with this lawyer, as God has clearly long since abandoned your soul and taken your IQ away). By the way, the appellate clients have been burned and become the savviest shoppers for legal services at this point in the case (if they haven't become sovereign citizens).

The lawyer you find may be great, or he may show up to your hearing two hours late, wearing a stained shirt and wrinkled suit, with a fresh buzz from the oxycodone he just freebased out in the parking lot. You are sort of playing the lottery. More likely than not, the judge will pretend that your lawyer's shirt is clean, his suit is pressed, and that he is not falling asleep as he selects the jury who will decide your fate. From the judge's perspective, it's hard to move the docket if you

remove lawyers or take other remedial action (Every docket has lawyers like this. Seriously, *every docket*). And under the [Strickland standard](#), the appellate courts will likely find that buzzed lawyering was “appropriate trial tactics” and that there wasn’t much of a likelihood of a different result with a sober lawyer who smelled good.

The lawyer you hire will do it all. He will run the office, take your fee, investigate your case (perhaps with the assistance of a paid investigator), serve the subpoenas, find experts, take your calls and emails, negotiate a resolution, and represent you in court.

If your lawyer wears a coat and tie when he meets with you, it is as dressed up as he will be. When he is in court, he will be wearing a coat and tie there, too. And in court, you will sit at the table with him during court. As the proceedings unfold, you will pester him mercilessly and break his focus as you lean over to whisper in his ear, “he’s lying” while witnesses testify.

Enter the English System

In England, you hire a solicitor. This solicitor runs an office and acts like something of a coordinator for legal services. The solicitor takes your retainer. She develops a strategy at the 10,000 foot level, including the hiring of an investigator and the selection of expert witnesses. The solicitor then

hires the barrister, who will be sort of the professional athlete in the courtroom. The barrister does nothing but court work. If the barrister develops a nasty opioid habit solicitors will stop turning to him. The solicitor does a job. The barrister does a job. And if you are a barrister, you can eventually get a promotion to QC, which is a higher level barrister. Your barrister may be defending you but prosecuting others. There is no prosecutor's office. The barrister has a mixed workload. When you are in court your barrister will sit in a different place in the courtroom. And your actual barrister will be wearing a robe and (here's what I love the most) a wig. You will mainly deal with the solicitor, and the solicitor will coordinate with the barrister. So, when you find interesting things 5 times a day on the internet you want to run by your representative — the solicitor screens all of that. The barrister prepares for and executes in the courtroom.

Here is why I think the American legal system needs to embrace the British model:

1. **No "True Believer" Syndrome.** I am going to get myself in trouble with many of my colleagues when I say this, but if I could take a 50/50 split in defense cases and prosecution cases, I would absolutely do that. I love trying cases and being a criminal lawyer first and foremost, and it would make absolutely no difference which side of the "v." I am on. I'm agnostic about it all.

I'm a defense attorney because I do not want to work in a government office and I like being selective about what cases I take. I do not prosecute out of any sort of choice. I can't. In criminal work, I meet my share of "true believers." They come in two varieties. They are equally terrible and annoying to be around. On the one side are prosecutorial true believers. See, e.g. [Nancy Grace](#). They view all alleged victims as noble and truthful who are to be avenged. They view all police officers as ethical and intelligent. And they seek maximum punishment for all, in spite of whatever mitigating circumstances may exist. On the other side are true believer defense attorneys. They think that all victims are lying, all police officers are corrupt at their core, that the criminal code should be merely aspirational, and that an arrest or conviction for a serious felony is a prerequisite to sainthood. They live to find the beautiful pure heart that is just beneath the surface of the triple axe murderer whom everybody else just misunderstands. They would like to amend the rules of the appellate courts so that they could file their pleadings on tye dyed paper. True believers of both stripes lose perspective and cause much damage. If we had a mixture of prosecution and defense cases, we would probably be better defenders and prosecutors. Barristers have this benefit.

2. **Barristers have a Buffer and a Focus.** The barrister is

focused on performing in court and doesn't have an office to run. The barrister isn't being a salesman to the client ("oh my gosh, that is a fascinating piece you've printed off for me from Findlaw. Of course, I'll talk about this in court,[because I want you to hire me and keep me on as your lawyer.]"). The barrister is focused on a winning court strategy. The solicitor gets to discuss the fascinating winning legal theory that the client's brother-in-law, who took a class in college on business litigation once, has developed. The barrister is getting ready for court.

3. **Quality Control.** If you are bad at trial law or you are going through some "personal stuff," the solicitors will likely know. And you won't be inflicting your mental distress or lack of chops on an unsuspecting clientele. The solicitors, who are in the know, will just go elsewhere. The barrister's target audience are professionals and not folks who can be easily manipulated. Hence, there will be less incentive to employ slimy internet marketing tactics to get clients directly.

It is entirely possible that I am just an Anglophile. But I don't think this is the case. My modest proposal is that we, as a legal institution, switch to a British system, at least in the criminal realm. We should do this pretty much right away. I will go wig shopping first thing this morning.