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## Introductory Note

Friends of Premier Debate,

This is Premier’s Jan-Feb brief, and the topic is “Resolved: Plea bargaining ought to be abolished in the United States criminal justice system.”

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**We’d like to thank Blake Andrews, Katya Ehresman, Abby Henry, Toran Langford, Elizabeth Pavlath, Amy Santos, and Bo Slade** for their efforts toward this communal resource. They worked really hard to provide some of the best evidence you’ll see this early on the topic. Do send them a thank you for their hard work! If you’d like to support them and our efforts to quickly produce comprehensive briefs, **consider donating** [**here**](https://www.paypal.com/donate/?token=zetDJkhXzKrBFv0cepeo0sED99ZeX0NxKBgSkuqHskkcOUNohWdKkrl_j-lfvMaAGguiGW&). And a big thank you to all our donors so far this year.

Lastly, we want to remind the readers about standard brief practice to get the most out of this file. Best practice for brief use is to use it as a guide for further research. Find the articles and citations and cut them for your own personal knowledge. You’ll find even better cards that way. If you want to use the evidence in here in a pinch, you should at least re-tag and highlight the evidence yourself so you know exactly what it says and how you’re going to use it. Remember, briefs can be a tremendous resource but you need to familiarize yourself with the underlying material first.

Good luck everyone. See you ‘round!

Bob Overing & John Scoggin

Directors | Premier Debate

# Aff

## Advantages

### Crime

#### Arresting people for low-level crimes has a negative effect on public safety.

Kutateladze and Lawson 16.Kutateladze, Besiki and Lawson, Victoria. Dr. Kutateladze is an internationally recognized expert in the development of performance indicators, and his research has been published in journals such as Criminology, Justice Quarterly, Cardozo Law Review, and Law & Human Behavior. His areas of focus include prosecution, inequality, and the rule of law. Additionally, Dr. Lawson is a senior research associate at the Institute for State and Local Governance. “ How Bad Arrests Lead To Bad Prosecution: Exploring the Impact of Prior Arrests on Plea Bargaining”. Cardozo Law Review Vol. 37; 973. 2016. https://pdfs.semanticscholar.org/dfee/f28fdec4dbe999e07e660f2329f30f5be3f5.pdf [Premier]

Although increasing **the frequency of arrests for low-level crimes** has long been used as a tactic to reduce crime and serve as a deterrent, these types of public nuisance or quality-of-life arrests may also **have negative effects on public safety for two reasons: first, because they harm police-community relationships, and second, because the time spent incarcerated may make detainees more likely to commit crimes after release.101 Frequent arrests for low-level offenses are** often **viewed as unjust and discriminatory; as a result, they decrease trust in** police and **the criminal justice system**, and beliefs in their legitimacy.102 **Research shows that residents of highly-policed communities may be less likely to report crime and** to **cooperate with law enforcement.103 Paradoxically, such policies may even increase the likelihood of some individuals committing crimes** .In addition to the problems related to decreased trust in the police, the loss of employment and difficulties involved with obtaining gainful employment may make engaging in criminal activity upon release more likely.105 **Furthermore, family and community connections may have been eroded, while connections to others involved in criminal activity** will have **increased**, simply **due to** the fact of **incarceration.**106

#### The Alaska ban on plea bargaining decreased conviction for lower level crimes and people of color.

Savitsky 12 Savitsky, Douglas. Center for the Study of Economy and Society, Department of Sociology, Cornell University. “Is plea bargaining a rational choice? Plea bargaining as an engine of racial stratification and overcrowding in the United States prison system.” Rationality and Society. May 30, 2012. <http://journals.sagepub.com/doi/pdf/10.1177/1043463112441351> [Premier]

 As plea bargaining’s contribution to prison stratification is a product of both prosecutor choice and defendant bargaining, it can be examined from two perspectives using existing datasets. First, by examining the types of crimes prosecuted before and during the Alaska ban, it is possible to test the hypothesis that plea bargaining incentivizes prosecutors to prosecute low-level crimes while disincentivizing the prosecution of high level and white collar crime. Second, to tease out the impact of the defendant’s bargaining power, one can examine modern-day US prosecution data and compare initial charges to final disposition, to determine whether blacks currently fare worse than whites for the same charges. Data collected during the plea bargaining experiment is available in the Alaska Plea Bargaining Study, 1974-1976 (Clarke, 2005). The dataset divides charged crime into hierarchical categories of severity, from Class-1 to Class-6. Class-1 crimes represent the most severe violent crimes, i.e. Savitsky 157 murder and kidnapping. Class-2 includes “other violent felonies.” Class-3 includes such crimes as burglary, larceny, and receiving. Class-4 includes less severe property crimes such as the passing of bad checks and fraud. Class-5 represents drug charges and Class-6 represents moral crimes. The data indicates a drop in the rate of conviction that is almost entirely attributable to a racial differential. The pre and post-ban rate of conviction for white defendants was unchanged at 53%, while the post-ban rate for non-white defendants dropped six percentage points, from 55% to 49%. Additionally, an examination of particular crimes indicates that the decrease in conviction numbers can be largely attributed to decreases in convictions for lower level crimes. The proportion of convictions for Class-1 and Class-2 crimes remained essentially constant, each dropping less than a percentage point. The proportion of convictions for Class-3 crimes increased from 35% to 44%. Additionally, the proportion of Class-4 convictions decreased from 7% to 4%, and Class-5 convictions decreased from 17% to 12%. One would not expect Class-1 and Class-2 conviction rates to change much as these classes represent the most serious crimes, over which prosecutors have the least discretion. However, for Class-3, Class-4, and Class-5, the crimes where prosecutors do have considerable discretion, the convictions moved from lower level crimes to higher level ones. This is particularly noteworthy as Alaska’s plea bargain ban occurred at the start of the war on drugs, yet rather than an escalation in drug prosecution, there was actually a decline. The racial makeup of the declines in low level convictions is more ambiguous. Before the ban, non-whites made up about 22% of those prosecuted for both Class-4 and Class-5 crimes. After the ban, this dropped to 13% for Class-4 and increased to 26% for Class-5. However, in both classes the overall conviction rates fell. Before the ban, non-whites were convicted of Class-4 crimes at a rate of 37.5%. After the ban the rate fell to 12.5%. For Class-5, prior to the ban the conviction rate was 48%; this fell to 35% after the ban. For whites, there were also decreases, with conviction rates falling from 45% to 33% for Class-4 and from 60% to 40% for Class-5. Thus, during the ban on plea bargaining, not only was there a drop in the number of criminal dispositions and conviction rates, but the largest reductions in convictions were seen in low level crime. It is possible that some of the decreases in lower level crime convictions can be accounted for by charges not being lowered. However, sentence bargaining, and not charge bargaining, was the preferred method of plea bargaining before the ban in Alaska (Rubinstein and White, 1979), which suggests that this explanation is unlikely to be correct. According to Carns and Kruse (1991), under the ban, there was also a disappearance of racial disparity in the implementation of Alaska’s criminal justice system. They further note that some attorneys suggested this disappearance was a direct result of the ban. In light of such anecdotal evidence, in a 1997 report commissioned by the Alaska Supreme Court in order to “identify concerns about racial and ethnic bias in the state court system and make recommendations” (Alaska Court System, 1997) the report made the following observation: And, while the Attorney General’s ban on plea bargaining was credited with eliminating some of the racial disparities found in earlier studies, these disparities that may have returned since the ban on plea bargaining was lifted in 1993. The Alaska Legislature should fund a new sentencing study by the Judicial Council (Alaska Court System: 90). Thus, anecdotal evidence suggests that under Alaska’s plea bargaining ban, racial disparity in the administration of justice seemingly “disappeared,” only to reappear once the state lifted the ban. A more direct analysis focused on modern data (US Department of Justice, 2011) can also help determine whether racial bias currently exists in the plea bargaining system. By comparing initial charges brought by prosecutors with bargained for dispositions, a differential in plea bargaining power can be revealed. In a race neutral criminal justice system that arrested and prosecuted defendants of particular races in proportion to the amount of crime committed by members of those races, black and white drug defendants would be expected to plead guilty and be sentenced at similar rates. Higher rates of guilty pleas, or higher sentences for bargainers from one group, would indicate that that group of defendants accepted bargains more readily and that they accept worse deals. However, as with most criminal justice data, there is a strong caveat that external factors, such as biased arrest rates, may heavily bias it. For instance, drug use and drug crime is largely equivalent across races, but prosecution for drug crime is much higher among blacks than whites. Assuming that within each group there is a continuum of people from least guilty to most guilty, that the people who are prosecuted are drawn predominately from the latter group, that strength of case and sentence is correlated, and that overall rates of prosecution are biased, one would not expect equal plea bargaining data between races. Instead, in a non-race neutral criminal justice system with race neutral plea bargaining, where blacks are arrested at higher rates for drug crimes, one would expect lower sentences and lower plea bargain rates for those black defendants, owing to more defendants being drawn from the less convictable portion of the continuum. Thus, even similar rates of plea bargaining and sentencing between black and white drug defendants would indicate bias in the plea bargaining system. The analysis supports the proposition that blacks do make worse plea bargains for drug crime than whites, even without the caveats above. The US Department of Justice collects and publishes data for all felony cases filed in May of every second year in 40 of the 75 most populous counties in the United States (US Department of Justice, 2011). Filtering this data for black and white (non-Hispanic) men charged with drug crimes, the mean sentence for blacks is 16.7 months with a standard deviation of 35.5, while for whites the mean is 12.4 months with a standard deviation of 28.1. The data distribution is not normal, having a heavy bias toward lower sentences (Figure 7). However, a normalized bar graph of sentences shows that, sentence-by-sentence, black men are more likely to receive higher sentences than are white men (Figure 7). This is true even though black defendants were more likely to receive a sentence of 0. As sentences become more severe, black men are proportionally more highly represented. Taking into account the unequal variances between groups, the mean sentences are highly significant (t(7723.477)=7.334, p<0.00001). In the sample, n for black men was 10,627, while n for white men was 3582. While arrests for drug crime are skewed, they are likely not as skewed as these numbers reflect, as the numbers most likely reflect the demographics of the urban counties where the data was gathered. While a more thorough analysis of the data is beyond the scope of this theoretical paper, and while no one piece of data is likely enough to prove bias in plea bargaining, the weight and preponderance of the evidence all point to plea bargaining being a factor in prison stratification.

### Coercion/Exploitation

#### Plea bargaining is coercive and draws on tactics used for torture.

Shechtman 2015. Shechtman, Paul. Paul is a lawyer who spent six years as counsel to District Attorney Robert Morgenthau in New York County and he served two terms as an assistant U.S. attorney in the Southern District of New York, first as chief of appeals and later as chief of the criminal division. “The Dynamics of the Plea Bargain”. New York Law Journal Volume 253—No. 108. June 8, 2015. <http://www.albany.edu/understanding-guilty-pleas/assets/NYLJShechtmanPleaBargain.pdf> [Premier]

**What does** this account of **medieval torture have to do with modern plea bargaining**? **Langbein’s thesis is that jury trials have become so complicated and time consuming that they are unworkable as a routine dispositive procedure**. **Having set an unrealistic level of safeguard, we**, too, **have** come **to resort to coercion to make the system work**. **Permit me to read from Langbein** once more**:** To be sure, our means are much politer; **we use no rack, no thumbscrew, no Spanish boot to mash his legs. But** like the Europeans of distant centuries ... **we make it terribly costly for an accused to claim his right to the constitutional safeguard of trial. We threaten him with a materially increased sanction if he avails himself of his right** and is thereafter convicted. **There is,** of course, **a difference between having your limbs crushed if you refuse to confess, or suffering** some **extra years of imprisonment if you refuse to confess, but the difference is of degree, not kind. Plea bargaining, like torture, is coercive.** This portrait may be overdrawn, but Langbein’s fundamental point is not: **if procedural rules are too exacting, ways will be found to circumvent them.**

#### Plea bargains are just a legal form of interrogation, this is problematic.

Walsh ’17 Dylan(Dylan Walsh is a freelance writer based in Chicago) Why U.S. Criminal Courts Are So Dependent on Plea Bargaining, The Atlantic, May 2, 2017, <https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/> accessed 12/9/17 [Premier]

**Police regularly toured jails to “negotiate” with the inmates**. One New York City defense attorney and friend to local magistrates loitered in front of night court hawking 10 days in jail for $300, 20 days for $200, and 30 days for $150.By the 1920s, as violations of the federal liquor prohibition flooded court dockets, 88 percent of cases in New York City and 85 percent in Chicago were settled through pleas. When the Supreme Court in 1969 finally heard a case concerning the legality of the issue, [it unanimously ruled](https://www.oyez.org/cases/1969/270) that pleas are constitutionally acceptable. They are “inherent in the criminal law and its administration,” the Court declared. **Indeed, the only bargaining restriction placed on prosecutors is that they cannot use illegal threats to secure a plea. “So if a prosecutor says, ‘I’ll shoot you if you don’t plead guilty,’ then the plea is invalid,”** Alschuler explained. “**But if he threatens to charge someone with a crime punishable by death at trial and the defendant pleads guilty, then the plea is lawfu**l.” Assuming they have probable cause, **prosecutors can even threaten to bring charges against a defendant’s family in order to extract a plea. For instance, if a defendant’s spouse or sibling is complicit in drug trafficking**—perhaps they took a call related to the case—**a prosecutor can offer to reduce or dismiss charges against the family member if the defendant pleads guilty.**

#### Mandatory minimums and inflated criminal charges make plea deals difficult to turn down.

Shechtman 2015. Shechtman, Paul. Paul is a lawyer who spent six years as counsel to District Attorney Robert Morgenthau in New York County and he served two terms as an assistant U.S. attorney in the Southern District of New York, first as chief of appeals and later as chief of the criminal division. “The Dynamics of the Plea Bargain”. New York Law Journal Volume 253—No. 108. June 8, 2015. <http://www.albany.edu/understanding-guilty-pleas/assets/NYLJShechtmanPleaBargain.pdf> [Premier]

**The literature talks of Plea Bargaining in the Shadow of Trials—the notion** is **that plea bargaining is merely bargaining about the odds of winning (or losing) at trial**. **But we have armed prosecutors with tools—Rockefeller drug laws, three-strikes and- you’re-out provisions, mandatory minimums that are mandatory only if prosecutors choose to invoke them—that have made the shadows disappear. Now only the brave or fool-hardy go to trial. The “trial penalty”** in this country **has grown.** No criminal law practitioner would tell you differently. **All** of **this matters because trials** (a good number of trials) **are essential to the health of our criminal justice system**. **Trials reduce the power of prosecutors by sharing it with judges and jurors. Trials keep police officers honest by exposing their conduct** to scrutiny. **Trials discourage perjury and the risk of mistaken identifications and** thereby protect the innocent. And **trials allow the public to see that justice is done**. The comedian Lenny Bruce, who was no stranger to the criminal justice system, once quipped that in the halls of justice, justice is done in the halls. He meant that as a condemnation.

#### Going to trial is time consuming and in turn incentivizes the acceptance of plea deals

Kutateladze and Lawson 16.Kutateladze, Besiki and Lawson, Victoria. Dr. Kutateladze is an internationally recognized expert in the development of performance indicators, and his research has been published in journals such as Criminology, Justice Quarterly, Cardozo Law Review, and Law & Human Behavior. His areas of focus include prosecution, inequality, and the rule of law. Additionally, Dr. Lawson is a senior research associate at the Institute for State and Local Governance. “ How Bad Arrests Lead To Bad Prosecution: Exploring the Impact of Prior Arrests on Plea Bargaining”. Cardozo Law Review Vol. 37; 973. 2016. https://pdfs.semanticscholar.org/dfee/f28fdec4dbe999e07e660f2329f30f5be3f5.pdf [Premier]

**Perhaps it is not surprising**, then, **that it is often far easier for an arrestee to plead guilty than to fight his conviction**.93 **Even if case-processing times were reduced, fighting a conviction requires additional court dates, and** **thus additional time away from work or school, which may increase the likelihood of even the innocent pleading guilty**.94 **Furthermore, a prior record is likely to lead to harsher sanctions;95 thus, both defendants and defense attorneys may be more inclined to view plea offers favorably regardless of the circumstances of the crime or the conditions of the offer.** However, **once a defendant has pleaded guilty, he may incur financial costs** (e.g., fines) **in addition to a criminal record and all of its** attendant **consequences.** These consequences—some of which can also result from simply an arrest—may include deportation, loss of custody, loss of property, ejection from public and other housing, loss of current employment or eligibility for current employment, difficulty obtaining future employment, driver’s license suspension, and lengthy incarceration when a low-level crime results in parole or probation violation.97 Time spent signing up for and then performing community service may result in the loss of work or school days and unemployment, and even an arrest that results in dismissal can affect employment (e.g., by leading to unexplained absences).98 There may also be serious health consequences: although inmates are at risk of disease while incarcerated, many enter the justice system with serious health problems due to poor health care prior to arrest99 and their health may then further deteriorate while imprisoned. Those with chronic conditions may be at particular risk of health consequences, given that jails and prisons tend to limit care largely to treatment of acute complaints.100

#### Plea deals are used to coerce witnesses into testifying in exchange for immunity.

Black 2014. Black, Conrad. Conrad writes for the National Review, wrote Franklin Delano Roosevelt: Champion of Freedom and wrote Richard M. Nixon: A Life in Full. “A Plea against Pleading”. The National Review. November 12, 2014. <http://www.nationalreview.com/article/392417/plea-against-pleading-conrad-black> [Premier].

But in the 1960s and 1970s, crime rates rose steeply, largely in drug-related and race-related activities, and legislators vastly increased sentences, many of which were made mandatory (as in liberal New York governor Nelson Rockefeller’s mandatory sentence of 15 years in prison for selling two ounces or possessing four ounces even of marijuana). The severity of sentencing was enhanced by making sentences on individual counts consecutive, so even relatively minor offenses could be aggregated into appallingly long prison sentences. The whole political community from right to left got on the law-and-order bandwagon, and dissenters were dismissed as permissive kooks and mollycoddlers of crime. The percentage of federal prosecutions tried by juries declined from 19 percent in 1980 to 3 percent today, as prosecutors have huge advantages over defense counsel and throw a great raft of counts against a defendant who declines to roll over. **The prosecutor wins most of the cases that are tried and**, as **he can decide on the number and level of gravity of counts charged, defendants can face as much as ten times as heavy a sentence if they plead guilty as they would if they try the case and, as usually happens, lose**. Rakoff does not mention that **the high probability of successful prosecution is enhanced by plea bargains with witnesses who are threatened with prosecution for conspiracy to obstruct justice if they do not jog their memories to recall damaging evidence against an accused in exchange for immunity** from prosecution, including for perjury. Rakoff does make the point that defense counsel are subject to allegations of “ineffective assistance of counsel” if a plea-bargain offer is rejected peremptorily, even as a negotiating ploy to extract a less onerous proposal from the prosecutor.

#### Plea bargaining is coercive and decreases the choices for defendants.

Dripps 16 Donald A. Dripps. Warren Distinguished Professor of Law and clerked for the Honorable Amalya Kears of the Second Circuit Court of Appeals in New York City. "Guilt, Innocence, and Due Process of Plea Bargaining," William & Mary Law Review vol. 57, no. 4 (March 2016): p. 1343-1394. [http://heinonline.org/HOL/Page?handle=hein.journals/wmlr57&div=34&g\_sent=1&casa\_token=&collection=journals#](http://heinonline.org/HOL/Page?handle=hein.journals/wmlr57&div=34&g_sent=1&casa_token=&collection=journals) [Premier]

Catastrophic trial penalties are not isolated incidents. John Gleeson, a federal district judge in Brooklyn, New York, said "[p]rosecutors routinely threaten ultraharsh, enhanced mandatory sentences that no one-not even the prosecutors themselves thinks are appropriate."4 A study by Human Rights Watch found that: [P]rosecutors often charge or threaten to charge mandatory minimums not because they result in appropriate punishment, even in the view of the prosecutor, but to pressure defendants to plead guilty and to punish them if they do not. The pressure they could bring to bear on defendants led to soaring numbers of guilty pleas in drug cases: from 1980 to 2010, the percentage of federal drug cases resolved by a plea increased from 68.9 to 96.9 percent, where it remained in 2012.' 5 The study concluded that "plea agreements, once a choice to consider, have for all intents and purposes become an offer drug defendants cannot afford to refuse."46

#### Guilty pleas without adequate consultation can lead to long-term consequences.

Zeidman 14. Zeidman, Steve.  Professor and Director of the Criminal Defense Clinic at CUNY School of Law, has spent the last 25 years working in the area of criminal defense. He supervises students representing people charged with misdemeanors in the New York City Criminal Court. “Justice Is Swift as Petty Crimes Clog Courts.” Collateral Consequence Resource Center. December 7, 2014. http://ccresourcecenter.org/2014/12/07/justice-swift-petty-crimes-clog-courts/ [Premier]

But perhaps the biggest concern with the prevalence of speedy guilty pleas is the ever-growing host of negative consequences that attach to and flow from those pleas.  Even a guilty plea to a statutorily designated non-criminal offense or violation can lead to deportation, eviction, loss of various licenses, inability to obtain loans, etc.  In a recent [NPR story](http://www.npr.org/2014/12/06/368742300/should-a-criminal-record-come-with-collateral-consequences), Robin Steinberg of the Bronx Defenders argues that because collateral consequences are so numerous and their application so uncertain, “indigent defendants need access to subject-matter experts in areas like family law and immigration to know how the laws will play out in their individual circumstances, before coming to the plea-bargaining table and before the laws are imposed.”

#### The current system suffers from unequal bargaining power and the prosecutors have too much power

O’Hear 08

O'Hear, Michael M. (Professor of Law, Marquette University. J.D., B.A., Yale University.) "Plea Bargaining and Procedural Justice," Georgia Law Review vol. 42, no. 2 (Winter 2008): p. 407-470.

[http://heinonline.org/HOL/Page?handle=hein.journals/geolr42&div=15&g\_sent=1&casa\_token=&collection=journals#](http://heinonline.org/HOL/Page?handle=hein.journals/geolr42&div=15&g_sent=1&casa_token=&collection=journals) [Premier]

Moreover, it is easy to overstate the extent to which plea bargaining really is bargaining.59 As noted previously, the practice often resembles shopping in a supermarket 6 °-with one important exception: the dissatisfied defendant is not free to move on to a different store in search of lower prices. Even when plea bargaining takes on a more adversarial character, there tends to be massive power imbalances between prosecutors and defendants. In light of such considerations as transaction costs and judicially imposed trial penalties, few defendants are willing to go to trial.61 Furthermore, the proliferation of sentencing guidelines and mandatory minimum sentences over the past quarter-century has given prosecutors even greater leverage over defendants than they have traditionally enjoyed; when prosecutorial lenience is the only reliable means to avoid a draconian sentence, the prosecutor can effectively dictate the terms of the "deal."62 Bargaining dynamics vary considerably from jurisdiction to jurisdiction, but, in many, Gerard Lynch's characterization of plea bargaining would be apt: administrative justice has replaced adversarial and the prosecutor now occupies the primary role in adjudicating guilt and setting punishments.63 In plea bargaining, then, the prosecutor may be perceived by defendants less as a negotiating partner and more as the key decisionmaker.

#### Civil law proves that duress makes plea bargaining an unenforceable contract and unconstitutional

Lynch 03

Lynch, Timothy. (Tim Lynch is an adjunct scholar at the Cato Institute and was, until 2017, the director of Cato’s project on criminal justice) "The Case Against Plea Bargaining," Regulation vol. 26, no. 3 (Fall 2003): p. 24-27. http://heinonline.org/HOL/Page?handle=hein.journals/rcatorbg26&div=39&g\_sent=1&casa\_token=&collection=journals [Premier]

First, it is important to note that the existence of some element of choice has never been thought to justify otherwise wrongful conduct. As the Supreme Court itself observed in another context, "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." The courts have employed similar reasoning in tort disputes between private parties. For example, a woman brought a false imprisonment action against a male acquaintance after he allegedly forced her to travel with him in his automobile when it was her desire to travel by train. According to the complaint, the man boarded the train, seized the woman's purse, and then disembarked and proceeded to his car. The woman then left the train to retrieve her purse. While arguing with the man in the parking lot, the train left the station. Reluctantly, the woman got into the vehicle to travel to her destination. The man maintained that the false imprisonment claim lacked merit because he exercised no physical force against the woman and because she was at liberty to remain on the train or to go her own way. The court rejected that defense and ruled that the false imprisonment theory had merit because the woman did not wish to leave the train and she did not wish to depart without her purse. The man unlawfully interfered with the woman's liberty to be where she wished to criticize a politician and then to deny that politician a "right to equal space" in the paper to defend himself against such criticism. Even though Florida newspapers remained free to say whatever They wished, the Court recognized that the statute exacted a "penalty" for the simple exercise of free speech about political affairs.

### Deportation

#### Plea Bargaining has been used as a tool to deport noncitizen defendants.

Johnson 2017. Johnson, Thea. Thea is an Associate Professor of Law at the University of Maine School of Law. “Measuring the Creative Plea Bargain. University of Maine School of Law Digital Commons. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2975882 2017 [Premier]

On the other end of the spectrum is **Maricopa County, Arizona,** which **has an “ immigration-enforcement” model.**171 **In Maricopa County,** **prosecutors consider immigration consequences as a means of enforcing federal immigration law.172** **For instance,** **prosecutors will charge defendants in state court with crimes that qualify as aggravated felonies** or crimes of moral turpitude under federal immigration law **in order to increase the chances that the noncitizen defendant will be deported in a later immigration proceeding.**

**Heidi Altman has also given us a window into how prosecutors think about immigration** consequences **by surveying 185 district attorneys in Brooklyn, New York. She found that, although over half of the district attorneys surveyed believed that it was sometimes appropriate to modify a plea to mitigate negative immigration consequences, less than half actually did refashion pleas** in practice for this vpurpose.175

### Frees Up Resources ~> More Convictions

#### Plea bargaining advantages prosecutors and frees up their resources to prosecute more crimes

Savistky 09 THE PROBLEM WITH PLEA BARGAINING: DIFFERENTIAL SUBJECTIVE DECISION MAKING AS AN ENGINE OF RACIAL DISPARITY IN THE UNITED STATES PRISON SYSTEM A Dissertation Presented to the Faculty of the Graduate School of Cornell University in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy by Douglas Savitsky August 2009 [https://ecommons.cornell.edu/bitstream/handle/1813/13836/Savitsky,%20Douglas.pdf;jsessionid=C0E8E5E8D5306C5AF10DB028AE404415?sequence=1](https://ecommons.cornell.edu/bitstream/handle/1813/13836/Savitsky%2C%20Douglas.pdf;jsessionid=C0E8E5E8D5306C5AF10DB028AE404415?sequence=1) DOA 12/11/17 [Premier]

The model continues with prison sentences being considered the price charged by society for various criminal transgressions, and with the prosecutor thus attempting to maximize income by winning convictions. The prosecutor prefers to prosecute crimes which have longer sentences, but she also prefers low hanging fruit. That is, she prefers easy prosecutions which require the fewest resources, and she seeks to balance these preferences for a maximum payoff. Additionally, Landes argues that a prosecutor, in an attempt to minimize resource allocation, will prefer to bargain if her resources are scarce. Landes suggests, “[I]f the prosecutor's transaction costs of a settlement equal [her] optimal resource expenditure on a trial, [she] would be willing to offer the suspect a reduction in the sentence ... in exchange for a guilty plea” (64). Landes continues, “[S]ince trial costs probably exceed these transaction costs, [the prosecutor] would be willing to offer a further sentence reduction as the savings in 3 Landes notes that actual guilt only matters in as much as it influences the actor’s perceptions about the probabilities involved. 4 Both of these assumptions are highly dubious and likely influence the model. 73 resources can be used to increase the conviction in other cases” (Id). That is, making a plea bargain not only results in a higher probability of conviction in the immediate case,5 but it also increases the probability of conviction in other cases as it frees up scarce prosecutorial resources. Since the prosecutor deals with defendants in a one to many arrangement, where the prosecutor can pool her resources but the defendants cannot,6 the prosecutor is at a structural advantage in deciding how best to calculate her allocation. Landes continues, “[For the prosecutor] it is shown that the decision to go to trial depends on the probability of conviction by trial, the severity of the crime, the availability and productivity of the prosecutor's and defendant's resources, trial versus settlement costs, and attitudes toward risk” (70). From the defendant's perspective, Landes posits that the expected costs are the probability of non-conviction times the costs of trial versus the probability of conviction times the cost of trial and the cost of a sentence.7 The defendant is also expected to maximize utility, and he will thus only expend resources where they will help him. Further, he will accept a plea bargain when it is his least expensive option. Finally, Landes points out that most of the transaction costs of bargaining are subsumed in the costs of litigation as the defendant will likely still incur these expenditures in the process of rejecting plea bargain offers. From these assumptions, Landes derives four main implications. These are (1) a negotiated sentence will tend to be shorter as the probability of conviction at trial 5 P=1asopposedtoP<1. 6 This is not necessarily true. While each defendant with a private attorney has non-poolable resources, this may not be true for the public defender. 7 In Landes' terms, the defendant's expected utility E(U) is E(U) = PU(Wc) + (1 – P)U(Wn) where Wc = W – s·S – r·R and where W is initial wealth, s is the value per unit of jail sentence, r is the price of a unit of R, S is the Wn = W – r·R sentence, and R is the resource input for trial. 74 diminishes; (2) the shorter the sentence associated with the charged offense, the more settlement is likely; (3) if both the defendant and prosecutor agree on the probability of conviction, settlements will take place in cases where the defendant is risk averse, or risk neutral, however not necessarily when the defendant is a risk seeker; and (4) when the prosecutor and defendant differ in their estimates of conviction at trial, if the prosecutor's assessment of conviction is lower, even risk preferring defendants will settle due to the ability to extract concessions. Thus, only when the prosecutor believes more strongly than a defendant that a conviction is likely will there be a trial. That is, Landes argues, a plea bargain will only occur where it is in the interest of both parties.8 Landes' assessment is, at least in part, borne out by statistics and thus useful as a starting point for examining plea bargaining dynamics. However, there are still consequential omissions in his model that need examination. For instance, the model does not incorporate socio-economic factors that may influence how different participants engage in plea bargain negotiations. Moreover, there is no consideration given to how individual plea bargains aggregate.

### Global Spillover

#### The U.S. system of Plea Bargaining is being modeled worldwide and has created injustice on a massive scale.

Bowcott 2017. Bowcott, Owen. Bowcott is the legal affairs correspondent for the Guardian. He was formerly the Guardian's [Ireland](http://www.guardian.co.uk/world/ireland) correspondent and also worked on the foreign news desk. “Global epidemic' of US-style plea bargaining prompts miscarriage warning.” The Guardian, April 27, 2017. <https://www.theguardian.com/law/2017/apr/27/traditional-trial-rights-renounced-as-countries-adopt-us-style-plea-bargaining> [Premier]

**The adoption of US-style plea bargaining has reached “epidemic proportions**” as more and more countries persuade defendants to plead guilty and renounce traditional trial rights**, a survey of international justice systems warns.** **The study of 90 countries by the human rights organisation** [**Fair Trials**](https://www.fairtrials.org/) **reveals that use of such procedures has increased by 300% since 1990,** **boosting,** it is alleged, **the risk of miscarriages of justice**. In the United States – which houses a fifth of the world’s prison population – as many as 97% of federal criminal cases are resolved through [guilty pleas](https://www.theguardian.com/society/2010/mar/20/rape-convictions-lady-stern-cps) involving unregulated negotiations between prosecutors and defendants**. In 2015, 44% of documented US miscarriages of justice involved cases where the defendant had pleaded guilty.** Popular television culture may be flooded with US courtroom dramas, the report says, but it increasingly represents an outdated view of the American justice system where even juveniles, who are less able to understand the legal consequences, are encouraged to plead guilty. **The US model has been the ideological inspiration for adopting trial-waiver systems worldwide, the study notes. The US government has provided development funding and technical support for rule of law projects, primarily** **through** the Office of Overseas Prosecutorial Development and **Training** sending out American prosecutors to train **foreign judges and lawyers.** **Fair Trials says that** **use of trial waivers** in some countries **has skyrocketed** over the course of a few years **because they are promoted as providing a more efficient form of justice.** **In Georgia, 12.7% of cases were resolved through plea bargaining in 2005 but that figure had soared to 87.8% of cases by 2012.** In Russia, deployment of plea bargaining deals shot up from 37% in 2008 to 64% in 2014. In the first instance courts in Chongqing, one of China’s major cities, use of ‘summary procedures’ – equivalent to trial waivers – increased from 61% in 2011, to 82% two years later. In South Africa, the number of similar “plea and sentence agreements” increased by a third in 2014-15. The Fair Trials report, The Disappearing Trial, was written with the international law firm Freshfields Bruckhaus Deringer. It acknowledges that there can be some merit in plea bargaining – such as waiting times, pre-trial detention, costs and protecting vulnerable victims from having to relive their ordeals – but it argues there should be more safeguards such as mandatory access to lawyers.

### No Presumption of Innocence

#### Plea deal’s take into consideration prior arrest history, which goes against the presumption of innocence.

Kutateladze and Lawson 16.Kutateladze, Besiki and Lawson, Victoria. Dr. Kutateladze is an internationally recognized expert in the development of performance indicators, and his research has been published in journals such as Criminology, Justice Quarterly, Cardozo Law Review, and Law & Human Behavior. His areas of focus include prosecution, inequality, and the rule of law. Additionally, Dr. Lawson is a senior research associate at the Institute for State and Local Governance. “ How Bad Arrests Lead To Bad Prosecution: Exploring the Impact of Prior Arrests on Plea Bargaining”. Cardozo Law Review Vol. 37; 973. 2016. https://pdfs.semanticscholar.org/dfee/f28fdec4dbe999e07e660f2329f30f5be3f5.pdf [Premier]

The study described as part of the Moral Argument represents a rare effort to use actual prosecutorial data and to document an empirical relationship between arrest record and plea offer types. **The** data showed that prior arrests influence sentence offers more than prior prison sentences. This **significant influence of prior arrests on sentence offers is consistent with the DANY Plea Offer Guidelines114 which recommend more severe punishments for defendants with prior arrest history**. The findings also suggest, however, that if these guidelines were based on prior sentences, as opposed to prior arrests, much of the difference between black and white, and Latino and white defendants would have disappeared, at least in misdemeanor cases.

**In addition to contributing to unfair and unequal decision making, the use of prior arrest record for cases that did not result in conviction also seems to contradict the principle of the presumption of innocence**. **If arrests have not led to conviction, defendants are presumed innocent, and therefore, these records should not be used as the basis for making sentences for subsequent cases more punitive, no matter how long the arrest history might be. However**, as noted in the Legal Argument,115 **the use of prior record in case processing is insufficiently regulated by both statutory and case laws, which leaves the door wide open for prosecutor’s offices to choose which factors to consider during the plea negotiations**.

### Prosecutorial Abuse

#### Plea bargains give prosecutors too much power; innocents go to prison

Walsh ’17 Dylan(Dylan Walsh is a freelance writer based in Chicago) Why U.S. Criminal Courts Are So Dependent on Plea Bargaining, The Atlantic, May 2, 2017, <https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/> accessed 12/9/17 [Premier]

This dynamic, combined with national trends over the last 30 years favoring lengthy mandatory sentences, gives prosecutors [inordinate leverage](http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html). If a defendant considers going to trial, a prosecutor might hang overhead some charge that carries a mandatory life sentence. A plea of guilty might instead get eight years, or 10 years, “or pick a number,” said Matt Sotorosen, a senior trial attorney at the Office of the San Francisco Public Defender. “Even if you have an innocent client, most don’t want to take that chance. They’ll just take eight years. What if things go south at trial?” The results of this lopsided calculus are evident in data from the National Registry of Exonerations: Of 2,006 recorded exonerations since the project started keeping track in 1989, [362 of those](https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7BFAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7%7D&FilterField1=Group&FilterValue1=P), or 18 percent, were based on guilty pleas.

#### There is little regulation in plea bargaining

Walsh ’17 Dylan(Dylan Walsh is a freelance writer based in Chicago) Why U.S. Criminal Courts Are So Dependent on Plea Bargaining, The Atlantic, May 2, 2017, <https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/> accessed 12/9/17 [Premier]

But there is also a central practical concern reformers want to mitigate: that spare oversight of the process invests prosecutors with broad, opaque powers. Judges are not regularly allowed to take part when a plea deal is made, and written records of a deal are almost never required. Though jury trials demand proof of guilt beyond a reasonable doubt, pleas follow no standards of evidence or proof; the prosecutor offers a break in exchange for a guilty plea, the defendant decides whether to take it without knowing the merits of his case. Indeed, the only bargaining restriction placed on prosecutors is that they cannot use illegal threats to secure a plea. “So if a prosecutor says, ‘I’ll shoot you if you don’t plead guilty,’ then the plea is invalid,” Alschuler explained. “But if he threatens to charge someone with a crime punishable by death at trial and the defendant pleads guilty, then the plea is lawful.” Assuming they have probable cause, prosecutors can even threaten to bring charges against a defendant’s family in order to extract a plea. For instance, if a defendant’s spouse or sibling is complicit in drug trafficking—perhaps they took a call related to the case—a prosecutor can offer to reduce or dismiss charges against the family member if the defendant pleads guilty.

#### Prosecutors have all the power since judges must impose sentences, leads to pleas higher than the minimum sentence

Fellner et al 13 An Offer you cant refuse: How US Federal Prosecutors force Drug Defendants to Plead Guilty December 5th 2013 <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead> Jamie Fellner, senior advisor in the US Program of Human Rights Watch, researched and wrote this report. Brian Root, the quantitative analyst at Human Rights Watch, helped analyze and develop graphic representations of the sentencing data presented in the report. Paul Hofer, adjunct assistant professor at Johns Hopkins and former special project director at the United States Sentencing Commission, was a consultant to Human Rights Watch for this report. He provided invaluable assistance regarding federal sentencing practices and policies, helped edit this report, and also developed statistics on the sentencing differential in drug convictions secured by plea versus trial. Alison Parker, director of the US Program of Human Rights Watch and Danielle Haas, senior editor of Program edited the report, and Dinah Pokempner, general counsel, provided the legal review. Samantha Reiser, US Program associate, provided research and production assistance. Layout and production were coordinated by Samantha Reiser. Fitzroy Hepkins, administrative manager, provided production assistance. DOA 12/11/17 [Premier]

Prosecutors have discretion, largely unreviewable by judges, as to what charges to bring, what promises or threats to make in plea bargaining, and whether to carry out those threats if the defendant does not plead. While all prosecutors are in a powerful position vis-a-vis criminal defendants, the power of federal prosecutors in drug cases is strengthened by mandatory sentencing laws that curtail the judiciary’s historic function of ensuring the punishment fits the crime. When prosecutors choose to pursue charges carrying mandatory penalties and the defendant is convicted, judges must impose the sentences. Prosecutors, in effect, sentence convicted defendants by the charges they bring. Prosecutors typically charge drug defendants with offenses carrying mandatory minimum sentences. Mandatory minimum drug sentences are keyed to the weight of the drugs involved in the offense (and the weight of filler substances, like cornstarch, used to dilute the drug). For example, the mandatory minimum sentence for dealing 5 kilograms of cocaine is 10 years and the maximum is life, regardless of the defendant’s role or culpability. The sentence imposed upon conviction will usually be higher than the minimum, as judges—taking their cue from the federal sentencing guidelines—take into account the actual amount of drugs involved in the crime, the defendant’s criminal history, and other aggravating and mitigating factors. In fiscal year 2012, 60 percent of convicted federal drug defendants were convicted of offenses carrying mandatory minimum sentences.[[3]](https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead%22%20%5Cl%20%22_ftn3) They often faced sentences that many observers would consider disproportionate to their crime. An addict who sells drugs to support his habit can get a 10-year sentence. Someone hired to drive a box of drugs across town looks at the same minimum sentence as a major trafficker caught with the box. A defendant involved in a multi-member drug conspiracy can face a sentence based on the amount of drugs handled by all the co-conspirators, even if the defendant had only a minor role and personally distributed only a small amount of drugs or none at all. Drug defendants have only three ways to avoid mandatory sentences: they can go to trial and hope for an acquittal, even though nine out of ten defendants who take their chances at trial are convicted; they may (if they are a low-level, nonviolent drug offender with scant criminal history) qualify for the limited statutory safety valve that permits judges to sentence them below the applicable mandatory sentences if they are convicted—although most defendants do not qualify; and they can plead guilty. Most prosecutors will offer drug defendants some sort of plea agreement that reduces their sentence, sometimes substantially. Indeed, they file charges carrying high sentences fully expecting defendants to plead guilty. To secure the plea, prosecutors may then offer to lessen the charges, they may offer to reduce the ones that do not carry mandatory sentences, to stipulate to sentencing factors that lower the sentencing range under the sentencing guidelines or, at the very least, to support a reduced sentence based on the defendant’s willingness to accept responsibility for the offense, i.e., to plead guilty. Prosecutors may also agree to file a motion with the court to permit the judge to sentence below the mandatory sentences when the defendant has provided substantial assistance to the government’s efforts to prosecute others. But prosecutors also threaten to increase defendants’ sentences if they refuse to plead. Perhaps their most powerful threats are based on two statutory sentencing provisions that can dramatically increase a drug defendant’s sentence. Under 21 U.S.C. §841(b)(1) prior felony drug convictions can dramatically increase a mandatory minimum drug sentence. Under 18 U.S.C. §924(c) prosecutors can file charges that dramatically increase a defendant’s sentence if a gun was involved in the drug offense. Prosecutors will threaten to pursue these additional penalties unless the defendant pleads guilty – and they make good on those threats.

#### Lawyers can’t check – they aren’t given the tools and skills in school necessary for negotiating plea deals.

Johnson 2017. Johnson, Thea. Thea Johnson is an Associate Professor of Law at the University of Maine School of Law. “Measuring the Creative Plea Bargain.” University of Maine School of Law Digital Commons. 2017. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2975882 [Premier]

The data here should raise questions about the training of attorneys both in practice and in law school. We must re-envision what it means to be a criminal lawyer. **The current model of legal education stresses trial skills, the rules of evidence, and the intricacies of procedure**. These skills remain critical. In fact, as defenders in these interviews noted, the way many of them secure good bargains is by knowing the law and not being afraid of a trial. The power of the trial as a bargaining chip is clear. **But criminal attorneys today are, more generally, negotiators. And yet, they are not getting negotiation training or a sense that negotiation is a skill that require**s as much **attention and** **practice** as effectively cross-examining a police officer. We should now define good defense work as the creative resolution of client problems through negotiation. **As the role of the attorney evolves from** adversarial **fighter to backroom** **negotiator, we** also **must acknowledge that the culture that attends the adversarial model— two players “ duking it out” to win— no longer works in a system that is** **based almost entirely on negotiation**. While negotiation certainly has elements of tension and struggle, it also involves making compromises and finding solutions.Yet, **although negotiation is the primary means by which we resolve cases in our** **criminal system, “ winning” still dominates the culture** of criminal practice. **This** **mismatch between the professional mindset and the reality of practice creates worse** **outcomes for defendants and less efficiency in the system** more generally. This research informs a new view of attorneys, but perhaps also a changing vision of the adversarial process.

### Wrongful Convictions

#### Plea bargains often convict innocent people

Yoffe ’17 Emily(Emily Yoffe is a contributing editor to the Atlantic) Innocence is Irrelevant in the Age of the Plea Bargain, The Atlantic, September 2017, <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/> accessed 12/9/17 [Premier]

Ideally, plea bargains work like this: Defendants for whom there is clear evidence of guilt accept responsibility for their actions; in exchange, they get leniency. A time-consuming and costly trial is avoided, and everybody benefits. But in recent decades, American legislators have criminalized so many behaviors that police are arresting millions of people annually—almost 11 million in 2015, the most recent year for which figures are available. Taking to trial even a significant proportion of those who are charged would grind proceedings to a halt. According to Stephanos Bibas, a professor of law and criminology at the University of Pennsylvania Law School, the criminal-justice system has become a “capacious, onerous machinery that sweeps everyone in,” and plea bargains, with their swift finality, are what keep that machinery running smoothly. Because of plea bargains, the system can quickly handle the criminal cases of millions of Americans each year, involving everything from petty violations to violent crimes. But plea bargains make it easy for prosecutors to convict defendants who may not be guilty, who don’t present a danger to society, or whose “crime” may primarily be a matter of suffering from poverty, mental illness, or addiction. And plea bargains are intrinsically tied up with race, of course, especially in our era of mass incarceration.

#### Plea bargaining risks false convictionsFeer 2017(Charles L. Feer, JD, MPA Bakersfield College)http://www2.bakersfieldcollege.edu/cfeer/Criminal%20Procedure/Crim%20B4-Chapt%2012%20Outline%20Sp%2015.doc [Premier]

**The defendant who accepts an offer to plead guilty often faces consequences besides a reduced sentence or charge. Important rights are often waived, such as the right to appeal, the right to a jury trial, and the privilege against self-incrimination**. Also, if the defendant supplies inaccurate information during the course of plea negotiations, he or she may not benefit from lenient treatment. Furthermore, **in exchange for pleading guilty, the prosecution may require that the defendant testify against a codefendant**. In *Ricketts v. Adamson*, 483 U.S. 1 (1987), the defendant testified against both of his codefendants in exchange for a reduction in the charge he was facing. He was then sentenced on the reduced charge. After that, the codefendants’ convictions were overturned on appeal. The prosecution then retried the codefendants, but the original defendant refused to testify at the second trial, claiming that his duty had been fulfilled. The prosecution then filed information charging him with first-degree murder. The Supreme Court did not bar the first-degree murder prosecution because the original agreement contained a clause to the effect that the agreement Brennan did acknowledge, however, that the defendant could have construed the plea agreement only to require his testimony at the first trial.

#### Plea deals only help people who are guilty and in turn are unfair.

Covey 2009. Covey, Russell. Russell is a Professor at Georgia State University College of Law, with a J.D. from Yale Law School and A.B from Amherst College. “Signaling and Plea Bargaining’s Innocence Problem”. Georgia State University College of Law. 2009 <https://pdfs.semanticscholar.org/8147/d0bb347a3b407dd8178c764d8d20077ba136.pdf> [Premier]

Finally, subwager devices might be constructed around defendants’ investigational cooperation more broadly. Here I mean something different than the kind of investigational cooperation that prosecutors frequently negotiate for to help them investigate and prosecute crime. **Defendants,** of course, already **receive substantial plea discounts for cooperating with police and prosecutors. But the usual plea discount follows provision of useful inculpatory information—that is, defendants can get a plea break by admitting guilt and implicating others. Like discounts for "acceptance of responsibility," the irony of typical cooperation discounts is that they are only available to guilty defendants**. **Because, by definition, innocent defendants are not in a position to provide useful** inculpatory **information to law enforcement, they** may **as** **a group receive worse plea deals than their guilty brethren.** Defendants who agree to make open-ended commitments to affirmatively cooperate with prosecutors and law enforcement agents by submitting to interrogation and by providing other assistance in investigating the facts of their case, and against whom prosecutors do not obtain additional incriminating evidence as a result of that cooperation, should be rewarded with a different type of cooperation discount, one that is comparable to that awarded to defendants for acceptance of responsibility. Such investigational cooperation discounts would signal defendants’ subjective belief in their own innocence and would, in effect, replicate the subwager dynamic, further helping to improve the pricing accuracy of the plea bargaining process. By providing incentives to innocent defendants to truthfully proclaim innocence, they would also minimize the perverse incentives of wrongfully convicted defendants to falsely confess guilt to limit their sentencing exposure or enhance their chance of parole.

#### Plea bargaining coerces defendants into pleading guilty for crimes they didn’t commit – there are no other options for them in the current criminal justice system.

Yoffe 17. Yoffe, Emily. Journalist and contributing editor to the Atlantic. “Innocence is Irrelevant.” The Atlantic. September 2017. <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/> [Premier]

This is the age of the plea bargain. Most people adjudicated in the criminal-justice system today waive the right to a trial and the host of protections that go along with one, including the right to appeal. Instead, they plead guilty. The vast majority of felony convictions are now the result of plea bargains—some 94 percent at the state level, and some 97 percent at the federal level. Estimates for misdemeanor convictions run even higher. These are astonishing statistics, and they reveal a stark new truth about the American criminal-justice system: Very few cases go to trial. Supreme Court Justice Anthony Kennedy acknowledged this reality in 2012, writing for the majority in Missouri v. Frye, a case that helped establish the right to competent counsel for defendants who are offered a plea bargain. Quoting a law-review article, Kennedy wrote, “‘Horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.’” Ideally, plea bargains work like this: Defendants for whom there is clear evidence of guilt accept responsibility for their actions; in exchange, they get leniency. A time-consuming and costly trial is avoided, and everybody benefits. But in recent decades, American legislators have criminalized so many behaviors that police are arresting millions of people annually—almost 11 million in 2015, the most recent year for which figures are available. Taking to trial even a significant proportion of those who are charged would grind proceedings to a halt. According to Stephanos Bibas, a professor of law and criminology at the University of Pennsylvania Law School, the criminal-justice system has become a “capacious, onerous machinery that sweeps everyone in,” and plea bargains, with their swift finality, are what keep that machinery running smoothly. Because of plea bargains, the system can quickly handle the criminal cases of millions of Americans each year, involving everything from petty violations to violent crimes. But plea bargains make it easy for prosecutors to convict defendants who may not be guilty, who don’t present a danger to society, or whose “crime” may primarily be a matter of suffering from poverty, mental illness, or addiction. And plea bargains are intrinsically tied up with race, of course, especially in our era of mass incarceration. As prosecutors have accumulated power in recent decades, judges and public defenders have lost it. To induce defendants to plead, prosecutors often threaten “the trial penalty”: They make it known that defendants will face more-serious charges and harsher sentences if they take their case to court and are convicted. About 80 percent of defendants are eligible for court-appointed attorneys, including overworked public defenders who don’t have the time or resources to even consider bringing more than a tiny fraction of these cases to trial. The result, one frustrated Missouri public defender complained a decade ago, is a style of defense that is nothing more than “meet ’em and greet ’em and plead ’em.” According to the Prison Policy Initiative, 630,000 people are in jail on any given day, and 443,000 of them—70 percent—are in pretrial detention. Many of these defendants are facing minor charges that would not mandate further incarceration, but they lack the resources to make bail and secure their freedom. Some therefore feel compelled to take whatever deal the prosecutor offers, even if they are innocent. Writing in 2016 in the William & Mary Law Review, Donald Dripps, a professor at the University of San Diego School of Law, illustrated the capricious and coercive nature of plea bargains. Dripps cited the case of Terrance Graham, a black 16-year-old who, in 2003, attempted to rob a restaurant with some friends. The prosecutor charged Graham as an adult, and he faced a life sentence without the possibility of parole at trial. The prosecutor offered Graham a great deal in exchange for a guilty plea: one year in jail and two more years of probation. Graham took the deal. But he was later accused of participating in another robbery and violated his probation—at which point the judge imposed the life sentence. What’s startling about this case, Dripps noted, is that Graham faced two radically different punishments for the same crime: either be put away for life or spend minimal time behind bars in exchange for a guilty plea. In 2010, the Supreme Court ruled, in Graham v. Florida, that the punishment Graham faced at trial was so cruel and unusual as to be unconstitutional. The Court found that a juvenile who did not commit homicide cannot face life without parole.

#### Plea deals can be detrimental to innocent defendants.

Alexander 12. Alexander, Michelle. An associate professor of law at Ohio State University and the author of “The New Jim Crow: Mass Incarceration in the Age of Colorblindness. “Go to Trial: Crash the Justice System.” The New York Times, The New York Times, 10 Mar. 2012, www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html. [Premier]

No wonder, then, that most people waive their rights. Take the case of Erma Faye Stewart, a single African-American mother of two who was arrested at age 30 in a drug sweep in Hearne, Tex., in 2000. In jail, with no one to care for her two young children, she began to panic. Though she maintained her innocence, her court appointed lawyer told her to plead guilty, since the prosecutor offered probation. Ms. Stewart spent a month in jail, and then relented to a plea. She was sentenced to 10 years’ probation and ordered to pay a $1,000 fine. Then her real punishment began: upon her release, Ms. Stewart was saddled with a felony record; she was destitute, barred from food stamps and evicted from public housing. Once they were homeless, Ms. Stewart’s children were taken away and placed in foster care. In the end, she lost everything even though she took the deal.

### Impact – Criminal Records

#### Plea bargains give millions of people criminal records

Yoffe ’17 Emily(Emily Yoffe is a contributing editor to the Atlantic) Innocence is Irrelevant in the Age of the Plea Bargain, The Atlantic, September 2017, <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/> accessed 12/9/17 [Premier]

Thanks in part to plea bargains, millions of Americans have a criminal record; in 2011, the National Employment Law Project estimated that figure at 65 million. It is a mark that can carry lifetime consequences for education, employment, and housing. Having a record, even for a violation that is trivial or specious, means a person can face tougher charges and punishment if he or she again encounters the criminal-justice system. Plea bargaining has become so coercive that many innocent people feel they have no option but to plead guilty. “Our system makes it a rational choice to plead guilty to something you didn’t do,” Maddy deLone, the executive director of the Innocence Project, told me. The result, according to the late Harvard law professor William J. Stuntz, who wrote extensively about the history of plea bargains in *The Collapse of American Criminal Justice* (2011), is a system that has become “the harshest in the history of democratic government.”

### Impact – Education Spending

#### Downsizing the prison industrial complex would trigger an increase in funds directed towards higher education – empirics prove

Weil 12 Widespread Use of Plea Bargains Plays Major Role in Mass Incarceration Wednesday, November 07, 2012 By [Danny Weil](http://www.truth-out.org/author/itemlist/user/46231), Danny Weil is a writer for Project Censored and Daily Censored. He received the Project Censored "Most Censored" News Stories of 2009-10 award for his article: "Neoliberalism, Charter Schools and the Chicago Model / Obama and Duncan's Education Policy: Like Bush's, Only Worse," published by Counterpunch, August 24, 2009. Dr. Weil has published more than seven books on education in the past 20 years.. <http://www.truth-out.org/news/item/12556-overwhelming-use-of-plea-bargains-plays-major-role-in-mass-incarceration> DOA 12/11/17 [Premier]

It is unfortunate that the money spent to [imprison millions of Americans](http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html?_r=1) is, much like the military-industrial complex, draining resources from more pressing social and economic needs, such as education. A stunning and detailed report with illustrative and compelling graphs from the California Common Sense web site has recorded just how [skyrocketing expenditures on incarceration in California have been associated with the decline in spending on higher education](http://www.cacs.org/ca/article/44). The report is not only thoroughly documented and visual, but also compares and contrasts a myriad of issues that now plague higher education and documents how they correlate to prison expenditures. In 2012, corrections spending and student debt nationwide reached $1 trillion each. Recently, The Huffington Post noted that: "Pennsylvania is home to the country's most expensive public university. In-state tuition at Penn State University runs higher than $15,000, but the state has been cutting spending on higher education since 2007. The result is [Pennsylvania now spends twice as much on corrections as it does on higher education](http://www.huffingtonpost.com/2012/08/28/spending-on-prisons-higher-ed_n_1835889.html)." One can look around the nation to see the burgeoning costs of incarceration and the corollary with cuts in higher education. In Massachusetts, a state known for its old-moneyed prestigious private universities, state legislators took an axe to cut appropriations to higher education between 2008 and 2012, hacking off a whopping 37 percent, according to the Boston Globe. This meant that the state spent dollar for dollar on higher education and mass incarceration in 2007. The National Association for the Advancement of Colored People (NAACP) released a report in April of 2011 entitled "Misplaced Priorities." In it, the NAACP examines America's escalating levels of prison spending and its impact on state budgets and our nation's children. The report concludes that in all 50 states, the [need is to downsize prison populations and shift the savings to education budgets](http://www.newjimcrow.com/).

## Structural Violence

### Class

#### Poorer clients are disadvantaged in the plea bargaining process.Bibas 04Bibas, Stephanos, "Plea Bargaining Outside the Shadow of Trial" (2004). Faculty Scholarship. 924. <http://scholarship.law.upenn.edu/faculty_scholarship/924> [Premier]

**The constraints on appointed attorneys' funding, time, and working relationships described above appear to influence outcomes. For example, public defenders are more likely to press their clients to plead guilty, or at least defendants perceive this to be true. Retained counsel file more motions than do appointed counsel. They also meet with their clients sooner and more often, getting a head start on learning the key facts and witnesses. Clients with retained counsel plead guilty later, so their lawyers have more time to investigate their cases and find weaknesses that could serve as plea- bargaining chips. Retained counsel may be more likely to take cases to trial, to win acquittals, to obtain dismissals, to avoid prison sentences, and to win charge reductions.**

#### Defendants of a low socioeconomic status are disproportionality affected negatively by plea bargains.

Rhode 03 Rhode, Deborah L. The Earnest W. McFarland Professor of Law at Stanford Law School and Director of the Keck Center on Legal Ethics and the Legal Profession. Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation. Oxford University Press. EBSCOhost. 2003. Page 7. http://libezproxy.syr.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=e000xna&AN=133769&site=ehost-live [Premier]

Trial judges also lack the ability or inclination to insure effective representation in other contexts, particularly in criminal cases involving appointed counsel for indigent defendants.26 Yet the economic conditions of practice for these lawyers work against adequate trial preparation. Most cases are handled either by grossly under-staffed public defenders or by private practitioners who receive minimal flat fees or low hourly rates. Compensation generally is capped at wholly unrealistic levels, of-ten a $1,000 or under for felony cases. Thorough preparation is a quick route to financial ruin.27 Defendants who hire their own counsel do not necessarily fare better. Most of these individuals have incomes just over the poverty line and cannot afford substantial legal expenses. Their lawyers typically charge a flat fee, payable in advance, which creates obvious disincentives for extensive work. These economic conditions help account for the high frequency of plea bargains in indigent criminal defense. About 90 percent of defendants plead guilty, and in the large majority of these cases counsel have interviewed no prosecution witnesses and filed no defense motions.2

### Fem

#### Special pressures and differential treatment are given to women by the criminal justice system to disproportionately prosecute and punish them through an emphasis of patriarchal gender roles

Jones 11 Under pressure: Women who plead guilty to crimes they have not committed Stephen Jones University of Bristol, UK 2011 Stephen Jones is a Senior Lecturer in Law at the University of Bristol, where he has taught criminal law and criminology for many years. He is the author of the books Criminology (OUP) and Understanding Violent Crime (Oxford University Press). DOA 12/11/17 [Premier]

Special Pressures on Women to Make a False Confession or Plea of Guilty Most people facing the prospect of a prison sentence would like to avoid it or, at least, minimize its duration. However, there are some forms of pressure to admit guilt which may be especially relevant to women. Family responsibilities Childcare and family contact. As the primary caregivers, women suffer considerable stress when they are separated from their families. Information collated by the Prison Reform Trust (2009) presents the stark factual background to this. Sixty-six per cent of imprisoned women have dependent children under 18. Only 9 per cent of children will stay in their own home being cared for by their father after their mother has been imprisoned. Around half of the mothers who were in contact with their children will not receive a visit from them, partly because the average distance between home (or court) and prison is 57 miles and for around 20 per cent of imprisoned women is over 100 miles. Such factors are likely to provide a stronger incentive to women to want to avoid or minimize the period of time spent in prison. There are also mental health issues: female prisoners are considered to have more problems than male prisoners (Ministry of Justice, 2009). Seventy-eight per cent of women are assessed in reception into prison as suffering from some form of psychological disturbance (the comparable figure for the general population is 15 per cent). This in itself raises questions as to the competence of some of these women to admit their guilt at the police station or in court proceedings. Brenda, who was one of the 50 imprisoned women interviewed by Jones (2008) (see earlier), pleaded guilty because she was led to believe she would not go to prison, and she was worried about being separated from her daughter: I’m saying to you now I’m innocent, but I pleaded guilty because my barrister advised me if I did that, and that the police came forward with an offer at the last minute and he said ‘If you plead you’ll get a suspended sentence’, and to me it was more important, rather than standing up for a principle, to be there for my daughter. But he obviously got it very wrong. Women convicted of criminal offences are also aware that they will be judged particularly harshly by others. Corston (2007: 20) quotes Baroness Hale, the only female member of the Supreme Court: Many women still define themselves and are defined by others by their role in the family. It is an important component in our sense of identity and self esteem. To become a prisoner is almost by definition to become a bad mother. If she has a husband or partner then again by definition she will become a bad wife or partner. According to Ann Lloyd (1995: 36), women who commit criminal offences are often considered ‘doubly deviant’: ‘Not only is she being tried for her crime, but how she measures up to the idea of proper womanhood is also being judged.’ This could also have implications for the woman’s family. Rachel Condry (2007) interviewed the close relatives of 32 serious offenders. As the offences committed by the men and the women were generally different in nature and gravity, she was unable to determine accurately whether the relatives of the women suffered greater levels of stigma. However, Jane, whose daughter had been convicted of a violent offence, considered this to be the case: ‘If it’s a female that’s done it, it’s worse for the people they’ve left on the outside. If they keep quiet in prison, they’re okay; it’s just the family on the outside’ (Condry, 2007: 91). Female offenders sometimes feel under greater pressure ‘to do the right thing’ after being charged because of their relationship with their parents and close family members. Another of Jones’s interviewees, Gemma, appreciated her family’s support, and this was clearly a contributory factor in her decision to plead guilty: Gemma: It took me a long time to agree with my family and plead to attempted robbery. I am stubborn and I don’t agree with lying. My family had suffered much more than me … I am OK in prison. My family said they would support me when I come out. I want to put them first. SJ: Did you meet this chap through alcohol? Gemma: Yes, I had consumed a litre and a half of vodka through the day and met him at a party in the evening. I know that I would personally never rob anyone. I am sure that I didn’t attack that man but who’s to say that I couldn’t have done something? I see reason with that because of the way my life was going … I have never been a nasty person but the alcohol abuse was a selfish act. SJ: From what you say, if you are taking on some kind of moral responsibility and therefore could not blame your boyfriend, do you blame him for you getting in that state? Gemma: I didn’t drink as much before I met him. I was drinking every day when I met him. He was sending me down the shop every day to buy alcohol. Mind you, we were living in a tent so maybe drinking was a way of dealing with that. I had so much shame for the way I lived my life in the last few months before this happened. Gemma’s concern for her family is not unusual. Research evidence suggests that young adult women have a stronger emotional connection to both their parents than young adult men do (Frank et al., 1988) and that women of all ages have a greater sense of felt obligation (Stein et al., 1998). It is also notable that Gemma was unsure as to whether she had actually committed the offence, but felt sufficiently bad about her way of life to assume that she might have done. Anne Worrall (1990), who studied 15 convicted women who had been involved with the probation service, observed a similar reaction. Worrall (1990: 74) considered that ‘women are both ideologically and materially preconditioned to accept the description of “guilty”’. This sense of guilt means that some women will easily accept that something they have done is deserving of punishment. Coercion Jones (2008) found that some of the imprisoned women he interviewed had been coerced into confessing to crimes committed by their male partners. Rachel was a bright and intelligent young woman who had enrolled to study for a university degree. However, the violence and intimidation she suffered from her partner had made it impossible to do this: He used to make me do things and stuff, credit cards and things but this particular offence I was actually shopping with my children at the time, and he came into the store and he was stealing and he was on bail for other offences and he told me ‘If you don’t say you done it, I’ll kill you’, this that and the other, so I took the blame for him. The police knew it wasn’t me, but because I said it was me they took me in and interviewed me and I got charged with it. In Becky’s case, her partner used emotional blackmail to persuade her to take the blame for his offence: ‘he’d say that if he went back to prison he would lose everything and he wouldn’t be able to cope and there would be no point living any more’. Desire to protect male co-defendant: ‘Stand by your man’ Several women in Jones’s study had pleaded guilty to a crime they had not committed in order to protect the guilt of a male partner or associate. Although it is certainly not unknown for men to confess to crimes in order to protect women, it appears to be significantly less common. Why is it, then, that some women are prepared to do this? Nina’s explanation is love, although it does present love as rather one-sided: S: You were arrested, together with your boyfriend, and presumably the other people as well, and then you very bravely said that you had done it. That’s a sign of love! Nina: I know S: Did he appreciate it? Nina: Yeah, he did appreciate it at the time S: And presumably, because you pleaded guilty, this was never an issue, but you carried this straight through to the court, and you said – what did you say you had done? Nina: That I had kicked him and punched him as well, because he lost his eye Nina: ... I think the police knew who done it because they took his clothes off him, but they never took the clothes off me, never took my clothes S: But they were quite happy for you to be charged Nina: Yeah Nina: … They love me in the police station because I just plead guilty straight away S: Have you helped out friends before? Nina: Yeah, I have helped people out but this is the only two that I have ever had to come to prison for. Sometimes a woman has the misguided view that women are always treated more leniently by sentencers than men. This was the case with Becky: Becky: We both got arrested but there was more evidence on me than what there was him and he’s not long been out of prison and he was on his licence so if he was to get charged with it he would get a licence recall and sent back to prison and so we agreed between ourselves that I would take the blame, which I said stupidly that I’d be a girl and not in as much trouble, that they would go more lenient with me than what they would do with him SJ: Did the father of your baby ever come to any kind of arrangement like this or try to? Becky: Yeah, I’ve took the blame for him loads of times before SJ: Really, is this common? Becky: I think it is, yeah However, in a study of decisions in magistrates’ courts, Farrington and Morris (1983) found that the sex of the defendant did not directly affect the severity of the sentence. On other occasions there is no apparent explanation for a wrongful confession. This was the case with another of Jones’s interviewees, Kate. Kate: There were 36 of us arrested but my main co-defendant was my partner SJ: Did you come up together in court or not? Kate: He went separate with some other lads and he got bail, I went up with some girls and got remanded SJ: He got bail, was he going to plead guilty or not guilty to the charge? Kate: He was being charged with concern to supply SJ: Being concerned in the supply Kate: He was going to plead not guilty and I was going to take the blame for it It may be, as Carol Gilligan has suggested, that women are generally more altruistic than men. In her seminal book In a Different Voice (1982), Gilligan argued that, whereas men’s moral judgements are founded on ideas of individual rights and abstract notions of right and wrong, women’s moral reasoning is more contextual and based on the importance of human relationships and an imperative to ensure that the needs of others transcend their own. On this basis, if female offenders are faced with the possibility of being able to protect their loved one from a spell in prison by taking the blame themselves, it is plausible that some will choose this course of action. (Perhaps a similar reaction can be seen in the cases where women provide men with a false alibi. A well-known example in the UK is Maxine Carr in relation to the ‘Soham murderer’, Ian Huntley.) Some psychologists argue that women can fall into a state of co-dependency with their male partner. The idea of co-dependency was originally developed to signify the psychological difficulties exhibited by the partners and even children of alcoholics, whose behaviour could inadvertently reinforce the maintenance of the drinking problem rather than aid in its recovery. However, in recent years the notion has been extended to cover a much broader range of dysfunctional and abusive relationships. The most common characteristic is an attempt to gain individual fulfilment through reliance on other people for approval, affection and feelings of self-worth. This will often be accompanied by an excessive desire to put other people’s needs ahead of one’s own. There may also be an attempt to organize the other person’s life so as to ‘rescue’ them from their own irresponsible behaviour. The consequence of all this is likely to be the opposite of what was intended: the relationship will become unstable, intense and ultimately distressing. As most of the ‘victims’ of co-dependency are identified as women, it is not surprising that the concept has been criticized by feminist and other writers, who claim that it pathologizes the inevitable consequences of the caretaking qualities that form the basis of women’s socialization from birth. Women are trained to undertake the care of others to a degree which places this ahead of their own wants and needs (Anderson, 1994). Co-dependency is therefore no more than over-conformity to the traditional feminine role. It can also be viewed as another tool in the oppression of women, as it denies male accountability and encourages the labelling of women as ‘sick’ in order to maintain an equilibrium of illness with the man. On the basis of interviews with first-year university undergraduate students, Dear and Roberts (2002) found a moderate relationship between co-dependency and gender-role identification. They concluded that this finding was broadly supportive of the feminist critique of co-dependency. Indeed, Dear and Roberts suggested that the relationship might have been even stronger had the sample been more representative of the general population

#### Plea bargains represent a system of patriarchal coercion where women are structurally oppressed by the criminal justice system and threatened to provide false confessions or bargain away their freedom

Jones 11 Under pressure: Women who plead guilty to crimes they have not committed Stephen Jones University of Bristol, UK 2011 Stephen Jones is a Senior Lecturer in Law at the University of Bristol, where he has taught criminal law and criminology for many years. He is the author of the books Criminology (OUP) and Understanding Violent Crime (Oxford University Press). DOA 12/11/17 [Premier]

A female thief or embezzler is particularly vulnerable to the suggestion that her stealing was for the benefit of someone else – a child, her husband, her boyfriend etc. In fact that is very often the reason why a female steals. Her thievery ordinarily is less selfishly motivated than a man’s. (Inbau and Reid, 1967: 45 (an American police interrogation manual)) In 1994 the Home Office published a short document entitled ‘Does the Criminal Justice System Treat Men and Women Differently?’ (Hedderman and Hough, 1994). The clear implication of the title is that ‘different treatment’ would be wrong. Yet many people consider that such a view has been a major problem for women. There has been extensive debate among feminist writers as to whether societies should aim to treat women in the same way as men, or whether allowances should be made for the different needs of the two sexes. Some feminists argue that the only way to remove discrimination against women is to pursue equality under the law and resist legislation which would result in different treatment. The contrary argument is that women can never be ‘the same’ as men and will always emerge as second best from any attempts to ensure equality of treatment, as they will simply be judged by the prevailing male standard. In practice, much of the debate has centred on issues relating to employment, and the criminal justice system has come under scrutiny to a far lesser extent. For many years, the ‘equality of treatment’ approach prevailed, with the consequence that the ‘add women and stir’ approach which Chesney-Lind (1988) identified as applying to theorizing about female criminality could just as easily describe the treatment of women in the criminal justice system. More recently, the problems inherent in the ‘equality/difference’ dichotomy have to some extent been addressed at a practical level by the political promotion of the idea of diversity. In the USA this emphasis on individual differences proved a palatable alternative to affirmative action or quotas for disadvantaged groups, even to those on the political right (Ben-Galim et al., 2007). Following on from this development, and a strong impetus from European Union Directives, the UK introduced the Equality Act 2006, which in section 84 established the ‘gender equality duty’. This states that ‘A public authority shall in carrying out its functions have due regard to the need (a) to eliminate unlawful discrimination and harassment, and (b) to promote equality of opportunity between men and women.’ Baroness Corston’s (2007: 3) Review of Women with Particular Vulnerabilities in the Criminal Justice System pointed out that ‘equality does not mean treating everyone the same’ and this is now dutifully reproduced in seemingly every government publication dealing with female offenders. For example, the Ministry of Justice (2009: 2, emphasis added) has stated: Equality in this context does not necessarily mean that everyone should be treated the same, but rather that policy should promote the equality of outcomes. The implications of this duty for criminal justice agencies includes [sic] recognising and delivering services which take account of the different needs of male and female offenders when, for example, dealing with suspects in police custody or prison. So equality of treatment should be replaced by equality of outcomes. If implemented in full, such an approach would have far-reaching consequences for the treatment of women in the criminal justice system. In relation to false confessions and plea bargains, this would have particular significance in the police station and the courtroom. If – as the evidence suggests – women falsely confess or make plea bargains more often than men as a result of police practices, the equality of outcome required by the gender equality duty will not be achieved. How could this be addressed? Forrest et al. (2002) cite research by Alavi and Lange (2001) which found that women were significantly more likely to confess to male interrogators. If researchers such as Carli (1999) (see earlier) are correct in their view that women are more compliant with interviewers they consider as powerful and authoritarian, it might be considered preferable for all such interviews to be conducted by female police officers.

### Race

#### Plea bargains differ depending on the race of the defendant

Kutateladze et. al ’16 Besiki Luka, Nancy R. Andiloro & Brian D. Johnson(Besiki Luka Kutateladze served as a research director in the Prosecution and Racial Justice Program at the Vera Institute of Justice at the time of the project, Nancy R. Andiloro served as a research associate at the Vera Institute of Justice, Brian D. Johnson is an associate professor of Criminology and Criminal Justice at the University of Maryland.) Opening Pandora’s Box: How Does Defendant Race Influence Plea Bargaining? Justice Quarterly Volume 33, Issue 3, 2016, [http://www.tandfonline.com/doi/abs/10.1080/07418825.2014.915340 accessed 12/9/17](http://www.tandfonline.com/doi/abs/10.1080/07418825.2014.915340%20accessed%2012/9/17) [Premier]

First, it is important to recognize that, despite accounting for legally relevant factors that should influence charging outcomes, differences still remain across racial and ethnic groups. Overall, black defendants, and to a lesser extent Latino defendants, were substantially more likely to receive charge bar- gains that involved pleas to the current charge as opposed to reduced charges. Similarly, blacks, and to a lesser extent Latinos, were far more likely to receive plea offers that included a jail term. Although differences between white and Asian defendants were generally much smaller, in the aggregate, Asian defendants tended to have the most favorable plea outcomes. Regardless of whether or not these aggregate charging patterns are warranted by legal considerations like differences in statutory severity and prior arrests, then, they paint an overall picture of stark differences in plea-bargaining outcomes across racial and ethnic groups.

#### Plea bargaining is often affected by implicit bias

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Although less empirical work has been conducted on prosecutors, recent theoretical arguments maintain that “Prosecutors are as susceptible to implicit racial biases as anyone else, and the unique nature of their job provides numerous opportunities for those biases to act within criminal justice proceed- ings” (Staats, 2013, p. 44). For instance, Smith and Levinson (2011) recently argued that implicit biases are likely to affect numerous decisions controlled by the prosecutor. They argue that plea-bargaining processes in particular are prone to implicit bias because they are widespread, highly discretionary and typically involve little oversight. Moreover, these scholars suggest that prose- cutors may be less likely to empathize with the plight of minority defendants, and more likely to interpret ambiguous or incomplete evidence in a negative light (Smith & Levinson, 2011). To the extent that prosecutors, like American citizens in general, are subject to implicit biases associated with the negative stereotyping of racial and ethnic minorities, systematic differences are likely to emerge in plea-bargaining outcomes across racial and ethnic groups. Prior research provides some tentative support for this expectation.

#### Plea bargains aren’t so “sweet” for People of color as incarceration rates are higher for them than whites.

Tucker ’17
[J.B.W. Tucker, 7-14-2017, "The Ultimate White Privilege Statistics & Data Post," Race, Racism and the Law,
<http://racism.org/index.php/articles/race/white-privilege/1890-the-ultimate-white-privilege-statistics-data-post-2?showall=&amp;start=4> [Premier]

Once arrested, blacks are more likely to remain in prison awaiting trial than whites; in some places, they are 33% more likely to be detained while awaiting trial than whites. Then, people of color are routinely arraigned under stiffer, harsher charges than white offenders**.** While more than 90% of cases end in a plea bargain, blacks and Latinos are less successful at getting their sentences reduced via plea bargain. According to a University of Michigan study: “[B]lack defendants face significantly more severe charges than whites even after controlling for criminal behavior (arrest offense, multiple-defendant case structure, and criminal history), observed defendant characteristics (e.g., age, education), defense counsel type, district, county economic characteristics, and crime rates. Unexplained racial disparities exist across the charge- severity distribution, especially at the high end. The most striking disparities are found in the use of charges that carry non-zero statutory minimum sentences**.”** Black men are nearly twice as likely to be arraigned on charges that carry a mandatory minimum. A study in Georgia in the 1980s found that more than 20% of black defendants convicted of murdering white victims received the death penalty. However, only 8% of whites who killed whites and 1% of blacks who killed other blacks received the death penalty. If you’ve watched Law & Order or just about any other police procedural show, you’re familiar with the idea that almost anything you can be arrested for can be brought under different charges—say, Murder II or Murder III, or even Manslaughter, instead of Murder I. People of color are prosecuted under the higher charges at much higher rates than whites. Blacks are 21% more likely to receive mandatory minimum sentences. Blacks are 20% more likely to be sentenced to prison than whites. Once convicted, black offenders receive sentences that are 10% longer than white offenders for the same crimes. That sentencing gap has widened in recent years; since judicial discretion was returned by the Supreme Court in 2005, “Prison sentences of black men were nearly 20% longer than those of white men for similar crimes in recent years.”[36] 2/3 of criminals receiving life sentences are non-whites; in the state of New York, it’s 83%. The higher rate of mandatory minimum sentencing, the increased likelihood of a prison sentence, and the longer overall sentences, are even worse when considering the previous statistics. Consider that blacks are routinely brought up on stiffer charges for the same actual crime, while whites are more frequently charged more leniently. Consider also that whites are more often successful at pleading the initial charge down to lesser charges than people of color. The result is that people of color end up facing longer sentences for lesser crimes, while whites receive shorter sentences for greater crimes**!** Blacks are frequently illegally excluded from serving on juries. “For example in Houston County, Alabama, 8 out of 10 African Americans qualified for jury service have been struck by prosecutors from serving on death penalty cases.”[9] Only 3-5% of criminal cases go to court; most are plea-bargained. “Most plea bargains consist of promise of a longer sentence if a person exercises their constitutional right to trial. As a result, people caught up in the system, as the American Bar Association points out, plead guilty even when innocent. Why? As one young man told me recently, ‘Who wouldn’t rather do three years for a crime they didn’t commit than risk twenty-five years for a crime they didn’t do?’”[9] People of color are much more likely to receive a public defender than whites.[9] In 2004, the US Bar Association—not exactly a liberal bunch—reviewed the public defender system and came to the following conclusion: “All too often, defendants plead guilty, even if they are innocent, without really understanding their legal rights or what is occurring**…**The fundamental right to a lawyer that America assumes applies to everyone accused of criminal conduct effectively does not exist in practice for countless people across the US**.”**

#### People of color get longer sentences for same crimes

Kutateladze ‘14
[Besiki Luka Kutateladze, Nancy R. Andiloro, January 31, 2014, Prosecution and Racial Justice in New York County – Technical Report, U.S. Department of Justice for the National Institute of Justice, <https://www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf> [Premier]

Overall, there has been comparatively little contemporary research that examines the influence of race and ethnicity on prosecutorial decision making, particularly when it comes to the process of plea bargaining. Moreover, although prior research consistently emphasizes the importance of evidentiary issues in prosecutorial decision making, researchers often lack quality information on the strength and type of evidence against a defendant. To address these limitations, we focused on plea-bargaining outcomes while incorporating unprecedented data on evidence collected from paper case files. Two vital components of the plea bargaining process—custodial sentence offers and reduced charge offers—were examined. The sentence offer analyses was conducted for (a) the population of misdemeanors in the dataset provided by DANY, (b) the random sample of 1,246 misdemeanor marijuana cases, and (c) the random sample of 1,153 felony non-marijuana drug cases. The charge offer analysis was performed for the two latter samples only because the population data did not include this information. Consistent with our hypothesis of more punitive plea offers for blacks and Latinos, overall, blacks, and to a lesser extent Latinos, were substantially less likely to receive reduced charge offers, and far more likely to receive custodial sentence offers. Although differences between white and Asian defendants were generally much smaller, in the aggregate, Asian defendants tended to have the most favorable plea outcomes.

#### Plea bargains feed into a corrupt system of racist mass incarceration that erodes justice for the sake of expediency

Weil 12 Widespread Use of Plea Bargains Plays Major Role in Mass Incarceration Wednesday, November 07, 2012 By [Danny Weil](http://www.truth-out.org/author/itemlist/user/46231), Danny Weil is a writer for Project Censored and Daily Censored. He received the Project Censored "Most Censored" News Stories of 2009-10 award for his article: "Neoliberalism, Charter Schools and the Chicago Model / Obama and Duncan's Education Policy: Like Bush's, Only Worse," published by Counterpunch, August 24, 2009. Dr. Weil has published more than seven books on education in the past 20 years.. <http://www.truth-out.org/news/item/12556-overwhelming-use-of-plea-bargains-plays-major-role-in-mass-incarceration> DOA 12/11/17 [Premier]

Pleading for Bargains as Opposed to Arguing for Justice A criminal plea bargain is an agreement in a criminal case where the defendant pleads guilty to a crime, usually to a lesser crime than the original charge, and as a result, waives his or her right to a jury trial. Unbelievably, in the modern criminal system, more than 90 percent of all criminal charges are resolved through plea bargains. It is a system based not on the presumption of innocence, but on the contrary - on the presumption of guilt. Arm-twisting defendants, many of them poor and people of color, into plea bargains means that the government does not have to shoulder its burden of proving the guilt of those they charge with crimes and can simply shirk the constitution for expediency. Plea bargaining has become historically ubiquitous as the principal, if not primary, method of criminal case disposition in the United States and a historical canker sore on the judicial system. Even as early as [1920, it was thought that 88 percent of convictions in New York were via guilty pleas, up from 22 percent just over 80 years earlier](https://www.ncjrs.gov/App/abstractdb/AbstractDBDetails.aspx?id=98903). As the New York Times reported in an editorial piece on July 16, 2012: "Earlier this year an opinion for the Supreme Court by Justice Anthony Kennedy noted a stunning and often overlooked reality of the American legal process: a vast majority of criminal cases - 97 percent of federal cases, 94 percent of state cases - are resolved by guilty pleas. [Criminal justice today is for the most part a system of pleas, not a system, of trials](http://www.nytimes.com/2012/07/17/opinion/trial-judge-to-appeals-court-review-me.html?_r=0)." This opinion was based on a Supreme Court ruling back in March of 2012, a ruling involving two people who were proven to have ended up with stiffer sentences than they might have received had their lawyers not failed them while plea bargaining. The two defendants took their case all the way to the highest court, [each of them asking the Supreme Court](http://www.huffingtonpost.com/2011/10/31/supreme-court-plea-bargain-advice-lafler-v-cooper_n_1068362.html) to invalidate their sentences under the Sixth Amendment's guarantee of effective assistance of counsel. The court, by a close vote of 5-4 in both cases, accepted the defendants' arguments and ruled in their favor, upholding [Missouri v. Frye](http://www.supremecourt.gov/opinions/11pdf/10-444.pdf), the legal ruling that provides a constitutional guarantee of a fair trial and judicious plea bargaining. [Justice Anthony Kennedy wrote on behalf of himself and four of his colleagues](http://www.huffingtonpost.com/2012/03/21/supreme-court-plea-bargain-constitution-violation_n_1369549.html), Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan. The plea bargain system is really based upon coercion, a legal form of extortion by the state. Prosecutors coerce defendants into pleading guilty by piling on charge after charge, and judges coerce those charged by making it known that the punishment will be much milder if you plead guilty than if you lose after exercising your supposed constitutional rights and go to trial. Retribution can be as swift. Like the Inquisition, this system of duress [too frequently results in innocent individuals entering guilty pleas they never would have if the constitution was really put into play](http://www.nytimes.com/2012/07/17/opinion/trial-judge-to-appeals-court-review-me.html?_r=0). The current system of plea bargaining has corrupted criminal defense law as it stampedes the constitution, leaving in its wake intimidation and fear. In practice, a defense lawyer's main job is negotiating guilty pleas and subsequent sentences, not defending the criminally accused, as many would believe. Instead, because over 90 percent of criminal cases are resolved through plea bargains, the economics of defense lawyers depends on pushing paper and maintaining good relationships with prosecutors; therefore, it is not uncommon for defense attorneys to allow a client to "take a fall" rather than accuse a prosecutor of misconduct and risk legal retaliation in future cases. Crony legalism is an essential part of crony capitalism, and nowhere is this better seen than in the halls of justice.

#### Plea bargaining fuels the prison industrial complex. Abolishing plea deals is an important step to ending mass incarceration – impact turns court clog.

Weil 12. Weil, Danny. “Widespread Use of Plea Bargains Plays Major Role in Mass Incarceration.” Truthout. November 7, 2017. <http://www.truth-out.org/news/item/12556-overwhelming-use-of-plea-bargains-plays-major-role-in-mass-incarceration> [Premier]

As long as plea bargains are used as a club to coerce defendants into abdicating their right of the constitutional guarantee to a fair trial, the prison-industrial complex will continue to grow exponentially. Plea bargains are one big woodpile that serves to fuel the ever-expanding prison-industrial complex, rendering transparent the American political resolve to incarcerate more and more people even if it means bankrupting their municipalities, cutting education and devoting their budgets to subsidizing the for-profit prison industry. If this resolve represents the mens rea (criminal intent) of the political will for mass incarceration, then plea bargaining can be said to represent the actus reus, the physical act of carrying out the industrial carceral state. If plea bargains were eliminated, or even severely monitored and reduced, the states and the federal government would then be required to carry out their burden under the constitution of proving the guilt of a criminal defendant in accordance with the law. If this happened, there would be a whopping reduction in prosecutions, not to mention incarcerations. Such a shift would be an important step in ending the current carceral culture of mass confinement and cruelty. Michelle Alexander, a civil rights lawyer and bestselling author of the book, The New Jim Crow: Mass Incarceration in the Age of Colorblindness, recently wrote in The New York Times that in her phone call with Susan Burton, a formerly incarcerated woman who took a plea bargain for drug use, Burton asked: What would happen if we organized thousands, even hundreds of thousands, of people charged with crimes to refuse to play the game, to refuse to plea out? What if they all insisted on their Sixth Amendment right to trial? Couldn't we bring the whole system to a halt just like that? Believe me, I know. I'm asking what we can do. Can we crash the system just by exercising our rights? Burton has the right to ask this question. It took her 15 years after pleading to a drug charge to get her life back together. The organization she recently started, A New Way of Life, offers a much-needed lifeline to women released from prison. But it does much more than this: it is also helping to start a movement against plea bargaining and the restoration of the constitution as it applies to citizens. All of Us or None is another such group that is organizing formerly incarcerated people and encouraging them to demand restoration of their basic civil and human rights. But the question Burton asks remains: could criminal defendants really crash the system if they demanded their constitutional rights and refused to plea to crimes they did not commit? From the point of view of American University law professor Angela J. Davis, the answer is yes. The system of mass industrial incarceration is entirely dependent on the cooperation of those it seeks to control. If everyone charged with crimes suddenly exercised their constitutional rights, then there would not be enough judges, lawyers or prison cells to deal with the flood tide of litigation. As Davis notes, not everyone would have to join for the revolt to have an impact: "if the number of people exercising their trial rights suddenly doubled or tripled in some jurisdictions, it would create chaos." The entire carceral system is riddled with corruption and broken beyond comprehension. Davis and Burton might be right: crashing the judicial system by refusing to get roughhoused into phony plea bargain deals could be the most responsible route to cleaning up the courts and restoring constitutional rights. It is daunting, and it takes guts, but with more than 90 percent incarcerated for plea bargains, it is courage we need. One thing we do know: there are many people falsely accused of crimes doing time in for-profit American gulags, and many more waiting to replace them. This situation might be good for the for-profit prison system and a few major stockholders but it spells Dante's Inferno for those forced to take the plea, as Alford, Banks, Burton and far too many others know.

#### Limitless prosecutorial power feeds the people of color into the prison industrial complex.

Heiner 16. Heiner, Brady. Ph.D, Associate Professor of Philosophy and CSUF “The procedural entrapment of mass incarceration: Prosecution, race, and the unfinished project of American abolition.” Philosophy and Social Criticism, vol. 42, no. 6, pp. 594-631. [Premier]

A pipeline has been constructed in America between working communities of color and the prison industrial complex – a pipeline whose structural genealogy goes back to the postbellum Black Codes and convict lease system and more recently involves de-industrialization, the war on drugs, pervasive ‘tough on crime’ political rhetoric and policy, corporate media construction and amplification of ‘moral panics’21 around immigration and racialized street crime, and public disinvestment in education, housing, welfare, and drug and alcohol treatment. Along this pipeline, prosecutors operate as the main valve. They unilaterally decide which and how many of the accused are prosecuted and which and how many charges are leveled against them. They also increasingly determine, through the charges they select, how severely the convicted are sentenced, as mandatory minimum sentencing legislation, federal sentencing guidelines and the proliferation of criminal statutes in recent decades have vastly shifted adjudicatory power from judges to prosecutors.22 Prosecutors are the most powerful officials in the American criminal justice system.23 No government official has as much unreviewable power or discretion as the prosecutor.24 As one Supreme Court justice, and former prosecutor, put it, ‘The prosecutor has more control over life, liberty, and reputation than any other person in America’.25 And 598 Philosophy and Social Criticism 42(6) that was in 1940, long before the massive expansion of prosecutorial power that has unfolded in tandem with the wars on drugs and terror. Prosecutorial power affects every stage of the criminal justice process: prosecutors’ decisions significantly affect the arrest practices of the police, the volume and disposition of cases in the courts, and the number of people transferred to the penal system.26 Given the stark racial disparities in America’s imprisoned population,27 and given the racial differentials in sentence severity for similarly situated defendants,28 the role of the prosecutorial function in the complexities of racial inequality in the criminal justice system, in the words of critical race legal theorist Angela J. Davis, is ‘inextricable and profound’.29 So profound that – contrary to the morally upstanding, even saintly representations of criminal prosecutors in Hollywood televisual dramas – Abbe Smith, a criminal defense lawyer, Georgetown law professor and legal ethicist, argues that one cannot be both a good person and a good prosecutor, given the institutional and cultural pressures of prosecutor offices in the current regime of punishment. Even the most ‘progressive’ prosecutor offices are responsible for filling the nation’s jails and prisons with poor people (largely of color) who are accused of committing street crimes that are predominantly non-violent, economic and drug-related.

#### Differential bargaining power supercharges the racial disparities in the criminal justice system

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To begin, innocent whites, have little outside incentive to plea bargain. A white defendant who believes himself to be innocent has confidence that the criminal justice system will work to his advantage, and he is unlikely to accept a plea bargain. Interestingly, this is in accord with most plea bargaining models (See Grossman and Katz 1983). On the other side of the equation, a guilty Black defendant has every incentive to bargain. In accord with the economic models, he believes he is guilty. He also believes that the system is stacked against him. As such, any concession he can get in exchange for a guilty plea likely lowers his expected sentence from what might be received at trial. However, the two other categories are more interesting. First, for a guilty white defendant, there are incentives cutting both directions. While he considers himself guilty, he also is more likely to be a risk taker. Thus, he may choose not to plea bargain hoping for a win at trial. However, even if he does plea bargain, he is likely able to win greater concessions from prosecutors than a Black defendant who is guilty because he is in a better bargaining position to begin with. That is, a white defendant has more faith in the criminal justice system that he will receive a fair trial, and thus he believes that it takes more than simply guilt to be found guilty. It takes a trial with evidence which is honest, fair, and comports with principles of justice and due process. Thus, this belief puts the white defendant in a relatively strong bargaining position making whether he will bargain unclear. Finally, the case for an innocent Black defendant is also not quite clear. As with innocent whites, an innocent Black defendant is also pushed to not bargain due to the expectation of wining at trial. However, several factors mitigate against this. First, as discussed, there is a cultural bias against the criminal justice system among African Americans which suggests that a Black defendant will likely expect the worst. Additionally, there is a likelihood of risk aversion. How these factors might balance is 39 impossible to predict. However, what is predictable is that an innocent Black defendant is more likely than a similarly situated innocent white one to accept a guilty plea. Further, when compared against an innocent white defendant who does accept a guilty plea, he is comparatively likely to accept a worse bargain. The contention that differential bargaining power exists, or that it is tied to race, is not new. In a 1991 study, for instance, Ayres found that when purchasing cars, after bargaining Blacks paid substantially higher prices that whites (Ayres 1991). In that study, Black and white testers approached car salespeople in Chicago and attempted to bargain for the best possible purchase price. On average, while the best price offered to white males was approximately $360 above dealer cost, the best price offered to Black males was $780 over cost.22 Indeed, even before any bargaining took place, the initial offers offered to Black men were nearly twice as high as the initial offers made to white men ($1534 over cost versus $818.) Plea bargaining is not the same as purchasing a car, but the example is illustrative that a person, a prosecutors or a car dealer, will take advantage of the best bargain he can make. When the person he is bargaining with is in a relatively weaker position, this position of power allows him to increases his own payoff.

#### Status quo trends show an excessively racist increase in people of color being incarcerated indicated a systemic failure of the criminal justice system – crime rates during the war on drugs proves

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In addition to simply being huge, the prison population in the United States is also remarkable in that it is incredibly unbalanced along racial lines. While the United States houses approximately 1 percent of its population in prison, and while statistically 1 in every 15 adults will go to prison at some point in their lifetime, this probability is not evenly split across racial lines (Warren 2008). Indeed, while 5.9 percent of white males (about 1 in 17) will face incarceration at some point in their lifetime, over 30 percent of Black males, or 1 in 3, will (Id). For Black men without a high school diploma, the number is 60 percent, or 3 in 5 (Western 2006). Overall, though only making up approximately 12 percent of the population, Blacks account for over 50 percent of those incarcerated (Tonry 1995). There are numerous reason for this disparity, however. The reasons given in the literature generally fall into one of two categories. The first of these relates to the war on drugs while the second focuses more on crime in general. This distinction makes some sense. The war on drugs alone accounts for over a fifth of the prison population. Further, the disparity within just this portion of the prisoner population is enormous even though drug use is generally even across races (Western 2006). What 96 that means is that a simple explanation that excludes a systematic failure of the criminal justice system is problematic. That is to say, an explanation that does not address why there is disparity in enforcement cannot explain the problem. On the other hand, rates of non-drug related crime, as far as most statistics indicate, are not even across races, generally being higher among African Americans (Blumstein 1982, 1993). Thus, in explaining why there are more Blacks incarcerated for index crimes than whites, commentators can point to these crime rate distinctions. However, these crime rate distinctions still do not account for all of the racial disparity in prisons (see infra). Why the war on drugs has been so disastrous in terms of prison populations is a multifaceted question. Begun in the early 1970s by the Nixon administration, the drug war hit its stride beginning with the Reagan administration and continued through the George H.W. Bush, Clinton, and George W. Bush administrations (King 2008). In 1980, in the United States, there were approximately 2.6 drug related arrests for every thousand people, accounting for about 6 percent of all arrests made (Id). This was up slightly from 1970, but only by a relatively small amount. Within a decade, however, the annual number of arrests had more than doubled (Id). By 2007, the numbers were up to close to 2 million per year, or about 1 arrest for every 130 adults (FBI Uniform Crime Report 2008). In many cities, over 20 percent of all arrests are for drugs, and in places like Newark, Baltimore, and Chicago, the numbers are close to 30 percent, or higher (King 2008). In other cities, like Tucson and Buffalo, the per capita increase in drug arrests rose over 800 percent between 1980 and 2003 (Id). Additionally, as noted by King (2008) unlike for other crimes, arrests for drugs are rarely offense driven but rather are sought out by law enforcement. In 97 other words, arrest rates reflect law enforcement priorities, not necessarily actual crime rates. Perhaps more important than the total number of arrests in the war on drugs is the breakdown in the number of arrests along racial lines. In 1980, Blacks were arrested on drug related charges at a rate of 684 per 100,000 people (about 0.7 percent) while whites were arrested at a rate of 387 per 100,000 (King 2008). As skewed as that was, by 2003 this disparity had expanded considerably. In 2003 whites were arrested at a rate of 658 per 100,000, an increase of 70 percent, and still lower than for Blacks a quarter century earlier. Blacks, on the other hand, were arrested at a rate of 2221 per 100,000, an increase of 225 percent over 23 years (Id). In terms of incarceration, the numbers are seemingly worse.9 The vast majority of people entering prison for drug violations are low level dealers or users (Fellner and Vinck 2008). In New York, for instance, in 1998, 63 percent of new admittees to prison were admitted for low level drug crimes, 37 percent of those being for mere possession (Id). According to a Human Rights Watch report, a survey of state prisoners showed that 58 percent of prisoners incarcerated for drugs had no history of violence or of high level drug activity (Id). Nationwide, in 2003, Blacks made up more than 50 percent of the people entering prison on drug charges (Id). In addition, Black men were nearly 12 times more likely than white men to be incarcerated for drug violations, and among men entering prison, nearly 40 percent of Blacks were doing so because of drugs while only 25 percent of whites were (Id). Accurate absolute numbers of prisoners are difficult to come by. However, of 34 states reporting data to the National Corrections Reporting Program, state prisons admitted 111,247 adults for drug related crimes in 2003. Of these, 59,535, or 53.5 9 It is worth a note that being arrested and not being incarcerated does not necessarily represent a case in which there is no penalty. Even a misdemeanor record for drugs can have serious repercussions. 98 percent were Black while 37,003, or 33 percent were white. At the high point, Blacks in Wisconsin were over 42 times more likely to be incarcerated than whites on drug charges (Id). While Illinois was slightly less skewed than Wisconsin with Blacks being only 24 times more likely to be incarcerated than whites for drugs, in absolute numbers, Illinois had the highest per-capita rate of drug imprisonment, admitting over 0.6 percent of its population to prison on drug related charges in 2003 (Id). What is perhaps most curious about these facts is that drug use has been reasonably steady since 1980 (Fellner and Vinck, 2008, Western 2006). Moreover, drug use across races is generally even (Western 2006). That is, Blacks and whites use drugs at roughly the same rates as each other, and at roughly the same rate they did before the start of the war on drugs. Indeed, by some measures, whites actually use drugs at higher rates than Blacks (Id). Additionally, people who deal drugs often arise from the ranks of drug users and tend to service people in their immediate community. In other words, drug dealers tend to look, in terms of demographics, like their customers (Fellner and Vinck 2008). Thus, there is no inherent reason that Blacks should be so over represented in the criminal justice system.

#### Plea bargaining is directly causational with the escalation of implementable racism

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This, of course, begs the question of why incarceration numbers for drug related crimes are so skewed? The model in this project argues that part of the reason rests with the plea bargaining system. However, there are other explanations as well. Indeed, plea bargaining cannot act alone, but instead acts in concert with the entirety of the criminal justice process. Plea bargaining, in the model, is an institutional construct that facilitates, perpetuates, and exaggerates other inequalities in the system brought about through factors from simple racism, to social and structural characteristics. With plea bargaining in place, other factors, actions, and institutional structures that lead to inequality are able to continue. Without it, many of them likely would not. These other factors are numerous. First, at the base level is simple racism. Cole, noting that intent is notoriously difficult to prove, shows numerous examples of laws and practices that, if not racist in their intent, certainly are in their results (Cole 1999). For instance, Cole notes the case of United States v Bell (86 F.3d. 820 (8th Cir. 1996)) where a Black male, Theophilis Bell, was arrested for riding his bicycle after dark without a headlight in Des Moines, Iowa. In a search incident to the arrest, the arresting officer found drugs on Bell, arresting him for possession with intent to sell. Bell argued that the stop, which the officer admitted was a pretext, was an equal protection violation noting that 98 percent of bicycles in Des Moines were without headlights, and that every person stopped for the same violation in the preceding month had been African American. Noting that, “The Equal Protection Clause precludes selective enforcement of the law based on race,” the court, as Cole put it, “dismissed the claim on the grounds that Bell had failed to prove that white people rode their bikes after sunset” (Cole 1999: 41). 100 On one hand, Bell was committing two crimes, one of which was visible. On the other, it is also clear that the police were not in the suburbs searching white people on bicycles. It is also clear that, while the court was, perhaps legitimately, concerned that Bell was in a “high-crime area,” since drug use is actually equal across races, Bell was perhaps no more likely than a white person in the suburbs to be carrying drugs. That is, the fact that Bell had drugs does not make the search not race based. The example is not isolated. The Supreme Court has held that traffic stops, even when conducted by officers with no authority to make them, are constitutional (Whren v. United States, 517 U.S. 806 (1996)). This, Cole notes, has allowed police to search nearly anyone, using traffic violations as a pretext. In one county, a study found that 5 percent of drivers on a particular highway were dark skinned, while 70 percent of those pulled over for traffic violations were Black or Hispanic, as were 80 percent of those whose cars were searched (Cole 1999). In another case, in a county in Colorado, after having a case thrown out when “Black” was found to be an explicit factor in drug courier profiles used by police in determining what cars to stop, the sheriff, a court found, “[W]ent from being a Drug Task Force officer who went for days at a time without ever concerning himself with traffic violations, to a drug enforcement officer obsessed with traffic enforcement” (United States v. Layman, 730 F.Supp. 332, 337 (D.Colo. 1990)). In that case, the lawsuit against the sheriff was successful. However, this case is clearly an exception. These examples are all anecdotal, and thus do not prove a racist system. However, familiarity with the criminal justice system shows a long history of, at best, racial profiling, and at worst outright racism (see generally Kennedy 1997).

#### Aff solves for the harms – abolishing plea bargaining has successfully lead to less racial disparity in the criminal justice system by leading to a decline in low level prosecutions subsequently reducing their effect on minorities

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If the elimination of plea bargains in a district led to a decline in low level prosecutions, but not in high level ones, one could surmise that given current demographic and prosecutorial distributions, the elimination of plea bargaining in a current district would have the effect of reducing prosecutions for minorities. Put another way, current prosecution and prison demographics show that convictions for low level crimes fall more disproportionately on minorities than do prosecution for high level crimes. Thus, if data from districts that eliminated plea bargaining shows that this elimination not only led to a reduction in criminal dispositions, but also that the reduction was primarily in dispositions for low level crimes, then logically the elimination of plea bargains also led to a more equal distribution of prosecutions along racial lines. Additionally, the project argues that since prosecutors are primarily interested in raw numbers of prosecutions, they will forgo difficult cases when inexpensive plea bargains are available. Moreover, the project argues that plea bargains for Black defendants are generally less expensive for a prosecutor than are plea bargains for whites. Since the project argues that racial disparity is a result of plea bargaining, logically, in the absence of plea bargains, when a prosecutor assesses how to allocate her resources, the racial disparity should decrease even for higher level crimes that will still be prosecuted. That is, not only will a prosecutor concentrate on crimes that are more socially costly, but she will also no longer face a situation where it is less expensive to prosecute Blacks for the same crime as whites. Finally, it should be noted that the data onprison admissions includes exceedingly few white collar type prosecutions. It is a contention of this project that the elimination of plea bargaining would increase the cost of prosecuting street crime bringing its cost closer to the level 146 of prosecuting white collar crime. Further, as was argued in chapter 5, the social cost, if not the prevalence, of white collar crime is in accord with the cost of street crime. Thus, the presumption is that without the cost savings obtained through plea bargains, prosecution of white collar crime should increase. Thus, for several different reasons, a move from prosecuting low level crime utilizing plea bargains to instead prosecuting higher level crime without plea bargains would lead to less racial disparity in the criminal justice system overall.

#### Prosecutors’ implicit racial bias causes people of color to receive harsher plea deals.

Smith and Levinson 12. Smith, Robert (Director of the Fair Punishment Project) and Justin Levinson (Professor of Law at University of Hawaii William S. Richardson School of Law, expertise in Criminal Law, Legal Fundaments, and Applied Psychology). “Implicit Racial Bias Can Operate in Every Phase of Prosecutorial Discretion.” Seattle University Law Review. 2012. <http://racism.org/index.php?option=com_content&view=article&id=1406:may041204&catid=136&Itemid=155&showall=&limitstart=5> [Premier]

Most criminal cases are resolved by plea bargain, where the defendant admits guilt in exchange for a reduced charge (or a lesser sentencing recommendation). Unlike the disclosure of exculpatory evidence, plea-bargaining is subject to almost zero oversight. We have argued that, in several contexts, implicit racial bias thrives in the midst of discretionary determinations. Plea-bargaining is no exception. Consider a sampling of four "factors" among those the Department of Justice instructs federal prosecutors to consult in deciding whether to pursue a bargained disposition: (1) "[T]he nature and seriousness of the offense or offenses charged"; (2) "the defendant's remorse or contrition and his willingness to assume responsibility"; (3) "the public interest in having the case tried rather than disposed of by a guilty plea"; and (4) "the expense of trial and How might the defendant's (or the victim's) race have an impact on the prosecutor's decision whether to offer a plea bargain, and if a plea is in fact offered, how much of a charging reduction will be offered in exchange for the guilty plea? First, consider prosecutors' assessment of the "seriousness of the offense charged." Imagine a domestic violence case where a man severely abuses his spouse. Does it matter if the spouse is black? Imagine white prosecutors deciding whether to offer the suspect a plea deal on a misdemeanor battery charge. As the prosecutors attempt to quantify the seriousness of the offense, they might not be able to empathize with the fear and pain of a black woman as much as they could empathize with a white woman subjected to domestic abuse. This phenomenon is known as "in-group favoritism," which is defined as "our tendency to favor the groups we belong Justice Scalia might use the term in-group favoritism to label the "undeniable reality" he described in his dissent in Powers v. Ohio"that all groups tend to have particular sympathies ... toward their own group There is experimental support for the existence and power of ingroup favoritism, or bias, as it relates to empathizing with a victim. Alessio Avenanti used a method called transcranial magnetic stimulation (TMS) to measure corticospinal activity level in participants who viewed short video clips of a needle entering into the hand of either a lightskinned or dark-skinned person. Consistent with the in-group empathetic-bias explanation, Avenanti found that region-specific brain activity levels were higher when Caucasian-Italian participants viewed the clip of a light-skinned participant experiencing pain than when they saw a clip of a dark-skinned target being subjected to pain. Returning to the white prosecutors trying to assess the seriousness of the domestic abuse suffered by a black woman, prosecutors might undervalue the extent of the harm caused by the abuse relative to the harm that they would consider a similarly situated white woman--perhaps someone who reminds them of their mothers, sisters, or daughters--to have suffered. The defendant's race (as well as the victim's race) can also influence the plea-bargaining process. Imagine a prosecutor trying to determine whether to offer a defendant a plea to manslaughter (and thus a term of years) or to proceed to trial to try to obtain a second-degree murder conviction (and thus, in many jurisdictions, life without parole). Whether "the public interest" is satisfied by a plea bargain (as opposed to going to trial where the defendant could receive a harsher sentence) and whether "the expense of trial" is worth it turn on how the prosecutor views the defendant. Is this person dangerous and thus likely to commit a future crime? As a white prosecutor reviews the case file of a young white defendant, the prosecutor might be unknowingly affected by positive implicit stereotypes relating to lawfulness and trustworthiness. This could lead to a more lenient evaluation of the defendant--troubled, but not a bad person, for example--and thus a plea offer is more likely to follow. As we have well-covered by now, the opposite will be true when the prosecutor views a black defendant; the prosecutor's mind will likely trigger automatic associations between the defendant and the concepts of violence and hostility. On a related point, as the prosecutor attempts to determine the degree of remorse the defendant has displayed (for example, during plea negotiations), the stereotype that black citizens are less fully human might render the prosecutor less able to detect remorse from a defendant's body language or more likely to reject a black defendant's apology as self-serving or otherwise not genuine. So too might the stereotypes that black citizens are violent, hostile, and prone to criminality have an impact on the degree of remorse that the prosecutor is able to detect in a defendant.

#### Black male defendants are at a structural disadvantage in the court system, specifically in pretrial negotiations – multiple empirical warrants prove.

Metcalfe and Chiricos 17. Metcalfe, Christi (Christi Metcalfe, PhD, is an assistant professor in the Department of Criminology and Criminal Justice at the University of South Carolina. Her research interests include criminal courts, developmental/life course criminology, punitive attitudes, and quantitative methods) and Ted Chiricos (Ted Chiricos is an American criminologist, currently the William Julius Wilson Professor at Florida State University). “Race, Plea, and Charge Reduction: An Assessment of Racial Disparities in the Plea Process.” Justice Quarterly. March 2017. [Premier]

First, we found that black defendants are less likely to plead guilty than white defendants. When considering race/sex dyads, this initial relationship remained true of cases involving black males, but not black females. Also, cases involving white males are more likely to proceed to trial when compared to cases involving white females. Second, the factors that predict the likelihood of a plea among black and white defendants are substantively, but not significantly, different. There was evidence to suggest that cases involving black defendants had higher odds of proceeding to trial when the offense was more serious and the prior record was more extensive than cases involving white defendants. Also, contrary to prior sentencing research, race seemed to condition the effect of sex in relation to the mode of disposition. Lastly, in terms of a charge reduction, black defendants get less of a value for their plea than white defendants. A closer analysis of race/sex combinations showed that black male defendants get the worst value for their plea. Also, black and white males exhibit greater differences in both actual and estimated probabilities of a charge reduction than black and white females, while black males and females exhibit greater differences in actual probabilities of a charge reduction than white males and females. If plea bargaining is viewed as advantageous for its more lenient sentencing outcomes, it appears that black males, and to a lesser extent white males, are disadvantaged in a system that relies heavily on plea bargaining. The results indicate that these defendants are more likely to proceed to trial than their female counterparts. In our theoretical discussion, we argued that this resolution could be a by-product of (a) the defendant’s choice, (b) incongruent case processing experiences across race and race/sex, and/or (c) differences in the value defendants receive for their plea across race and race/sex. In terms of human agency, it has been suggested that the method of case resolution is closely tied to the level of trust and confidence the defendant has in the system (Albonetti, 1990; Frenzel & Ball, 2008; Kellough & Wortley, 2002). In this scenario, it is possible that black males, especially, view the judicial process with less confidence and on that account are less willing to trust negotiation tactics by the prosecutor, including plea bargaining (Albonetti, 1990; Frenzel & Ball, 2008; Kellough & Wortley, 2002). Unfortunately, we are unable to directly test for this possibility, though results are consistent with such an interpretation. The findings from the disaggregated plea models can speak to the second possible explanation—that blacks and whites may be experiencing “different models of case processing” (Miethe & Moore, 1986, p. 220). For instance, prior record is related to a significant reduction in the likelihood of a plea among blacks but not whites (although the difference of coefficients is not statistically significant). For blacks, prior record seems to represent an “aggravating circumstance” that offers a “negative basis” to their case and can impact court actor discretion (Albonetti, 1990, p. 332), which is not necessarily true for whites. This is particularly concerning if court actors are weighing certain factors, like prior record, more heavily for some defendants and not others, and if these differences exist along racial lines. The plea value results add credence to the third possible explanation, suggesting that black defendants may not be getting as good of an offer as white defendants. Black defendants tend to have higher prior records and are more likely to be detained (see Table 1), both of which decrease the odds of a charge reduction by 38.3 and 55.6%, respectively (see Model 1 of Table A1). A defendant’s prior record is based, to some extent, on their arrest record, which is at the discretion of police officers, and the decision to detain is largely left to the discretion of judges, with some of the prosecutors’ input. If these arrest and detention decisions were made with input from attributional stereotypes, focal concerns and implicit biases relating to offender blameworthiness and dangerousness to the community, there is the possibility of what has been called “cumulative disadvantage” in racially disparate terms. Stated differently, “earlier negative events” can be seen as increasing “the odds of subsequent negative events” (Wooldredge et al., 2015, p. 189). As Kutateladze et al. (2014) recognize, “focusing on a single decision-making stage (i.e. sentencing) may mask disparities originating at other discretionary points in the system” (p. 517). There exists the possibility that decisions made at earlier phases of the process can set black males at a disadvantage in the plea process, such that they will likely get worse plea offers in part because of these earlier decisions. Ultimately, the lower value received for their plea, which we find in the current study, may be an impetus for going to trial among black males, where they are subject to potentially harsher penalties. As with previous studies addressing focal concerns and attributional stereotypes, the potential biases discussed above can only be inferred based on the disparities found, but the results do suggest that blacks are more likely to have certain case characteristics that make a charge reduction, and subsequently a plea, less likely.

#### A new study proves racial bias in plea bargaining. Prefer our evidence – most reliable and expansive data set.

Borchetta and Fronteir 17. Borchetta, Jen Rolnick and Alice Frontier. “When Race Tips the Scales in Plea Bargaining.” Slate, October 23, 2017. <http://www.slate.com/articles/news_and_politics/jurisprudence/2017/10/new_research_finds_that_prosecutors_give_white_defendants_better_deals_than.html> [Premier]

Countless people like this young man face tremendous pressure to accept a prosecutor’s plea offer. And most criminal punishment results—not from a trial by a jury of your peers—but in convictions imposed through plea deals. Against this backdrop, a new study showing racial bias in the plea bargaining process demands attention and action. A new study from Carlos Berdejó of Loyola Law School demonstrates for the first time that there are significant racial disparities in the plea deals white and black people receive on misdemeanor charges—with black people facing more severe punishments. Berdejó analyzed 30,807 misdemeanor cases in Wisconsin over a seven-year period and found that white people facing misdemeanor charges were more than 74 percent more likely than black people to have all charges carrying potential prison time dropped, dismissed, or reduced. And white people with no criminal history were substantially more likely to have charges reduced than black people who had no criminal history. This suggests, as Berdejó concludes in his report, that prosecutors use race to judge whether a person is likely to recidivate when deciding what plea to offer. Prior studies have found racial disparities in the plea bargaining process. The Berdejó study differs, however, in that it analyzes a detailed statewide data set of the entire life of criminal cases, from charging to sentencing, making it more reliable and expansive. The majority of arrests nationally are for misdemeanor charges. At The Bronx Defenders, where we provide public defense services to low-income people in the Bronx, New York, we had more than 18,000 new misdemeanor cases in 2016 alone. That was more than three-quarters of our cases, and about half of all cases that we closed last year resulted in plea deals. If there are racial disparities in pleas in misdemeanor cases that lead to worse punishment of black people, it means a significant proportion of our criminal justice system is meting out punishment in a racially biased manner. Prosecutors wield enormous power and total discretion in deciding whether and how to charge people, whether to request pre-trial detention or money bail, and what plea to offer. One factor guiding this decision is whether the attorney believes the person will be held on bail. Frequently, people charged with misdemeanors accept pleas just to go home. A young black man from the South Bronx, one of the poorest congressional districts in the country, may have almost no chance of paying bail, so the only option is a criminal record and probation. Contrast that to a wealthier white man who knows that if the judge sets bail he can pay his way out. This man has no pressure to accept a plea, and his lawyer can investigate his case and negotiate a better plea. Immediate interventions could stem racial disparities in pleas. New York must eliminate money bail for misdemeanors to end the threat of pretrial incarceration that disparately extracts guilty pleas. Prosecutors should state the reasons for plea offers on the record to create transparency and be required to collect and share data about their offers to expose any disparities. It is only through established facts and data that we can educate prosecutors and judges, as well as work to combat implicit and overt bias. Prosecutors have virtually unchecked power in the plea bargain process. It’s the power to take away freedom, destroy livelihoods, and tear families apart. Ultimately, it’s the power to devastate low-income communities already suffering from aggressive and discriminatory law enforcement tactics. In a place like the Bronx, unfair police and prosecutor practices combine to create a situation in which nearly all of the people facing criminal charges are black or brown men, even though one-third of the population is white. This power must be grounded in fundamental principles of fairness rather than the drive to rack up convictions. Otherwise, the criminal justice system simply administers punishment, rather than justice, and in the process continues to destroy communities of color and further erode its own legitimacy.

#### Black and Latino defendant are more likely to face bias in pretrial decisions such as plea bargaining, leading to harsher sentencing.

Sutton 13. Sutton, John. Professor of sociology at the University of California, Santa Barbara. Sutton specializes in organizations, the sociology of law, and crime and punishment. “Structural bias in the sentencing of felony defendants.” Social Science Research Journal. April 2013. [Premier]

Pretrial decisions should be more vulnerable to bias because they are relatively informal. Research on pretrial detention yields mixed evidence of bias (Free, 2002), but this may be because many studies lump Latinos and Anglos together as ‘‘whites.’’ More discriminating analyses by Demuth (2003) and Schlesinger (2007) find that Latino and African American defendants are significantly more likely to be detained. A few studies have examined racial patterns in modes of conviction. Some find that black defendants are less likely than whites to plead guilty, but the evidence regarding Latinos is unclear (Albonetti, 1990; Frenzel and Ball, 2007; Kellough and Wortley, 2001; LaFree, 1985). Whether pretrial decisions are biased or not, a further important question is whether the effects of those decisions on sentencing vary by race or ethnicity. Sentencing research routinely finds that detained defendants are sentenced more harshly than those who are released pending trial, but analyses of race-ethnic differences in those effects is rare. One example is Auerhahn’s (2007) study of homicide defendants, which found that detention leads to longer sentences for older Latinos, and perhaps for older black defendants, than it does for Anglos. Most studies find evidence of significant sentence discounts for guilty pleas—or the converse, penalties for being convicted at trial—but a few find no such effects (see reviews in Kramer and Ulmer, 2009, pp. 140–141; Ulmer and Bradley, 2006, pp. 632–633). Some studies have directly examined racial disparities in sentencing based on mode of conviction. Albonetti (1997) found no racial-ethnic disparities in sentence discounts for guilty pleas among drug defendants in federal courts, and Ulmer et al.’s (2010) study of federal court sentencing found disparities in trial penalties that favored black male defendants. Studies of trial penalties using Pennsylvania data tend to show that black defendants are punished more severely than whites if convicted at trial, but there is no evidence of disparities affecting Latinos (Johnson, 2003; Kramer and Ulmer, 2009; Ulmer, 1997; Ulmer and Bradley, 2006). The evidence that mode of conviction interacts with race to affect sentencing is thus mixed. Moreover, none of these studies has tested for differences in the prior tendency to plead guilty. Recent studies that explicitly aim to test for cumulative disadvantage are helpful, but not definitive. Chen’s (2008) analysis of cumulative bias is based on aggregate data, so is only suggestive about effects on individual defendants. Schlesinger (2007) studied the impact of biased pretrial detention patterns on individual sentences, but her evidence of racial bias on the latter is indirect. Thus while cumulative bias is often hypothesized, no study has systematically estimated its effects. For this study, the cumulative disadvantage argument is taken to mean that both early bias and the rate at which bias may accumulate are contingent on the race and ethnicity of the defendant. Detection of such effects requires data that track defendants through the stages of the court process, and models that estimate the main effects of race and prior events at each stage, as well as their interactions. The general expectation is that minorities are more disadvantaged than Anglos by the negative stigma of pretrial detention, and are less likely to receive lenient sentences in return for pleading guilty. More specifically: 1. Blacks and Latinos who are detained before trial are less likely to plead guilty than detained Anglo defendants. 2. Convicted blacks and Latinos who are detained receive more severe sentences than detained Anglo defendants. 3. The sentence discounts given to black and Latino defendants who plead guilty are less than those given to similar Anglo defendants.

#### Plea deals are a form of coercive procedural entrapment of people of color and impoverished people.

Heiner 16. Heiner, Brady. Ph.D, Associate Professor of Philosophy and CSUF “The procedural entrapment of mass incarceration: Prosecution, race, and the unfinished project of American abolition.” Philosophy and Social Criticism, vol. 42, no. 6, pp. 594-631. [Premier]

In actuality, the plea bargain regime is concretely constituted by structural asymmetries and relations of domination that are masked by the liberal contractual framework. The ‘self-incrimination’ that results from plea bargains is frequently the product of duress and unconscionable information deficits wherein defendants (who are often indigent) are deprived of the opportunity to deliberatively evaluate the ‘exchange’ of risks and penalties into which they enter. For instance, one formerly incarcerated person with whom I spoke at Project Rebound in San Francisco was given 10 minutes in court to decide in isolation whether to accept a plea carrying a 25-year sentence or face a potential life sentence. Such duress is not exceptional. Also, few criminal defendants (or people in general) realize that felony conviction, beyond possible prison time, entails a host of ‘collateral consequences’ or civil penalties that persist even after one has been released from prison. Judges and lawyers are not required to inform criminal defendants of some of the most important rights and entitlements that defendants are forfeiting when they plead guilty to a felony (and that they incur whether or not they spend a day in prison). These civil penalties (technically called ‘civil disabilities’, since courts have generally declined to interpret that such sanctions, for constitutional purposes, are actually ‘punishment’) include deportation, and denial of the rights to Heiner 601 vote, serve on a jury, or be employed in certain occupations, as well as lifetime ineligibility for food stamps, cash assistance programs, public housing and student loans.51 Legislative and judicial representatives readily admit that mandatory minimum sentencing schemes are excessive and thus in violation of the retributive principle of proportional punishment – not by accident, but by design.52 And they readily admit that such utilitarian design is consequentially to ‘induce’ defendants to forfeit their constitutional rights. In the executive branch, prosecutors routinely and openly apply leverage and overlap these excessive sentencing schemes to compel defendants to ‘self-incriminate’ by ‘pleading out’ of the jury trial system to which they are constitutionally entitled. And yet, the Supreme Court masks the coercion that undergirds this system. In the 1978 precedent-setting case that gave ultimate legal sanction to prosecutorial compulsion in plea bargaining, the Court acknowledged that punishing a person accused of a crime for exercising his or her right to trial by jury ‘is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person’s reliance on his legal rights is patently unconstitutional. But’, the Court continues, ‘in the ‘‘give-and-take’’ of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution’s offer.’53 This was in the context of a decision ruling it constitutionally legitimate for a prosecutor to threaten someone with life imprisonment (!) for a minor crime (i.e. forging an $88.30 check) in an effort to strong-arm him into forfeiting his right to a jury trial.54 How many reasonable people, when faced with the ‘double bind’ alternative between a potential life sentence and a guaranteed 5-year sentence, would feel meaningfully free to ‘accept or reject the prosecution’s offer’ and risk exercising her or his constitutional right to due process?55 Cognizant of systemic racial disparities, like the steeply higher rate of criminal conviction and disproportionate severity of criminal sentences meted out to subjects of color,56 reasonable people of color are especially unlikely to feel the freedom of choice that would distinguish a relation of equal exchange from a relation of domination. Seen in the light of these unconscionable information deficits and distributional inequities, the coercive and pervasive prosecutorial practice of charge-stacking and overcharging, and the sharply asymmetrical negotiating positions of the state and the accused; furthermore, considering the massive under-representation of people of color among criminal prosecutors (e.g. on average, 86 per cent of judges and prosecutors in federal districts are white),57 and the enormous over-representation of people of color among those incarcerated (i.e. roughly 70 per cent, and nearly 50 per cent Black):58 we ought to hear this multitude of pleas not as a chorus of guilty confessions singing in synch with the expediently fine-tuned orchestra of American criminal justice (playing the melody of the Law and Order theme song); and we surely ought not to view it as an expression of prosecutorial ‘leniency’ or procedural justice. Rather, we ought to conceptualize this throng of pleas, massively and predominantly, as the procedural entrapment of the impoverished and racially oppressed.

#### Plea bargaining is a tool of procedural entrapment of POC that feed the PIC, a form of modern day slavery.

Heiner 16. Heiner, Brady. Ph.D, Associate Professor of Philosophy and CSUF “The procedural entrapment of mass incarceration: Prosecution, race, and the unfinished project of American abolition.” Philosophy and Social Criticism, vol. 42, no. 6, pp. 594-631. [Premier]

The concept of procedural entrapment that I am proposing here works in the spirit of Richie’s notion of gender entrapment insofar as it expands the legal notion of entrapment to encompass a broader array of structural social processes that, through Heiner 605 their cumulative intersection, subject socially marginalized criminal defendants, prior to their conviction or incarceration, to ‘a more fundamental sense of confinement’ that is ‘strikingly similar’ to the coercive conditions of imprisonment.74 While Richie’s book focuses on the intersectional gender entrapment on account of which battered Black women are compelled, prior to their arrest, to engage in illegal activity, the present article focuses on the procedural entrapment on account of which socially marginalized criminal defendants are compelled, after their arrest, to surrender their constitutional rights to due process. The systematic practice of plea bargaining, I submit, functions massively and predominantly as a form of procedural entrapment. Poor criminal defendants of color are often caught in an oppressively dilemmatic, ‘no-win’ situation. Faced with a stack of selectively applied charges carrying excessively harsh, often deliberately disproportional mandatory sentences, under-resourced public legal defense, and a trial process that they are reasonably mistrustful will produce a racially unbiased verdict, they are compelled to self-incriminate. Indeed, they are arguably (if not literally) already confined, even before they are convicted, sentenced, or imprisoned.75 Contemporary procedural entrapment is functionally analogous to a scene described by the anonymous African American laborer from postbellum Georgia referenced earlier. When the man sought release from his plantation confinement at the end of his binding 10-year contract – which he signed amid unconscionable information deficits – the senator who had ‘employed’ him said that he and other similarly situated laborers must first sign a ‘written acknowledgement of their debts’ for the excessively priced commissary supplies they were compelled to purchase during their peonage. As he recounts, ... no one of us would have dared to dispute a white man’s word ...Besides, we fellows didn’t care anything about the amounts – we were after getting away; and we had been told that we might go, if we signed the acknowledgements. We would have signed anything, just to get away ... That same night ... we were locked up, every one of us, in one of the Senator’s stockades. The next morning it was explained to us... that, in the papers we had signed the day before, we had not only acknowledged our indebtedness, but that we also agreed to work for the Senator until the debts were paid by hard labor. And from that day forward we were treated just like convicts. Really we had made ourselves lifetime slaves, or peons, as the laws called us.76 While current penalties may be distinct from those of the antebellum and immediate postbellum periods, they are functionally analogous, as is the sedimented logic of racial domination. To clarify, I do not maintain that each and every one of the plea bargain convictions that occurs every two seconds during a typical workday is an instance of entrapment functionally analogous to the above transaction.77 Some plea bargains, no doubt, do not involve charge-stacking and overcharging, and may very well deliver the intended utilitarian benefits of expediency and economy in a manner that is mutually agreeable to all parties and does not conflict with ideals of procedural justice. My argument is a structural one comprising two claims. The procedural entrapment thesis pertains to plea bargaining as a systematic practice; the sedimentation thesis concerns the function of the prosecutor within that system. First, the procedural entrapment thesis is that the American plea bargain system (as an apparatus of population management wherein the USA maintains 5 per cent of the global population but 25 per cent of the world’s imprisoned population, and as an institution that coerces the forfeiture of due process rights to accelerate criminal conviction and confinement of those charged), is massively and predominantly, though not accidentally or exclusively, a technology of racial domination. As a system of procedural entrapment, the plea bargain regime is a necessary condition of and a leading contributor to mass incarceration, which is fundamentally immoral and racially unjust. Without the widespread ‘forfeiture’ of rights that the plea bargain regime manufactures, the American criminal justice system simply could not process – i.e. arrest, detain, prosecute, imprison, and supervise – the vast numbers of people (predominantly of color) that it currently does. The Supreme Court recognized this in 1971: ‘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.’78 (And this was just 5 months after President Richard Nixon declared the war on drugs, which inaugurated the era of mass incarceration that has since led to the upsurge of the imprisoned population by over 500 per cent. If criminal justice procedural capacity would have had to multiply many times over to accommodate every criminal defendant’s constitutional right to trial in 1971, the equivalent capacity requirements today would be paralysing to state and federal budgets.) The Court then concluded that plea bargaining is ‘an essential component of the administration of justice’.79 ‘The truth is’, writes Timothy Lynch, director of the criminal justice project at the libertarian Cato Institute, ‘government officials have deliberately engineered the system to assure that the jury trial system established by the Constitution is seldom used. And plea bargaining is the primary technique used by the government to bypass the institutional safeguards in trials.’80

### Race Impact

#### Race remains a permanence in a modern political context. Racism pervades every social structure, meaning that the historical understanding of systematic black extermination best addresses the political context by which plea bargaining is a flawed legal structure with serious ramificationsWinant 2004In Howard Winant. The New Politics of Race: Globalism, Difference, Justice. Minneapolis: University of Minnesota Press. [Premier]

**Because race and racism are more-or-less omnipresent in US society, the veil** -- which is their metaphor -- **does not need documentation**. What I aim to do here is to demonstrate the flexibility of the veil and its quintessentially political character. In a general way I adopt an "overdetermination" approach to the problem of the dialectic of the veil. In other words, I argue that **the concept of the veil is effective in analyzing the depth and breadth of race and racism because it so seamlessly links the numerous sites where they are present in US society** (and ultimately on a global scale, though that is not my main subject here**). Certainly the veil divides the human psyche and figures the human body; yet it also fissures soul and nation, collectivity, polity, history, and culture. Since every US institution as well as every identity is partitioned by race and racism, fractured by the veil, and since at the same time the entire society owes its existence to the workings of race and racism3** **-- to the presence of the veil -- the concept necessarily takes on an accretive quality. The veil signifies a profound social structure that has been built up for centuries, accumulating among the infinite contradictions of race and racism as they have shaped our identities and social organization.**

### Rape/Sexual Assault

#### Plea deals protect rapists.

Schmidt 16. Schmidt, Samantha. “Accused in Two Rapes, Former Student at Indiana University Avoids Prison With Plea Deal.” The New York Times. June 27th, 2016. <https://www.nytimes.com/2016/06/28/us/indiana-rape-plea-deal.html> [Premier]

A former Indiana University student who was charged with rape in two separate cases in September accepted a plea deal last week in which both felony charges were dismissed and he was sentenced to a year’s probation with no prison time for a misdemeanor. That the former student, John P. Enochs, 22, spent only a night in jail last fall before posting bail was met with outrage on social media. It also drew comparisons to a recent case in which a Stanford University student, Brock Turner, was sentenced to six months in jail by a judge after being convicted of sexual assault. The case reflected the complexities that often arise in campus sexual assault cases, when alcohol blurs memories and evidence becomes too ambiguous to prove rape. Mr. Enochs pleaded guilty to one count of battery with moderate bodily injury. Prosecutors had sought a felony charge but, because of Mr. Enochs’s age and lack of prior criminal convictions, a judge reduced the charge to a misdemeanor. “The most frustrating aspect of this case is the fact that there were two unrelated complaints against the defendant, but neither was sufficient to prove rape,” said Robert T. Miller, chief deputy prosecuting attorney for Monroe County, Ind. The more recent episode took place on April 11, 2015, at a party hosted by Mr. Enochs’s fraternity, Delta Tau Delta. A woman told the police that while she was drinking at the party, she went into the house to look for a bathroom. She said she had later found herself in a room with an unknown male having sex with her, despite her telling him “no” repeatedly and trying to push him away. Video surveillance tapes showed her entering and exiting the room with Mr. Enochs, and DNA evidence showed that they had had sex, according to court records. A nurse said that she had observed a laceration in the woman’s genital area, according to court documents. After learning of the 2015 allegations against Mr. Enochs, a second woman pursued criminal charges against him. The woman said that she had blacked out while drinking with Mr. Enochs in her sorority house in October 2013, and was later told by friends that he had had sex with her. She had pain in her genital area for several days and was treated in a hospital soon after, she said, according to a police affidavit. In a statement on Monday, Mr. Miller said the 2013 case was difficult to prove because the woman had no specific recollection of that night, because of her consumption of alcohol. He said video and DNA evidence that emerged during the investigation of the 2015 case had made it difficult to prove that Mr. Enochs committed rape. Mr. Enochs had been scheduled to stand trial on July 5. Ultimately, Mr. Miller said, prosecutors determined that they did not have strong enough evidence in either case. That there were two cases had been an important consideration in charging Mr. Enochs, Mr. Miller said, but prosecutors were required by law to have the cases heard by separate juries. The woman in the 2013 case is also pursuing a civil complaint against the Indiana University chapter of Delta Tau Delta. After the 2015 rape allegation, the university placed the fraternity chapter on social restrictions for six months. Students and campus organizations at Indiana University voiced shock that the rape charges had been dropped, likening the plea deal to the light sentence in the Stanford case. “To have it happen again in the town that I live in is extremely discouraging and frightening,” said Emma Riedley, an incoming senior and member of the Independent Council for Women at Indiana University. “It makes me angry and afraid as a woman and a human being to see this crime not be punished as harshly as it needs to be.” Mr. Enochs’s lawyer, Katharine C. Liell, dismissed the allegations against her client as false. “He’s not Brock Turner,” she said.

#### Plea deals don’t bring justice or closure to rape survivors – survivors aren’t consulted and rapists get lesser sentences.

Larcombe 11. Larcombe, Wendy. PhD, Law professor at University of Melbourne, conducts research in the fields of law, gender and sexuality, and legal education. “Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law.” Feminist Legal Studies, vol. 19, no. 1, pp. 27-45. April 2011. [Premier]

Another way to increase conviction rates would be to focus on securing guilty pleas (see, for example, Kebbell et al. 2006)—if need be, to lesser sexual offences or by ‘bargaining’ over the number of charges (see Lievore 2004a, pp. 31, 35). This may hold certain advantages for the survivor, who will not be required to testify in court. However, there is evidence to suggest that complainants are not happy with convictions on lesser charges, which inevitably result in lesser sentences, particularly when they have not been consulted about the bargaining process, the charges to be ‘dropped’ or the facts that will be agreed (Heenan and McKelvie 1997, pp. 181–183).12 Indeed, using Herman’s terminology, the complainant may be even more ‘peripheral’ in such negotiations than she is in the conduct of a trial; her interests would not necessarily be represented or her wishes given appropriate weight if the primary objective is to secure a plea. By contrast, feminist measures of reforms in this area would assess the extent to which the position of the complainant in the prosecution process is habitable: whether it is accessible to all who are victims of sexual violence and whether the individual complainant’s interests, needs and wishes are regarded as central, rather than marginal, so that her autonomy and dignity are protected. An increase in conviction rates alone will not tell us anything about victim/survivors’ experiences of seeking to assume the rape complainant’s position—about whether there was ‘justice’ from the victim’s perspective (Herman 2005).

#### Plea deals fail to convict rapists and reinforce rapists’ views that they can get away with it, making them more likely to do it again.

Williams 10. Williams, Rachel. Freelance writer. “Fewer rape convictions because plea bargains prevail, report suggests.” The Guardian. March 20, 2010. <https://www.theguardian.com/society/2010/mar/20/rape-convictions-lady-stern-cps> [Premier]

Hundreds of convictions gained in rape cases are actually for lesser offences, official figures reveal. In her landmark review into the handling of rape cases, Lady Stern suggested this week that there should be greater focus on the fact that of rape cases that got to court, 58% ended in conviction for rape or a related offence. But Ministry of Justice records show that in 2008 only 38% of rape cases won a conviction for rape itself. Alternative convictions were generally for offences such as sexual assault or sexual activity with a child under 16 – a much easier charge to prove because consent is not an issue. But they could also include non-sexual crimes such as a violent attack that was part of the incident, although the Crown Prosecution Service said this was highly unlikely to occur. Alternative convictions could come about because of a plea bargain, where a rape or – more likely – attempted rape charge is dropped after a defendant offers to plead guilty to a lesser sexual offence, or because the jury is given two alternative charges and convicts on the lesser one, acquitting the defendant of rape. Campaigners said reducing rape to a less serious offence was a "kick in the teeth" for victims. "The sentence will be lower, the man will be out sooner, and the victim may also get less or even no compensation," said Ruth Hall, of Women Against Rape. "The rapist will be confirmed in his view that he can get away with rape and is more likely to do it again." When a charge of sex with a minor is used instead of rape it can be particularly harrowing for the victim, because it suggests she consented to the activity. The mother of an underage teenage girl who complained she had been raped by a teenage boy but saw him charged with sexual activity with a child said: "She still is judged by others as a result of this charge and the subsequent pathetic sentence." The CPS could not provide a breakdown of which offences convictions were being gained for. While the 58% and 38% figure are not directly comparable, because they cover different time frames, they nonetheless give a reliable indication of the disparity between the number of cases that result in conviction for any offence and the conviction rate for rape itself. The CPS figures show that for the year 2008/09, there were 3,495 instances of people being charged with rape (or attempted rape). In 2,018 of those cases, some kind of conviction was secured. According to the MoJ's figures, some 2,395 charges of rape (or attempted rape) were brought in England and Wales in 2008. There were 922 convictions for those offences. The equalities office said it had not yet responded to Stern's views on the issue of the 58% figure, although it acknowledged that more should be made of the increase in conviction rates over recent years. The government is currently examining the best way to present the statistics, a spokeswoman added.

#### Light sentences for rapists are the result of plea deals – negotiating with rapists doesn’t bring justice for survivors.

Martin 14. Martin, Tim. “No more plea deals for sex offenders.” Times-Standard News. September 2, 2014. <http://www.times-standard.com/article/ZZ/20140802/NEWS/140808593> [Premier]

A 31-year-old man who formerly directed a Roman Catholic youth ministry in New York was charged with sexually abusing four teenage girls. He walked out of prison after serving 2 years for having sex with the teenagers, to whom he was supposed to be giving "spiritual guidance." In another case a Delaware Judge gave DuPont heir, Robert H. Richards IV, probation for raping his 3-year-old daughter. In the judge's order suspending Richards' eight-year prison sentence, she was concerned that Richards "would not fare well" in prison. Cases like this are part of a disturbing pattern in which judges treat sexual assault crimes as worthy only of a slap on the wrist. In California an estimated 50 percent of sex crimes are plea bargained down to a lesser crime. A national study estimates approximately 37 percent of reported rapes are prosecuted and only 18 percent of those cases end in a conviction. Even when charges are filed the legal system often downgrades felony rape charges for guilty pleas on other crimes, such as "criminal use of a computer," "risk and injury" or "disorderly conduct." A call to the Humboldt County District Attorney's office requesting the number of local rape cases plea bargained went unanswered. A typical plea deal requires that the defendant plead guilty to a lesser charge in exchange for the prosecutor's agreement to not charge the defendant with a greater crime, dismiss other charges, or recommend a reduced sentence. How does the court system determine that sex offender probation for a crime of violence is more effective than, say, placement on the Megan's Law sex offender registry? The usual excuse is that "half a loaf is better than none." They insist that when evidence is weak it's best to give a rapist a lighter sentence than risk an acquittal. Evidently, job performance and job security outweighs justice in our courts. Studies show that convicted rapists often spend an extremely short amount of time behind bars. A 45-year-old California soccer coach was sentenced to one year in prison after pleading no contest to raping one of his players while she was drunk and unconscious; A Washington attorney got four defendants off with zero jail time after they raped a 15-year-old-girl; A Montana District Judge sentenced a former high school teacher to 30 days in lockup for raping a 14-year-old student, who later killed herself. The judge stated that the victim was "older than her chronological age" and "as much in control of the situation" as the teacher. An Alabama man was convicted of raping his neighbor when she was 14 and had his 40-year prison sentence suspended in full. The light sentences were all a result of plea deals. Why do judges and DAs cook up an alternative universe in which rape is used as a bargaining chip? Do they misunderstand the seriousness of the crime? Are they busy with "more important" cases? Traditionally a rape victim has no voice in the plea bargain and no right to pursue her assaulters as she deems fit. In the most basic terms, plea deals are between the prosecutor and defense that the judge must agree to accept for it to go forward. What justice is there for a rape survivor when the offender gets off easy and never has to acknowledge his crime? Is it fair that a victim must live with issues about intimacy and trust for the remainder of her life? Using rape as a negotiating tool sends a dangerous message to sex criminals and child predators, too. It tells them that the sexual abuse of a female by a male is not actually a serious crime. But according to the FBI, rape is the nation's second most violent crime, trailing only murder. After the occurrence of rape, a victim can experience a multitude of emotional and mental effects that make the reporting process difficult, from shock and anxiety to denial and fear. Sexually assaulting a person is about as close as you can come to killing them. Negotiating with rapists must stop. The only way to accomplish this is to allow victims to have more involvement in plea bargain cases and insist that judges and DAs impose harsher penalties. Letting sexual predators off with a light sentence is a horrific injustice to those who suffer at their hands and forced to live with it every day. Rape victims should have the right to pursue their assaulters as they deem fit and our courts need to ensure that all perpetrators of sex crimes are prosecuted to the fullest extent of the law.

### Spillover

#### Abolishing plea bargaining would be a massive and successful revolt against the corrupt justice system

Alexander 12 Go to Trial: Crash the Justice System By MICHELLE ALEXANDERMARCH 10, 2012 Michelle Alexander is the [author](http://www.amazon.com/Michelle-Alexander/e/B002EX7BPI/ref%3Dntt_athr_dp_pel_1) of “The New Jim Crow: Mass Incarceration in the Age of Colorblindness.” <http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html?_r=0> DOA 12/11/17 [Premier]

I launched, predictably, into a lecture about what prosecutors would do to people if they actually tried to stand up for their rights. The Bill of Rights guarantees the accused basic safeguards, including the right to be informed of charges against them, to an impartial, fair and speedy jury trial, to cross-examine witnesses and to the assistance of counsel. But in this era of mass incarceration — when our nation’s prison population has quintupled in a few decades partly as a result of the war on drugs and the “get tough” movement — these rights are, for the overwhelming majority of people hauled into courtrooms across America, theoretical. More than 90 percent of criminal cases are never tried before a jury. Most people charged with crimes forfeit their constitutional rights and plead guilty. “The truth is that government officials have deliberately engineered the system to assure that the jury trial system established by the Constitution is seldom used,” said Timothy Lynch, director of the criminal justice project at the libertarian Cato Institute. In other words: the system is rigged. In the race to incarcerate, politicians champion stiff sentences for nearly all crimes, including harsh mandatory minimum sentences and three-strikes laws; the result is a dramatic power shift, from judges to prosecutors. The Supreme Court ruled in 1978 that threatening someone with life imprisonment for a minor crime in an effort to induce him to forfeit a jury trial did not violate his Sixth Amendment right to trial. Thirteen years later, in Harmelin v. Michigan, the court ruled that life imprisonment for a first-time drug offense did not violate the Eighth Amendment’s ban on cruel and unusual punishment. No wonder, then, that most people waive their rights. Take the case of Erma Faye Stewart, a single African-American mother of two who was arrested at age 30 in a drug sweep in Hearne, Tex., in 2000. In jail, with no one to care for her two young children, she began to panic. Though she maintained her innocence, her court-appointed lawyer told her to plead guilty, since the prosecutor offered probation. Ms. Stewart spent a month in jail, and then relented to a plea. She was sentenced to 10 years’ probation and ordered to pay a $1,000 fine. Then her real punishment began: upon her release, Ms. Stewart was saddled with a felony record; she was destitute, barred from food stamps and evicted from public housing. Once they were homeless, Ms. Stewart’s children were taken away and placed in foster care. In the end, she lost everything even though she took the deal. On the phone, Susan said she knew exactly what was involved in asking people who have been charged with crimes to reject plea bargains, and press for trial. “Believe me, I know. I’m asking what we can do. Can we crash the system just by exercising our rights?” The answer is yes. The system of mass incarceration depends almost entirely on the cooperation of those it seeks to control. If everyone charged with crimes suddenly exercised his constitutional rights, there would not be enough judges, lawyers or prison cells to deal with the ensuing tsunami of litigation. Not everyone would have to join for the revolt to have an impact; as the legal scholar [Angela J. Davis](http://www.wcl.american.edu/faculty/adavis/) noted, “if the number of people exercising their trial rights suddenly doubled or tripled in some jurisdictions, it would create chaos.” Such chaos would force mass incarceration to the top of the agenda for politicians and policy makers, leaving them only two viable options: sharply scale back the number of criminal cases filed (for drug possession, for example) or amend the Constitution (or eviscerate it by judicial “emergency” fiat). Either action would create a crisis and the system would crash — it could no longer function as it had before. Mass protest would force a public conversation that, to date, we have been content to avoid.

## Framework/Morals

### Constitutionality

#### Plea bargaining is unconstitutional

Palmer 99 Jeff Palmer [Executive Editor of American Journal of Criminal Law, B.S. West Point, J.D. University of Texas Law School] “Abolishing Plea Bargaining: An End to the Same Old Song and Dance,” American Journal of Criminal Law, Summer 1999 [Premier]

**Plea bargaining also raises many constitutional issues. Critics stress that plea bargaining circumvents the standards of proof and due process imposed in trials. The defendant is encouraged to waive his constitutional right to trial in lieu of receiving a harsher sentence at trial. The defendant also waives his privilege against self-incrimination and the right to confront adverse witnesses**. **The indiscriminate manipulation of the powers entrusted to public officials to coerce defendants into yielding important constitutional rights is anathema to those who claim that "steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." The very possibility of such manipulations breeds contempt and resentment - instead of remorse and resolve - on the part of the defendant and undermines the justice system's credibility and legitimacy in the eyes of the public.**

#### Plea Bargaining has no basis in the Constitution or the Declaration of independence.

Lynch 2011. Lynch, Tim. Tim Lynch is an adjunct scholar at the Cato Institute and was the director of Cato’s project on criminal justice until 2007. “The Devil’s Bargain: How Plea Agreements, Never Contemplated by the Framers, Undermine Justice”. Cato Institute. July 2011 [https://www.cato.org/publications/commentary/devils-bargain-how-plea-agreements-never-contemplated-framers-undermine-justice [](https://www.cato.org/publications/commentary/devils-bargain-how-plea-agreements-never-contemplated-framers-undermine-justice%20%5B)Premier]

**Most Americans are under the mistaken impression that when the government accuses someone of a crime, the case typically proceeds to trial, where a jury of laypeople hears arguments from the prosecution and the defense, then deliberates** over the evidence before deciding on the defendant’s guilt or innocence. **This image of American justice is wildly off the mark**. Criminal cases rarely go to trial, because about 95 percent are resolved by plea bargains. In a plea bargain, the prosecutor usually offers a reduced prison sentence if the defendant agrees to waive his right to a jury trial and admit guilt in a summary proceeding before a judge. This standard operating procedure was not contemplated by the Framers**. The inability to enter into plea arrangements was not among the grievances set forth in the Declaration of Independence. Plea bargaining was not discussed at the Constitutional Convention or during ratification debates. In fact, the Constitution says “the Trial of all Crimes,** except in Cases of Impeachment; **shall be by Jury.”** **It is evident that jury trials were supposed to play a central role in the** administration of **American criminal justice. But as** the Yale law professor **John Langbein** **noted** in a 1992 *Harvard Journal of Law* and *Public Policy* article, “**There is an astonishing discrepancy between what the constitutional texts promise and what the criminal justice system delivers**.”

#### Plea bargains should be ruled unconstitutional because they are designed to pressure defendants into waiving their constitutional rights.

Harvard Law Review 70. “The Unconstitutionality of Plea Bargaining.” Harvard Law Review, vol. 83, no. 6, pp. 1387-1411. April 1970. [Premier]

Many of the values of a trial thus are lost upon entry of any guilty plea. But at least in the absence of a bargain, a guilty plea may be a fair reflection of the defendant's own preferences un- altered by the state's ability to influence the results of his various choices. A guilty plea induced by a bargain occurs because the state has structured the outcome so that the defendants will choose not to go to trial. Plea bargaining is inherently destruc- tive of the values of the trial process, for it is designed to prevent trials. The practice forfeits the benefits of formal, public adjudi- cation; it eliminates the protections for individuals provided by the adversary system and substitutes administrative for judicial determinations of guilt; it removes the check on law enforcement authorities afforded by exclusionary rules; and it distorts sen- tencing decisions by introducing noncorrectional criteria. This nullification of constitutional values should not continue without careful examination. The individual's assertion of his constitutional rights may be deterred if the state makes their exercise costly. When an indi- vidual forgoes the exercise of a constitutional right in order to obtain or retain a benefit from the state, established doctrine re- quires that the courts examine such an exchange to determine if it places an undue burden on the exercise of the right and hence is unconstitutional.49 In bargaining pleas, the state conditions the granting of sentence or charge concessions on defendants' waivers of their fifth and sixth amendment rights. Unconstitutional con- ditions that induce waiver should be distinguished from uncon- stitutional pressures that render a plea involuntary. An in- quiry into the voluntariness of a defendant's decision not to exer- cise a constitutional right focuses on his mental state, i.e., his freedom of will and his knowledge and understanding of the al- ternatives before him. A defendant's decision is involuntary if it differs from the choice a rational, unpressured individual with his preferences would make in the same situation. An inquiry into the burdens a state places on the exercise of a constitutional right, on the other hand, focuses simply on the presence and im- portance of the right and the justifications for penalizing its exercise.

#### There is ample precedent for SCOTUS to rule plea bargains unconstitutional – Garrity v. New Jersey and Spevack v. Kelin prove.

Harvard Law Review 70. “The Unconstitutionality of Plea Bargaining.” Harvard Law Review, vol. 83, no. 6, pp. 1387-1411. April 1970. [Premier]

The constitutionality of plea bargaining depends in large part on the burden the state may place on the defendant's exercise of his fifth amendment privilege against self-incrimination, which in the context of plea bargaining takes the form of a right not to plead guilty.50 In recent cases where the government sought to elicit information from its employee or licensee in order to de- termine his qualifications, the Supreme Court refused to allow any burden on the right. Garrity v. New Jersey 51 held that in- criminating evidence secured under the threat of discharge was not admissible in a later criminal trial. A companion case, Spe- vack v. Klein,52 held that an attorney could not be disbarred for failure to produce records and testify in a judicial inquiry if he had not been offered immunity from later criminal prosecution. Later cases 53 extended the Spevack privilege to state employees. The Court in Garrity, Spevack, and their progeny did not seek merely to alleviate coercion of the accused that might impair the voluntariness of his acts.54 The question for the Court was, rather, may the state structure an individual's choice in such a way that he will voluntarily forgo the fifth amendment privilege in order to retain a different state-granted benefit? In these cases the Court answered, "No." The fifth amendment right is so im- portant that its exercise may not be conditioned by the exaction of this price by the state. Whipsaw tactics by the government were forbidden no doubt because the Court felt that the fifth amendment privilege is the keystone of the criminal accusatorial system.

#### Challenges to plea bargaining are making their way to the Supreme Court.

Saltzman 17. Saltzman, Veronica. “Plea Bargaining and the Supreme Court.” Harvard Civil Rights – Civil Liberties Law Review. March 3, 2017. <http://harvardcrcl.org/plea-bargaining-and-the-supreme-court/> [Premier]

A few weeks ago, I wrote about ineffective assistance of counsel and plea-bargaining in the context of the upcoming Supreme Court case, Lee v. United States. In deciding Lee, the Court will consider whether it is rational for a noncitizen defendant, despite strong inculpatory evidence against him, to reject a plea offer and choose trial when the plea deal mandates permanent exile.[1] On February 21, the Supreme Court agreed to hear Class v. United States, yet another case involving defendants’ rights in the context of plea-bargaining. In deciding Class, the Court will examine “whether a guilty plea inherently waives a defendant’s right to challenge the constitutionality of his statute of conviction.”[2] As the law currently stands, a knowing and voluntary guilty plea waives a defendant’s right to raise many claims on appeal.[3] Defendants can appeal some claims, such as double jeopardy[4] and ineffective assistance of counsel.[5] Yet most claims are limited on appeal. In Tollett v. Henderson, for example, the Supreme Court noted that a guilty plea “represents a break in the chain of events which has preceded it in the criminal process,”[6] thus limiting the grounds for appeal after a defendant admits guilt. Tollett barred a defendant from appealing a plea deal based on an alleged deprivation of constitutional rights that took place before the court finalized the deal (the defendant alleged unconstitutional discrimination in grand jury selection). Class appears to be an attempt to reexamine this issue. The prevalence of plea-bargaining,[7] as well as Lee and Class on the docket, bring up questions about reforming rights in the criminal justice system to fit the practical needs of most modern defendants. In 2012, the Supreme Court expanded the rights of the accused in plea-bargaining in Lafler v. Cooper. In Lafler, Justice Kennedy wrote the majority opinion, holding that the two-prong standard of ineffective assistance of counsel applied to defendants during the plea bargaining process.[8] One year later, however, the Court in Burt v. Titlow upheld the doubly deferential standard, which requires that in cases involving a claim of ineffective assistance of counsel during plea-bargaining, the appeals court must give both the state court and the defense attorney the benefit of the doubt.[9] With two new plea bargaining cases on their way to the Supreme Court, I wondered how the new Court would react. Neil Gorsuch may not be on the Court in time to review Lee and Class. However, continued challenges to the plea-bargaining regime will likely make their may up to the Court in the future. When I read the rumors that Neil Gorsuch was involved in the Harvard Prison Legal Assistance Project and Harvard Defenders Program,[10] I wondered how he might treat defendants’ rights in the context of plea-bargaining, if and when he is confirmed. Neil Gorsuch is an originalist.[11] As such, he is likely persuaded by arguments that, (1) the Constitution does not bar a defendant from making the decision to plead guilty rather than risk a far higher sentence at trial[12] and (2) since the Constitution does not include a right to a plea bargain, the usual constitutional rights do not automatically attach.[13] In fact, in his dissenting opinion in Williams v. Jones, a case involving a defendant whose lawyer threatened to leave if he took a plea deal, Gorsuch stated: “No principle of justice rooted in our constitutional order entitles a defendant to receive, accept, or enforce a plea offer. Very much to the contrary, the Supreme Court has explained (repeatedly) that a plea offer is a matter of executive grace—not constitutional right or even contract—and so affords the defendant no enforceable rights unless and until the plea is embodied in the judgment of a court.” Absent a new and more originalist characterization of defendants’ rights during and after the plea-bargaining stage, Gorsuch seems unlikely to part from Scalia’s staunch views.[15] After Lafler, advocates of defendants’ rights can hopefully rely on Kennedy to join the four liberal justices in expanding rights of the accused. Yet like many other progressive causes, the immediate future for plea-bargaining reform is uncertain. Reform may occur via a more general effort to cabin prosecutorial discretion. Measures such as lowering sentences overall or setting caps on plea to trial sentencing differentials could help advance the rights of the accused during the plea-bargaining process. The current political climate likely makes this a project for state governments. Then again, mass incarceration is an enormous problem on the state level anyway.[16] In the absence of support on the federal level, states should take steps to reform the plea-bargaining process with the knowledge that they will most likely be the key innovators in the criminal justice system over the foreseeable future.

### Democracy

#### The guilty plea system is based on the liberal democratic theory, which is being undermined in plea bargaining.

Dripps 16 Dripps, Donald A. Warren Distinguished Professor of Law and clerked for the Honorable Amalya Kears of the Second Circuit Court of Appeals in New York City. "Guilt, Innocence, and Due Process of Plea Bargaining," William & Mary Law Review vol. 57, no. 4 (March 2016): p. 1343-1394. [http://heinonline.org/HOL/Page?handle=hein.journals/wmlr57&div=34&g\_sent=1&casa\_token=&collection=journals#](http://heinonline.org/HOL/Page?handle=hein.journals/wmlr57&div=34&g_sent=1&casa_token=&collection=journals) [Premier]

The bedrock principles of liberal democratic theory from which the guilty plea system so grossly deviates are bedrock principles for good reasons. When they are disregarded, it is only a matter of time before government authority runs amok. In the plea bargaining context we now see two terribly practical downsides to prosecutorial hegemony. First, the system prosecutors have dominated for the last thirty years has become the most punitive in the world and indeed, if we leave aside police states with camp systems, perhaps in history. Second, the arbitrary power to threaten catastrophic conviction consequences endangers the innocent-not only by confronting them with irrational risks if they stand trial but also by creating incentives to offer "substantial assistance" to prosecutors even if the grounds of cooperation need to be invented.49

### Distributive Justice

#### Plea bargaining undermines distributive justice.

Ingram 13. Ingram, Andrew. Department of Philosophy UT Austin. “A (Moral) Prisoner's Dilemma: Character Ethics and Plea Bargaining.” Ohio State Journal of Criminal Law, Vol. 11, No. 1, 2013. <http://moritzlaw.osu.edu/students/groups/osjcl/files/2013/12/8.-Ingram.pdf> [Premier]

To my mind, punishing the more virtuous to a greater degree than the more vicious for the same offense is a prima facie problem. The intuition is that this state of affairs is unfitting: there is a mismatch between the assignment of punishments and the virtue of the citizens. In technical terms, it offends what philosophers call distributive justice. Distributive justice is identified with Aristotle’s famous definition of justice as proportionality between a person’s worth and the good or bad things he receives. 22 Honesty is a good, and more of it is better than less of it. That being the case, the person with more is entitled to better treatment than the person with less. This claim, all other things being equal, is not a controversial proposition, and yet accomplice plea bargaining is likely to produce the opposite outcome

#### The prosecutor creates an unjust dilemma for the defendant with plea bargaining.

Ingram 13. Ingram, Andrew. Department of Philosophy UT Austin. “A (Moral) Prisoner's Dilemma: Character Ethics and Plea Bargaining.” Ohio State Journal of Criminal Law, Vol. 11, No. 1, 2013. <http://moritzlaw.osu.edu/students/groups/osjcl/files/2013/12/8.-Ingram.pdf> [Premier]

Finally, there is something twisted and cruel about deliberately putting a person to a choice between her conscience and her freedom. Tracy, we imagined, was not someone who made the decision to turn state’s evidence lightly. There are, however, some people who do so easily, with utter indifference to their former partners or even malice in their hearts against them. When the prosecutor offers to make a deal with such an awful character, his only hesitation will involve just how good of a deal he can bargain to obtain. Now contrast this person with someone like Louisa who is honest or who has tender feelings and wishes not to harm another human being by increasing the amount of time that person will spend in prison. She is caught between the demands of her compassion or her honor on one hand, and the prospect of years of misery behind bars on the other. Moreover, Louisa must also be mindful of her duties as a mother. The thought of violating one’s principles or bringing harm to one’s former partner in crime (who could be a close friend or even a close family member as well) is tortuous for the woman of conscience. The same is true for the fear of prison; its deprivations are at least as miserable for the saint as they are for the sinner. In sum, the perverse reality is that the more honest or compassionate a person is, the more she will suffer from the dilemma the prosecutor has fashioned.24

### Procedural Justice

#### Reforming plea bargaining enhances procedural justice in the US criminal justice system.

Bibas 16. Stephanos, Bibas. United States Circuit Judge for the United States Court of Appeals for the Third Circuit, who previously was a professor of law and criminology at the University of Pennsylvania Law School. Designing Plea Bargaining from the Ground up: Accuracy and Fairness without Trials as Backstops. William & Mary Law Review volume 57. March 2016. P.1055-1082 [http://heinonline.org/HOL/Page?handle=hein.journals/wmlr57&div=28&g\_sent=1&casa\_token=&collection=journals#](http://heinonline.org/HOL/Page?handle=hein.journals/wmlr57&div=28&g_sent=1&casa_token=&collection=journals) [Premier]

Procedural Justice Fairness is also a matter of how the plea process treats defendants and other participants. Defendants should have opportunities to meet with their lawyers in person, or at least by videoconference, several times before pleading to build trust, discuss the facts, and evaluate plea offers.' 72 That means abolishing "meet 'em and plead 'em" lawyering... except for the most minor misdemeanors. Defendants-and perhaps victims and neighbors-should receive plenty of advance notice of plea offers and court dates.'74 Defendants should have opportunities to allocute at plea hearings and at sentencing.175 Defendants and victims should also have opportunities to meet and reconcile with one another, through victim-offender mediation or similar restorative justice conferences.'76 The criminal justice system should likewise favor the most open and transparent forms of plea bargaining. The best pleas are ones that do not lie about or manipulate the charges or facts.'77 These include blind or open pleas, in which defendants plead guilty to the indictment, anticipating a sentence discount that is fixed or based 169. At the other end of the spectrum are fact bargains, which lie about what happened, as well as Alford and no-contest pleas, which equivocate about defendants' guilt.'79 More generally, charge bargains obscure what really happened and mute the system's unequivocal finding of guilt. 8 ° It is difficult to ensure that prosecutors have not manipulated the baseline through precharge bargaining, but rigorous charge screening by a different prosecutor could help to ensure that charges start at an appropriate level. Rationing cooperation agreements, restricting them to a distinct minority of overall cases, could also help limit the corrosive mistrust they breed and assuage the fears that the government is buying disloyalty or even engineering crimes.

#### Defendants need to be better informed of the plea bargain they are facing in order to make an informed decision.

Bibas 16. Stephanos, Bibas. United States Circuit Judge for the United States Court of Appeals for the Third Circuit, who previously was a professor of law and criminology at the University of Pennsylvania Law School. Designing Plea Bargaining from the Ground up: Accuracy and Fairness without Trials as Backstops. William & Mary Law Review volume 57. March 2016. P.1055-1082 [http://heinonline.org/HOL/Page?handle=hein.journals/wmlr57&div=28&g\_sent=1&casa\_token=&collection=journals#](http://heinonline.org/HOL/Page?handle=hein.journals/wmlr57&div=28&g_sent=1&casa_token=&collection=journals) [Premier]

Defendants need better information about the facts and the strength of the evidence against them. 6 ' The most obvious remedy is to liberalize both the amount and the timing of discovery, as discussed above.'62 Discovery must be ample and occur well in advance of a plea hearing.163 Defendants also need a sense of the best alternative to taking the deal before them. 16 4 Is there a mutually beneficial alternative, such as a cooperation deal? Does the deal trigger or avoid various collateral consequences, such as deportation? What are the dangers of cooperating and, conversely, the downsides if the defendant is not fully cooperative? Would holding out likely yield a better or worse deal? What are the odds of acquittal at trial and if convicted, what is the expected post-trial sentence? In order to provide this information more effectively, defense counsel need better training, mentoring, and information sharing (and sometimes language skills, for clients who speak little English).'65 Judges and prosecutors can also help to ensure that defense counsel have communicated thoroughly. 6 In particular, prosecutors can use reverse proffer sessions to explain to defendants the strength of the evidence, the likelihood of conviction, the expected post-trial sentence, and the benefits of a deal.6 7 Lawyers can also do more to present this information effectively to defendants, who may be innumerate, illiterate, or speak little or no English.'68 All plea bargains should be in writing, ideally in plain English, with simple charts to explain any changes in charges and 160"9 These charts should factor in probation, parole, and good-time credits, disclosing what portion of the sentence must be served-and what fraction typically is served-before a defendant is released. 70 Lawyers must translate technical descriptions of crimes into plain English so defendants understand the requirements for conspiracy or accomplice liability, for example.'7 ' Translations should be readily available for non-English speakers.

#### Plea bargaining has resulted in far harsher punishments for the same crime just because one wishes to exercise their legal right

Lynch 03

Lynch, Timothy. (Tim Lynch is an adjunct scholar at the Cato Institute and was, until 2017, the director of Cato’s project on criminal justice) "The Case Against Plea Bargaining," Regulation vol. 26, no. 3 (Fall 2003): p. 24-27. http://heinonline.org/HOL/Page?handle=hein.journals/rcatorbg26&div=39&g\_sent=1&casa\_token=&collection=journals [Premier]

Plea bargaining rests on the constitutional fiction that our government does not retaliate against individuals who wish to exercise their right to trial by jury. Although the fictional nature of that proposition has been apparent to many for some time now, what is new is that more and more people are reaching the conclusion that it is intolerable. Chief Judge William G. Young of the Federal District Court in Massachusetts, for example, recently filed an opinion that was refreshingly candid about what is happening in the modern criminal justice system: Evidence of sentencing disparity visited on those who exercise their Sixth Amendment right to trial by jury is today stark, brutal, and incontrovertible.... Today, under the Sentencing Guidelines regime with its vast shift of power to the Executive, that disparity has widened to an incredible 500 percent. As a practical matter this means, as between two similarly situated defendants, that if the one who pleads and cooperates gets a four-year sentence, then the guideline sentence for the one who exercises his right to trial by jury and i convicted will be 20 years. Not surprisingly, such a disparity imposes an extraordinary burden on the free exercise of the right to an adjudication of guilt by one's peers. Criminal trial rates in the United States and in this District are plummeting due to the simple fact that today we punish people- punish them severely - simply for going to trial. It is the sheerest sophistry to pretend otherwise.

### Virtue

#### Plea bargaining discourages virtue in the criminal justice system by rewarding dishonesty.

Ingram 13. Ingram, Andrew. Department of Philosophy UT Austin. “A (Moral) Prisoner's Dilemma: Character Ethics and Plea Bargaining.” Ohio State Journal of Criminal Law, Vol. 11, No. 1, 2013. <http://moritzlaw.osu.edu/students/groups/osjcl/files/2013/12/8.-Ingram.pdf> [Premier]

Now there are some philosophers and lay people who may profess not to care about character. On the other hand, there are some who care about character a great deal. Though it is not a commonly held position today, there have been some thinkers who argued that the purpose of the state is the development of virtue in the citizens.23 For these theorists, the objective of the ideal state is to facilitate and cultivate the development of virtuous individuals. This principle would extend to criminal-justice policy. A justice system which deliberately took steps with a high chance of rewarding dishonesty would not be in keeping with the criteria for criminal justice in the character-building state. At a minimum, the state would be sending the wrong message to its citizens, declaring that it cares not for virtue and vice and will nonchalantly punish the relatively virtuous more than the comparatively vicious. Beyond this, there is the problem that the state is encouraging vice and discouraging virtue by incentivizing the one and penalizing the other. Strictly speaking, this is not my thesis, although it is suggested by the same phenomenon. The traditional position in virtue ethics is that virtuous actions build virtue and vicious actions build vice—just like other habits. From the perspective of the character-building state, it is obviously unacceptable for it to be encouraging betrayal given that such acts nourish bad character.

### Violates 6th Amd Right to Trial

#### Plea bargaining is a violation of the 6th amendment right to a trial

Walsh ’17 Dylan(Dylan Walsh is a freelance writer based in Chicago) Why U.S. Criminal Courts Are So Dependent on Plea Bargaining, The Atlantic, May 2, 2017, <https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/> accessed 12/9/17 [Premier]

Ninety-seven percent of [federal cases](http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/) are settled the way Church’s was, by plea bargain. [State-level data](http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro) suggest similar numbers nationwide. Though access to a public trial is enshrined in the Sixth Amendment, taking a plea forecloses that possibility. “This constitutional right, for most, is a myth,” U.S. District Judge John Kane [wrote](https://www.themarshallproject.org/2014/12/26/plea-bargaining-and-the-innocent#.x2Vo6k55X) in 2014—one voice among a chorus of jurists, advocates, and academics all calling for reform. Some want tweaks to the regulation and oversight of pleas; others urge more ambitious overhaul of the way trials are conducted, streamlining the process to make it accessible to greater numbers of people.

#### Plea bargaining has effectively eliminated the jury trial

Gocha 16, Alan J. "The Sanitization of Violence: Exposing the Plea Bargain Regime as a Tool for Mass Injustice," Georgetown Journal of Law & Modern Critical Race Perspectives vol. 8, no. 2 (Fall 2016): p. 307-334. http://heinonline.org/HOL/Page?handle=hein.journals/gjmodco8&div=18&g\_sent=1&casa\_token=&collection=journals# [Premier]

Trial by jury has been a staple of the American legal system since its very conception. 1 The nation's founders, living in a time of political mistrust and fear of power,2 viewed jury trials as essential components of a free society.3 The belief was that a jury system acts as a counterweight to government oppression by (a) providing ordinary citizens with a mechanism to limit the imposition of unjust laws and (b) strengthening democracy through fostering public participation in the judicial process. 4 This sentiment is echoed in both the First Continental Congress's Declaration of Rights (explicitly calling for the right to a jury trial) 5 and the Declaration of Independence (citing British interference with the colonial jury system amongst its list of grievances).6 Thus, unsurprisingly, a criminal defendant's right to a jury trial was the only procedural guarantee included in all twelve state constitutions enacted prior to the Constitutional Convention.' Similarly, when James Madison proposed the Sixth and Seventh Amendments-guaranteeing the right to a jury trial in criminal and civil cases, respectively-he was met with overwhelming support.8 Some founders even suggested that a citizen's right to serve on a jury is as fundamental as the right to vote. 9 While previously understood as an indispensable component of the criminal justice system, jury trials have been almost entirely displaced.l1 Plea bargains began to surpass jury trials in popularity during the mid-1800s. 11 By the 1920s, plea bargains represented over eighty percent of felony convictions in a number of major U.S. cities. 12 Today, over ninety percent of people charged with a crime inevitably plead guilty. 13 Out of all state and federal criminal convictions, only five percent are actually the result of a trial. 14 Consequently, the modern criminal justice system bears little resemblance to the one envisioned by its framers.

#### Abuse of prosecutorial discretion is unfair, unjust, and enables discrimination

Gocha 16, Alan J. "The Sanitization of Violence: Exposing the Plea Bargain Regime as a Tool for Mass Injustice," Georgetown Journal of Law & Modern Critical Race Perspectives vol. 8, no. 2 (Fall 2016): p. 307-334. http://heinonline.org/HOL/Page?handle=hein.journals/gjmodco8&div=18&g\_sent=1&casa\_token=&collection=journals# [Premier]

The plea bargain regime is at odds with traditional notions of fairness, justice, and truth.24 Unlike trials which are public, involve legal community outsiders, and have expansive constitutional substantive and procedural protections-plea-bargaining "take[s] place in the shadow of the law, largely immune to judicial review, with minimal and under-enforced oversight. 25 Prosecutors have virtually unlimited discretion in determining when to dismiss a case, offer a plea, or proceed to trial. 26 When a plea deal is obtained, it rarely is the result of a meaningful two-sided negotiation. "Prosecutors have the clear and undeniable upper hand...they can overcharge, leverage overbroad laws, exploit the information imbalance, wear down the defendant with (often extended) pre-trial incarceration...", and threaten to abuse draconian sentencing guidelines. 28 The reasonableness of a plea offer is contingent on a number of factors, but ultimately, two similarly situated defendants may face vastly different penalties depending on how sympathetic or antagonistic a particular prosecutor is to a given defendant or victim.29 Thus, broad and unmonitored discretion both allows for, and inhibits detection of, the discriminatory application of criminal laws.30 In its current form, the plea bargain regime grants prosecutors the unshackled authority to perpetuate systematic inequality. 31 These injustices are further compounded when a defendant is poor ("80 percent of defendants are indigent and thus unable to hire a lawyer").32 Public defenders are commonly denied access to essential resources along with being burdened by excessive caseloads.33 As a result, many defendants are pressured into accepting a plea deal after speaking with their attorney for only a few minutes-a practice disparagingly known as "meet em' and plead em’". 34

### AT Virtue

#### The confession of violent criminals is not due to their virtue as citizens.

Ingram 13. Ingram, Andrew. Department of Philosophy UT Austin. “A (Moral) Prisoner's Dilemma: Character Ethics and Plea Bargaining.” Ohio State Journal of Criminal Law, Vol. 11, No. 1, 2013. <http://moritzlaw.osu.edu/students/groups/osjcl/files/2013/12/8.-Ingram.pdf> [Premier]

Even where the captured criminal is sincerely repentant, this need not be evidence of a newfound respect for law, for it may simply be the fruit of a troubled conscience. In this vein, a Journal Editor points out that the example crime I have chosen, a fraud scheme perpetrated on a corporate retailer, is likely to disguise the repentant motive in the cooperating criminal. Those captured for other crimes, especially violent crimes like rape or homicide, are more plausibly motivated by repentance in choosing to assist the prosecutor. Although I agree with this characterization of my hypothetical crime, I do not think that the repentance we imagine a violent criminal experiencing is connected to the virtue of citizenship identified in the original objection. What is motivating here seems to be the visceral brutality of the criminal acts themselves and their corresponding moral salience. As such, it is not respect for the law or regard for the duties of citizenship that inspire someone shocked by their own violent misdeeds to confess. Significantly, this motivation to repent is unlike the virtue of citizenship in that it need not call for one to finger one’s accomplice but only to confess one’s own wrongs

#### Criminals are not inherently devoid of virtue.

Ingram 13. Ingram, Andrew. Department of Philosophy UT Austin. “A (Moral) Prisoner's Dilemma: Character Ethics and Plea Bargaining.” Ohio State Journal of Criminal Law, Vol. 11, No. 1, 2013. <http://moritzlaw.osu.edu/students/groups/osjcl/files/2013/12/8.-Ingram.pdf> [Premier]

In order to show that accomplice plea bargaining risks disparate punishment of the comparatively virtuous criminal, it is necessary to first establish that there is such a thing as virtue amongst criminals. If all lawbreakers were completely devoid of virtue, then there would be no problem of disparate penalties for honorable accomplices. The succeeding paragraphs aim to show that this is not the case, i.e., that “criminals” are not uniformly, indistinguishably bad. Rather, virtue is distributed amongst them in varying degrees, just as it is in the social mainstream.4

## Blocks (Answers To)

### AT Charge Bargaining

#### Federal reforms aimed at charge bargaining fail

Covey 08

Covey, Russell D. (Russell is a Professor at Georgia State University College of Law. With a J.D. from Yale Law School; M.A., Princeton University and A.B., Amherst College.) "Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings," Tulane Law Review vol. 82, no. 4 (March 2008): p. 1237-1290. http://heinonline.org/HOL/Page?handle=hein.journals/tulr82&div=37&g\_sent=1&casa\_token=&collection=journals [Premier]

There are two main reasons why federal policies purporting to discourage charge bargains have proven ineffective. First, although the DOJ frowns on dropping "readily provable" charges, the line prosecutor's determination of which charges are "readily provable" and which are not is difficult to second-guess."' Prosecutors can always defend decisions to accept guilty pleas to lesser charges based on their assertion that the higher charge, while colorable, was not "readily provable.""'2 Second, federal prosecutors have enormous power to determine sentences through their discretion to select charges, and they use that power to induce defendants to plead guilty."3 Notwithstanding the United States Federal Sentencing Commission's (Commission) effort to reduce the impact of charging decisions, the selection of charges makes a major difference with respect to the defendant's sentence after trial.'1

### AT Court Clog

#### Abolishing plea bargaining will not lead to court clogs, empirics proveGorr 2KMichael Gorr, “The Morality of Plea Bargaining,” Social Theory and Practice, 2000https://www.pdcnet.org//pdc/bvdb.nsf/purchase?openform&fp=soctheorpract&id=soctheorpract\_2000\_0026\_0001\_0129\_0152&onlyautologin=true [Premier]

**For at least a century, the institution of plea bargaining has been a central feature of the American system of criminal justice**. Lawyers and non-lawyers alike have generally assumed that **the reason for this is the enormous size of the case load** in relation to the available legal personnel. However, recent experiments involving the partial or complete abolition of plea bargaining have cast doubt on the adequacy of this explanation. For example, **in an analysis of Alaska's ban on plea bargaining in the mid- 1970s**, Rubinstein and White were surprised to find that [**c]ourt processes did not bog down; they accelerated.... [a]lthough the trial rate increased substantially, the absolute number of trials remained relatively small ... [c]onviction rates did not change significantly overall ... [and] plea bargaining ... had not been replaced by implicit or covert forms of the same practice**. Such studies, moreover, have not been confined to sparsely populated, rural jurisdictions. **In a review of the stringent restrictions on plea bargaining in Philadelphia's trial court system, Stephen Schulhofer observed that most defendants there receive bench trials in which "their cases are resolved in genuinely contested adversary proceedings."**

#### The most effective way to reduce court clog is through reforming the criminal justice system and getting rid of bad policy.

Lynch 2011. Lynch, Tim. Tim Lynch is an adjunct scholar at the Cato Institute and was the director of Cato’s project on criminal justice until 2007. “The Devil’s Bargain: How Plea Agreements, Never Contemplated by the Framers, Undermine Justice”. Cato Institute. July 2011https://www.cato.org/publications/commentary/devils-bargain-how-plea-agreements-never-contemplated-framers-undermine-justice [Premier]

It is remarkable how few people will openly defend the primary method by which our courts handle criminal cases. **The most common** **apologia for plea bargaining is** **a pragmatic argument**: Courthouses are so busy that they would grind to a halt if every case, or even a substantial share of them, went to trial**. But there is nothing inevitable about** those **crushing caseloads. Politicians chose to expand the list of crimes**, eventually **turning millions of Americans into criminals**. **Ending the disastrous war on drugs would unclog our courts in short order**. In any case, trials are one of the few things the government indisputably should be spending money on. **If additional funds are needed, free them up by stopping the nation-building exercises abroad and the corporate welfare here at home. The administration of justice ought to be a top priority of government.**

#### Turn – court clog is caused by mass sentencing, which is exacerbated by plea deals.

McArdle 17. McArdle, Megan. Megan McArdle is a Bloomberg View columnist. She wrote for the Daily Beast, Newsweek, the Atlantic and the Economist and founded the blog Asymmetrical Information. “Plea Bargains Are a Travesty. There's Another Way.” Bloomberg. September 26, 2017. <https://www.bloomberg.com/view/articles/2017-09-26/plea-bargains-are-a-travesty-there-s-another-way> [Premier]

The justice system is no longer set up to provide an innocent man his day in court. It is a machine for producing plea bargains in industrial quantities. It can operate no other way, because the volume of cases is far larger than the court system can actually handle. So instead of trials that take a long time and cost a lot of money but ideally separate the guilty from the innocent, we have become dependent on an assembly line where the accused go in at one end and come out the other a (relatively) short time later -- as convicted criminals, regardless of their guilt or innocence, but with shorter sentences than they would have faced if convicted at trial and with smaller lawyers’ bills than they would have faced if they had gone to trial. As this suggests, there are real benefits to the plea-bargaining system, even for the defendants. But there is a drawback as well. In 1979, law professor Malcolm Freeley published “The Process Is the Punishment,” a book in which he used the lens of the New Haven, Connecticut, court system to show the ways in which the trial itself -- as separate from any sentence imposed -- can function to punish people. This can be a problem even if the defendant turns out to be guilty, but at least we have the option of compensating for this extra-judicial punishment by reducing the formal sentence. But when the system gets out of control, it produces Kafkaesque results even for guilty defendants: How many of us think that three years behind bars is the right sentence for the theft of a backpack? And of course, when the defendant is innocent, this jail term is not merely excessive, but something close to a crime itself. This is not what the machine was designed to produce. The most obvious way to begin repairing this broken system is to spend more money building courtrooms and hiring judges, so that defendants actually do have a chance at their constitutionally guaranteed right to a speedy trial. We should also take a long, hard look at the number of things that are crimes, and the sentencing laws that require many crimes be requited with very harsh penalties. Most our mass incarceration problem is a sentencing problem, driven by both mandatory minimums and prosecutors who are rewarded for being “tough on crime.” 1 These factors aggravate the flaws of the plea-bargaining system. Prosecutors can threaten to prosecute on draconian charges, which carry draconian sentences -- and all but force a defendant, even an innocent one, to take a plea bargain, with a lesser charge and a lesser sentence. Defendants (guilty and innocent alike) usually conclude that the risk of going to trial is simply too great. And the plea bargains, in turn, keep the machine from choking on the volume of cases being run through it. Instead it grinds out a very poor substitute for justice. Reducing the number of laws and reducing the ability (or requirement) for prosecutors to secure serious jail time for so many offenses would reduce mass incarceration and start to unclog our court system.

### AT Fixed Discount CP

#### Most discount programs fail, circumvention and lack of enforceability

Covey 08

Covey, Russell D. (Russell is a Professor at Georgia State University College of Law. With a J.D. from Yale Law School; M.A., Princeton University and A.B., Amherst College.) "Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings," Tulane Law Review vol. 82, no. 4 (March 2008): p. 1237-1290. http://heinonline.org/HOL/Page?handle=hein.journals/tulr82&div=37&g\_sent=1&casa\_token=&collection=journals [Premier]

In this Part, I will explore the major problems inherent in most fixed-discount schemes that make full and effective implementation impractical. Flaws inherent in those proposals help explain why the fixed-discount provisions of the Guidelines have not reduced the prevalence of plea bargaining." As I discuss below, there are two primary weaknesses in conventional fixed-discount proposals, both of which are manifested in the Guidelines. First, conventional fixed discounts are easily evaded through substitute bargaining mechanisms, including charge and fact bargaining, and most fixed-discount proposals provide few effective mechanisms to prevent the parties from engaging in such alternative bargaining." Second, fixed-discount proposals in general, and the Guidelines in particular, share a common flaw: it is practically impossible to provide effective judicial review of plea bargaining to ensure that it remains confined within fixed discount limits. This is true for more or less the same reason that efforts to impose constraints on prosecutorial discretion generally have failed. The federal experience with fixed discounts demonstrates that, without some mechanism to limit evasion, the promised benefits of fixed discounts will remain illusory.'"

#### Perm do both

Covey 8, Russell D. (Russell is a Professor at Georgia State University College of Law. With a J.D. from Yale Law School; M.A., Princeton University and A.B., Amherst College.) "Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings," Tulane Law Review vol. 82, no. 4 (March 2008): p. 1237-1290. http://heinonline.org/HOL/Page?handle=hein.journals/tulr82&div=37&g\_sent=1&casa\_token=&collection=journals [Premier]

Fixed discounts address these process concerns. Like supermarket price tags, fixed discounts take the haggling out of the plea-bargaining process." That is, fixed discounts permit the abolition of bargaining without abolishing the concessions needed to ensure that most cases are disposed of through guilty pleas rather than trials. Abolishing bargaining without abolishing concessions preserves the resource savings that guilty pleas offer, while removing the aura of arbitrariness that surrounds the plea-bargaining process. At the same time, fixed discounts ensure that different defendants do not receive varying discounts, reducing the possibility of disparate treatment among similarly culpable defendants.

### AT Judge Discretion CP

#### Shifting the burden to judges won’t eliminate the coercion or corruption of the criminal justice system. Judges are still incentivized to encourage plea bargaining meaning their CP replicates their own harms.

Savistky 09 THE PROBLEM WITH PLEA BARGAINING: DIFFERENTIAL SUBJECTIVE DECISION MAKING AS AN ENGINE OF RACIAL DISPARITY IN THE UNITED STATES PRISON SYSTEM A Dissertation Presented to the Faculty of the Graduate School of Cornell University in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy by Douglas Savitsky August 2009 [https://ecommons.cornell.edu/bitstream/handle/1813/13836/Savitsky,%20Douglas.pdf;jsessionid=C0E8E5E8D5306C5AF10DB028AE404415?sequence=1](https://ecommons.cornell.edu/bitstream/handle/1813/13836/Savitsky%2C%20Douglas.pdf;jsessionid=C0E8E5E8D5306C5AF10DB028AE404415?sequence=1) DOA 12/11/17 [Premier]

Judges also have incentives to encourage, and to sometimes engage in, plea bargains. The primary incentive for a judge is to clear his docket. Rates of arrests, and the complexity of trials,14 have increased dramatically, yet the number of judges, or indeed the number of courtrooms, has changed very little.15 In order to accommodate these numbers, some judges have become complicit and even active in the plea bargaining process. Alschuler notes that this can take two primary forms. In the majority of districts, while it is explicitly prohibited by the American Bar Association’s rules of ethics as well as several other legal ethics’ authorities,16 judges do in fact actively participate in the plea bargaining process going so far as to meet with the parties involved and actively bargain with defense attorneys (Alschuler 1976). One of the most important aspects of this sort of judicial bargaining is that it allows an explicit glimpse into judges imposing extra sentences for defendants who exercise their right to trial. Alschuler recounts an anecdote where a judge, saying “He takes some of my time – I take some of his,” told a defense attorney that if his client, who maintained his innocence, did not plead guilty to a lesser charge and accept a two to five year sentence, that upon a guilty verdict, rather than giving the mandatory minimum of ten years, the judge would give twenty (Alschuler 1976:1089). While this anecdote may be extreme, although it also may not be, it illustrates the reality that judges do sometimes impose harsher sentences on defendants who exercise their right to trial in order to induce them to plea bargain (Brereton and Casper 1981), thus reducing the workload for the system as a whole. In other districts, judges either bargain implicitly by imposing “unwritten rules” regarding minimum sentences by consistently sentencing defendants who go to trial more severely than those who do not,17 or they simply abdicate their own responsibility by following prosecutor’s sentencing recommendations. One study, done in a state district where judges tended to not actively engage in the plea bargaining process, found that of 1000 felony cases disposed of through plea bargaining, judges accepted the prosecutor’s sentencing recommendation in approximately 97 percent of the cases (Johnson 1972). Moreover, of the ten judges in the study, three followed the prosecutor’s sentence recommendation in 100 percent of cases. In the court of the judge who had the least inclination to follow the sentencing recommendations (only in 88 percent of cases), anecdotal evidence suggested that fewer defendants entered guilty pleas.18 Further anecdotal evidence also suggested that this particular judge worked longer hours than his colleagues, yet had a longer backlog of cases (Alschuler 1976). While clearing the docket is a strong incentive for a judge, there are other incentives as well. Fisher notes that while judges do not necessarily have a stake in the outcome of criminal cases, with plea bargained verdicts, there is little chance that the outcome will be overturned (Fisher 2003). Defendants who plead guilty give up almost all rights to appeal. For a judge, this means that his opinions and procedures can rarely be vetted, and a higher court can rarely rebuke the judge for legal mistakes. Thus, a judge avoids the possibility of damage to his reputation, as defendants who plea bargain have no recourse to courts of appeal.

### AT Juries Bad

#### Jury trials are more effective and less biased than plea bargaining.

Ross 06. Jacqueline E. Ross. Associate Professor, University of Illinois College of Law The Entrenched Position of Plea Bargaining in United States Legal Practice, 54 Am. J. Comp. L. 717 (2006) <http://heinonline.org/HOL/Page?handle=hein.journals/amcomp54&div=69&g_sent=1&casa_token=&collection=journals> [Premier]

The central role of plea bargaining in a criminal process that celebrates the communitarian virtues of jury trials has prompted a great deal of scholarly controversy, though defense counsel, prosecutors, and judges defend the practice as useful and efficient. Albert Alschuler has argued that it is irrational, from a penological perspective, to reduce sentences because it would be costly and time-consuming to try the case, or because the evidence is weak. Neither consideration reflects the purposes of punishment or the culpability of the defendant.46 He also decries the pressure which the plea bargaining process can exert on the innocent to plead guilty, and the influence of gamesmanship, bluffing, and outright deception by prosecutors (and defense counsel) on the decisions of many defendants and on the substantive terms of their bargains.47 Acknowledging that plea bargaining "is a more flexible method of administering justice" than traditional adversary proceedings and that "[i]t affords a far greater range of alternatives than do most trial proceedings," Alschuler argues that "[fIlexibility is ... an advantage that all lawless systems exhibit in comparison with systems of administering justice by rules."48 Jury trials have the advantage that "[a] jury is unlikely to seek conviction for the sake of conviction, to respond to a defense attorney's tactical pressures, to penalize a defendant because he has taken an inordinate share of the court's and the prosecutor's time, to do favor for particular defense attorneys in the hope of future cooperation, or to attempt to please victims and policemen for political reasons."49 He views many plea bargains as substantively unconscionable, particularly for the poorest and most unsophisticated among criminal defendants, who sometimes enter into such agreements from a failure to appreciate their own interests.50 In addition, Alschuler contends, exclusionary rules are less likely to deter the police from engaging in illegal investigative activity (such as warrantless searches), if the police know that defendants' procedural rights can be treated as bargaining chips and compromised in the negotiation of a guilty plea. 51 Criticizing plea negotiations for producing, at different times, both excessively harsh and excessively lenient sentences, Alschuler concurs with Justice Benjamin Cardozo that this method of disposing

### AT Victim Statement

#### Victim consultation in plea bargaining is costly, interrupts due process, and fosters dissatisfaction in victims.

O’Hear 2007 summarizes. Michael, M. O’Hear. Professor of Law, Marquette University Law School. “PLEA BARGAINING AND VICTIMS: FROM CONSULTATION TO GUIDELINES” Marquette Law School Scholarly Commons. 2007. http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1028&context=mulr\_conferences [Premier]

Yet, mandatory consultation has also been subject to a variety of important criticisms, which essentially reflect two distinct concerns. First, consultation diverts scarce criminal justice resources that could be better spent elsewhere.39 There is, of course, the time spent directly soliciting and receiving victim input, which, depending on the circumstances and individuals involved, may or may not be a lengthy process. Even when the exchange is brief, however, it may represent a significant burden in routine, high-volume cases, in which many prosecutors are accustomed to plea "negotiations" that last no more than a few minutes. Perhaps even more important, though, are the ancillary logistical difficulties. Many victims will be hard to track down, slow to respond to letters and phone messages, or unable to visit the courthouse or prosecutor's office during regular working hours. Consulting with such victims may not only require considerable effort on the part of the prosecutor, but also may entail repeated continuances and fruitless court appearances. Such delays are not only costly to the lawyers and court personnel, but they may also represent a great unfairness to a defendant waiting in pretrial detention for resolution of a routine, low-level case. Indeed, in some cases, the victim himself or herself may actually wish more for prompt resolution than for an opportunity to weigh in on the proposed plea deal. “Reasonable efforts" proviso that effectively excuses the prosecutor from consulting with victims who present logistical challenges. But, this response may undermine the practical value of the consultation requirement; the victims who respond promptly to messages and get themselves to prosecutors' offices on a timely basis will probably do a pretty good job of making their voices heard with or without mandatory 39. See, e.g., Edgar, supra note 9, at 508-09. Alternatively, a prosecutorial office may lessen the administrative burdens by hiring a victim coordinator to handle the logistics and perhaps even the consultation itself. However, a capable paraprofessional staff will not come without its own costs. Moreover, there may be significant risks of error or misunderstanding when victim prosecutor communications go through an intermediary. A second broad area of concern is that of disappointed expectations. As one critic, Allen Edgar, has put it: Many victims already think the prosecutor is supposed to represent them and expect their impact statement to affect the outcome of sentencing. When these expectations go unfulfilled, as they usually do, victim dissatisfaction increases, not just with the sentencing process but with the criminal justice system as a whole. Compulsory consultation can only increase the likelihood that victims will think of the prosecutor as representing them, while participation . . . will generate greater expectations-and subsequent increased dissatisfaction when they remain largely unfulfilled.4" From the standpoint of procedural justice theory, this critique is an especially striking one: a voice opportunity intended to increase victim satisfaction and acceptance of outcomes may actually end up doing precisely the opposite. Edgar's concerns may be alleviated to the extent that prosecutors take particular care to ensure that victims have an accurate understanding of the prosecutorial role and the limits of the consultation requirement-but not without thereby exacerbating the transaction costs problem. Indeed, some might see something of a Catch-22 here: the only way to ensure real improvements in victim satisfaction through consultation may be to insist on such intensive efforts by prosecutors as to defeat the whole efficiency-enhancing point of plea bargaining.

# Neg

## Blocks (Answers To)

### AT Coercion

#### Plea bargaining is not coercive.

Dripps 16 summarizes Dripps, Donald A. Warren Distinguished Professor of Law and clerked for the Honorable Amalya Kears of the Second Circuit Court of Appeals in New York City. "Guilt, Innocence, and Due Process of Plea Bargaining," William & Mary Law Review vol. 57, no. 4 (March 2016): p. 1343-1394. [http://heinonline.org/HOL/Page?handle=hein.journals/wmlr57&div=34&g\_sent=1&casa\_token=&collection=journals#](http://heinonline.org/HOL/Page?handle=hein.journals/wmlr57&div=34&g_sent=1&casa_token=&collection=journals) [Premier]

If we consult the philosophical literature on coercion, we may sympathize with the evasive nature of the jurisprudence. 0 ' The standard modern view emerged only with Alan Wertheimer's Coercion in 1987.102 On that view, "coercion" refers to threats (in a technical sense) that would induce compliance from any reasonable person.' 3 Wertheimer distinguishes threats from offers by whether the inducer's proposal makes the inducee worse off rather than better off.'0 4 Wertheimer then posits a moralized or normative baseline for determining worse or better off.' 5 Only if the inducer acts wrongly does he threaten, rather than make an offer to, the inducee.' °6 If the threat would overcome the will of a reasonable person, it is coercive.' 7 Wertheimer devoted a chapter to plea bargaining, concluding that plea bargaining is not coercive because the prosecutor has a right to bring either set of charges.'08 It follows that the prosecutor's proposal is an offer, not a threat. Abusive interrogation methods, by contrast, violate the legal and moral duties of the interrogators. Only threats can coerce, so plea bargaining is not coercive. The Supreme Court's plea bargaining cases, reviewed in the next Part, are not inconsistent with this view and are widely seen to support 100. See Miller v. Fenton, 474 U.S. 104, 115-18 (1985) (holding that when the defendant challenged his post-Miranda-waiver admission as coerced, the voluntariness of the confession was a question of law on which the federal habeas court had a duty to decide without deferring to the state court conclusion). 101 So this account of plea bargains as noncoercive offers is the standard view.

### AT Innocent Convictions

#### Innocent defendants are not better off with a trial by jury.

Young 11. Young, Michael. Michael received his J.D., magna cum laude, from the Ohio State University (Order of the Coif) and his LL.M. in legal theory from New York University and is an associate in the Technology, Privacy & IP Transactions Group and a member of the Privacy & Data Security Team. A Moral Defense of Plea Bargaining. SSRN Electronic Journal. 10.2139/ssrn.2118336. 2011. <https://law.onu.edu/sites/default/files/251%20-%20Young.pdf> [Premier]

With respect to the “innocence problem,” I argued that the critical case is only incompletely made out at present.145 Without an absolute measure defining the morally unacceptable threshold rate of innocent conviction, the critic is left arguing that plea-bargaining is worse than the relevant alternative—jury trials.146 But the present empirical evidence does not bear this comparison out.147 There is little reason to think that juries will not generally repeat the mistakes of prosecutors in convicting the wrongfully charged.148

### AT Prosecutorial Abuse

#### Plea Bargaining can be reformed to force juries to approve criminal charges, which is a key check against prosecutorial abuse.

Neyfakh 2015. Neyfakh, Leon. Leon currently writes and works for Slate Magazine and previously was a writer for the Boston Globe. “No Deal: Should Prosecutors be Forced to Have Their Plea Bargains Approved by Juries?” Slate Magazine. April 7, 2015. <http://www.slate.com/articles/news_and_politics/crime/2015/04/plea_bargains_should_prosecutors_be_forced_to_have_their_plea_bargains_approved.html> [Premier]

**As Appleman imagines** it, **members of the plea jury would hear the** underlying **facts of each case, along with the charges** that were brought against the defendant by the district attorney’s office, **before deciding whether the punishment being proposed as part of the plea deal fits the crime and whether the defendant is agreeing to it knowingly** and voluntarily. In this way, Appleman told me, **the plea jury would give the public a voice in a process that usually takes place out of sight** **and would** allow the community to **provide** **a** **check on prosecutors** **who** might **otherwise bring egregiously inflated charges as a way of pressuring defendants to plead guilty.**

“The problem with the plea bargaining process is that all the power is with the prosecutors,” said Appleman. “We’ve gone from an adversarial system to what I’d call an inquisitorial system, meaning there’s one person—i.e., the prosecutor—putting defendants through their paces.” And while in principle, Appleman said, it’s the job of defense attorneys to make sure their clients aren’t taken advantage of, the fact is that most people accused of crimes can’t afford lawyers and have to rely on public defenders who are no less motivated than the prosecutor or the presiding judge—who also has a burdensome docket to get through—to resolve each case as fast as they can. **The introduction of a jury with the power to reject plea deals—or at least recommend** that **the judge do so—would subject the plea bargaining process to the scrutiny of people who have no interest in maximizing efficiency at the expense of justice**.

#### T**he Supreme Court has historically regulated plea-bargaining to make the process more constitutional.**

Roberts 2013. Roberts, Jenny. Roberts is a Professor of Law and Co- Director of the Criminal Justice Clinic at American University College of Law. “Effective Plea Bargaining Counsel.” American University Washington College of Law. 2013 [https://digitalcommons.mainelaw.maine.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/scholar?start=50&q=plea+bargaining+and+finding+criminals&hl=en&as\_sdt=0,44&as\_ylo=2013&httpsredir=1&article=1078&context=faculty-publications[Premier](https://digitalcommons.mainelaw.maine.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/scholar?start=50&q=plea+bargaining+and+finding+criminals&hl=en&as_sdt=0,44&as_ylo=2013&httpsredir=1&article=1078&context=faculty-publications%5bPremier)]

**Despite its well-deserved description as “seismic,**”45 “a landmark interpretation . . . [that] is long overdue,”46 and “the case that many believed Gideon was meant to be,”47 **Padilla was not the first time the Supreme Court** **regulated plea bargaining and the guilty plea process. In its first forays in the** **area, the Court focused on due process considerations**, **in holdings** that largely related to what the prosecution and trial judge must or cannot do. **Thus,** **in the 1970s the Court applied a totality-of-the-circumstances test to determine the voluntariness of a guilty plea** in one case,48 **and** **invalidated a bargained-for sentence where the prosecution breached its promises with respect to that** **bargain** in another.49 Several years later, as guilty plea statistics continued to rise,50 the Court sounded an accepting note about the “‘give-and-take’ of plea bargaining” in finding no due process violation where the prosecutor carried out a threat made during plea negotiations to reindict the defendant on more serious charges if he did not plead guilty to the original charges.

#### The supreme court holds the prosecutor to ethical standards in plea bargaining.

Hessick and Saujani 02 F. Andrew III Hessick; Reshma M. Saujani. Andrew Hessick-A.B. 1998, Dartmouth College; J.D. Candidate 2002, Yale Law School. Fall 2002, a clerk for Judge Raymond Randolph of the United States Court of Appeals for the District of Columbia Circuit. Reshma Saujani-B.A. 1996, University of Illinois, Urbana-Champaign; M.P.P. 1999, John F. Kennedy School of Government, Harvard University; J.D. Candidate 2002, Yale Law School. Fall 2002, an associate at Davis Polk & Wardwell. “Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defense Counsel, and the Judge.” 16 BYU J. Pub. L. 189 (2002) <http://heinonline.org/HOL/Page?handle=hein.journals/byujpl16&div=13&g_sent=1&casa_token=&collection=journals> [Premier]

The Supreme Court has decided that the prosecutor may offer strong incentives to the defendant to plead in order to close a case. 68 Since the defendant has allegedly violated the law, the prosecutor may seek the maximum charge and penalty under that law. Any leniency that the prosecutor offers in a bargain constitutes the incentive. The framing of the concession as a gift or a threat is irrelevant. Negative incentives comprise threats. The strongest form of threat is the death penalty. Defendants who face the death penalty only if they opt for trial often accept bargains offered by the prosecutor.69 Threats are also manifested when the prosecutor threatens to bring heavier charges against the defendant unless he enters a plea.7 ° Similarly, promises, such as dismissing charges or assuring certain sentences act as positive incenfives to plea bargain. In order to protect the innocent defendant from the machinations of zealous prosecutors, the Supreme Court has held the prosecutor to ethical standards in the plea bargaining process that remove some of his leverage: the prosecutor cannot withhold favorable evidence from the defendant,7' nor may he fabricate it.72 Further, the prosecutor cannot act vindictively because the defendant exercised his right to trial.73

### AT Solvency

#### Empirics negate; plea bargaining doesn’t increase court leniency and removing plea bargaining would worsen innocent defendant’s chances at acquittal. Squo also solves – there are already check backs in the justice system to prevent misuse of plea-bargaining

Gazal 04 Law & Economics Working Papers Law & Economics Working Papers Archive: 2003-2009 University of Michigan Law School Year 2004 Screening, Plea Bargains and the Innocent Problem Oren Gazal Gazal is a faculty of Law <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1031&context=law_econ_archive//> [Premier]

Using the above analysis, we can now address the plea-bargaining opponents' two main arguments. Firstly, the suggestion that plea-bargaining leads to leniency, and thus undermines deterrence, is incorrect. In exchange for offering a degree of leniency to defendants, the prosecutor could increase the number of cases she is able to prosecute, and thus actually increase deterrence.2 Secondly, the plea-bargaining process does not harm innocent defendants, as a defendant would only accept a deal if he believed that a trial provided a real threat of a harsher sentence. Thus, when a defendant could show his innocence in court, the prosecutor would not be able to force him to accept a plea-agreement. When a defendant knows that he might be convicted in atrial, plea-bargaining can serve as an insurance against a more severe sentence. Removing the option of plea-bargaining from an innocent defendant only worsens his already grave situation. In fact, as Grossman & Katz, 1983 showed, the percentage of wrongful convictions actually would be lower in a system where plea-bargaining is available. When agreements are forbidden, both innocent and guilty defendants have a chance of being acquitted in court. Alternatively, in a system that allows plea-bargaining, only defendants that refuse the prosecutor's offer can be found innocent. While a guilty defendant might refuse a plea bargain offer, an innocent defendant is much more likely to refuse such an offer, because he has a better chance at trial. While the defendant knows with assurance whether he is guilty, the prosecutor only has an estimation about his guilt. A guilty defendant knows that the facts revealed in court 2 Similarly, by agreeing to penalties that are lower than the retributively-appropriate penalty, the prosecutor can ensure that more offenders that deserve punishment will be punished. might increase the probability of his conviction. In contrast, an innocent defendant knows that court proceedings could reveal information that would assist his claim of innocence. Thus, the guilty defendant would most likely estimate the chances of his acquittal to be lower than the prosecutor's estimation, while the innocent defendant's estimation of the probability of a not-guilty verdict would be higher than the prosecutor's estimation. Hence, guilty defendants are more likely to accept prosecutors’ offer than innocent defendants. As a result, the percentage of innocent defendants that refuse plea-bargain offers and go to trialis higher than the percentage of guilty ones. Because going to trial provides a chance for acquittal, and since guilty defendants are more likely to accept a deal out of court, the plea-bargaining system actually reduces the rate of wrongful convictions (Scott & Stuntz, 1992). It is important to note that in this sce nario , the actual number of innocent defendants that would be convicted does not decrease. In fact, the number would be higher. This is the result of the fact that the overall number of defendants would rise when plea- bargaining is allowed. As there are always innocent people among indicted defendants, an increase in the number of defendants prosecuted and convicted would increase the number of innocent defendants convicted as well. However, this occurrence does not justify the limitation of plea-bargaining because the most important factor is not the number of wrongful convictions, but their percentage among overall convictions. It is not only bad to convict innocent defendants, it is also good to convict guilty ones. If the percentage of wrongful convictions was less important than the number of innocent defendants convicted, then tevery penal system could be improved by arbitrarily acquitting half of the defendants. Such an action would reduce the number of innocent defendants that were convicted by half. This would not, however, change the percentage of wrongful convictions among those that were declared guilty. Few people would support such a reform. In practice, the complete abolition of the plea-bargaining system has not occurred. Different forms of p le a- agreements are widespread in different common law countries. However, in some jurisdictions the arguments against plea-bargaining systems have become incorporated into its implementation. In the United States, the general rule is that the prosecutor's sentence recommendation does not bind the court. Thus, if the court holds that the suggested sentence is too light, it has the authority to impose a higher one after the defendant has pled guilty. This rule is aimed to address the concern that plea-agreements would lead to excessively lenient sentences. However, the Supreme Court of the United States appears to have adopted the law and economics scholars’ arguments against the "innocent problem". Since the court believes that an innocent defendant is better off with the option to plea-bargain, no judicial measures have been taken to prevent a rational, innocent defendant from pleading guilty in return for leniency. The most striking example of this approach is found in the famous Alford case.3 In this case, the Supreme Court of the United States accepted a guilty plea from a defendant that openly proclaimed his innocence but preferred the more lenient punishment offered to defendants that pled guilty to the risk of a trial.4

#### Plea bargaining are procedurally and economically efficient – the process makes for a more effective justice system, abolishing them leaves irreparable gaps in judicial procedings.

Savistky 09 THE PROBLEM WITH PLEA BARGAINING: DIFFERENTIAL SUBJECTIVE DECISION MAKING AS AN ENGINE OF RACIAL DISPARITY IN THE UNITED STATES PRISON SYSTEM A Dissertation Presented to the Faculty of the Graduate School of Cornell University in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy by Douglas Savitsky August 2009 [https://ecommons.cornell.edu/bitstream/handle/1813/13836/Savitsky,%20Douglas.pdf;jsessionid=C0E8E5E8D5306C5AF10DB028AE404415?sequence=1](https://ecommons.cornell.edu/bitstream/handle/1813/13836/Savitsky%2C%20Douglas.pdf;jsessionid=C0E8E5E8D5306C5AF10DB028AE404415?sequence=1) DOA 12/11/17 [Premier]

This primary defense of plea bargaining stems from the belief of the parties involved that plea bargaining is in their interest, but it is often made in terms of systematic efficiency. These parties, which includes prosecutors, defendants, defense attorneys, judges, legislators, crime victims, and the public, tend to believe that plea bargains gain them more than it costs them, and indeed the primary focus of this project is an exploration of why this is largely untrue. However, as a way of understanding its prevalence, it is worth exploring briefly why parties believe plea bargains to be in their interest. Fisher notes that, “The sheer efficiency of plea bargaining as a means of clearing cases to some extent has frozen it in place” (Fischer 2003: 176). He continues, “When prosecutors and judges manage to keep pace with fast-growing workloads either with no increase in staffing or with increases that lag behind the growth in case numbers, any appeal they might make to the legislature for more personnel will fall short.” Further, he argues, “And as staffing fails to keep pace with mounting loads, any hope of easing reliance on plea bargaining fails.” Thus, for Fisher, there is a feedback loop where increases in plea bargains suggest an increased efficiency by the criminal justice system, which convinces the legislature that additional funding is unnecessary. Further, this lack of funding necessitates increased reliance by the criminal justice system on plea bargains to push through cases. The position that plea bargaining is economically beneficial to the point that it is worth keeping has been adopted by the Supreme Court. In Santobello v. New York (404 U.S. 257 (1971)), saying that plea bargaining is “an essential component of the administration of justice,” and reiterating that the government would need to invest enormous resources in “judges and facilities,” the Court indicated that plea bargaining was not just acceptable, but was to be encouraged. Similarly, other commentators have offered support of plea bargaining predicated on the contention that it offers flexibility not available in a jury trial (Heumann 1978). Under this argument, by avoiding the rigid constraints imposed by the criminal justice system, and the rules of law, parties are able to bargain around the rules to make themselves better off than they otherwise might be. This sort of laissez- faire argument is made in many contexts regarding the appropriate level of government interaction in people’s lives. While there are generally persuasive arguments made on both sides, and adherence to those arguments is something of a religious phenomenon, in general, the strongest arguments against this social free-for- all occur in contexts where there is a strong power dynamic. That is, in contexts where one party has a great deal of power over another, Coasian type bargaining tends to break down. Arguing against the notion that mere efficiency or flexibility offered by plea bargaining was sufficient justification for the support of plea bargains, Church (1979) still supported plea bargains so long as certain requirements are met. These requirements, namely that a defendant has the alternative of a trial with fair consequences, that the defendant is represented by counsel, that the defendant and prosecutor have equal access to the evidence, and that both sides have sufficient resources for trial (Church 1979), while met in an ideal world, are rarely met in practice (see Alschuler 1968, 1975, 1976).

#### Turn – Alaska’s ban shows that when plea bargaining is prohibited prosecutors make their deals with defendants’ underground and behind closed doors leading to more coercion and less constitutional oversight

Savistky 09 THE PROBLEM WITH PLEA BARGAINING: DIFFERENTIAL SUBJECTIVE DECISION MAKING AS AN ENGINE OF RACIAL DISPARITY IN THE UNITED STATES PRISON SYSTEM A Dissertation Presented to the Faculty of the Graduate School of Cornell University in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy by Douglas Savitsky August 2009 [https://ecommons.cornell.edu/bitstream/handle/1813/13836/Savitsky,%20Douglas.pdf;jsessionid=C0E8E5E8D5306C5AF10DB028AE404415?sequence=1](https://ecommons.cornell.edu/bitstream/handle/1813/13836/Savitsky%2C%20Douglas.pdf;jsessionid=C0E8E5E8D5306C5AF10DB028AE404415?sequence=1) DOA 12/11/17 [Premier]

However, even with the general prohibition on prosecutorial bargaining ordered by the Attorney General, the ban was not necessarily complete. Many defense attorneys continued to advise their clients to plead guilty. As has been noted, defense attorneys have many incentives, some of which push them toward advising guilty pleas for their clients (Alschuler 1975). Additionally, even without active plea bargaining on the part of the prosecutors, courts still generally give lower sentences to defendants who plead guilty, and in Alaska this was the case. Alaska’s sentencing differential for sentence lengths given for guilty trial verdicts were 334 percent longer than for guilty pleas (McDonald 1985). While research on sentencing differentials is complicated, with a number of studies finding they can be accounted for by such factors as more serious cases being more likely to go to trial (Eisenstein and Jacob 1977, Rhodes 1978), most researchers consider differentials quite common (McDonald 1985). Furthermore, as a way around the ban, a number of judges attempted to take matters into their own hands by making their own deals with defendants. In these deals, a judge would make a pretrial agreement with a defendant with regard to sentencing in exchange for a guilty plea. The state Supreme Court stepped in, and in State v. Buckalew (561 P.2d 289 (1977)), it prohibited this as being a conflict of interest. However, this did not stop unofficial deals from continuing. Thus, even in the absence of official plea bargains as such, defendants continued to enter a large number of guilty pleas in exchange for a sentencing concession from the courts. However, for at least a period, Alaska appears to have managed to eliminate the vast majority of active plea bargains. The policy officially remained in effect through a number of administrations until 1993 when it was finally eliminated (Alaska Fairness Study 1997). However, by the 1990s many of the barriers to plea bargaining had 149 begun crumbling which allowed plea bargaining to return, at least partially (Carns and Kruse 1991).

#### Plea bargaining is less risky than a trial because it produces less severe sentences.

Hessick and Saujani 02 F. Andrew III Hessick; Reshma M. Saujani. Andrew Hessick-A.B. 1998, Dartmouth College; J.D. Candidate 2002, Yale Law School. Fall 2002, a clerk for Judge Raymond Randolph of the United States Court of Appeals for the District of Columbia Circuit. Reshma Saujani-B.A. 1996, University of Illinois, Urbana-Champaign; M.P.P. 1999, John F. Kennedy School of Government, Harvard University; J.D. Candidate 2002, Yale Law School. Fall 2002, an associate at Davis Polk & Wardwell. “Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defense Counsel, and the Judge.” 16 BYU J. Pub. L. 189 (2002) <http://heinonline.org/HOL/Page?handle=hein.journals/byujpl16&div=13&g_sent=1&casa_token=&collection=journals> [Premier]

A final incentive operating to produce guilty pleas is lack of confidence in the outcome at trial. Many attorneys consider the risk associated with going to trial very high because it is well understood that defendants convicted at trial usually receive more severe sentences than those who plead guilty. 117 Defense attorneys usually do not forget the instance when they encouraged a client to go to trial, only to have the client convicted and sentenced harshly." 8 That experience may dissuade attorneys from going to trial in the future. When an attorney pleads his client guilty, that decision cannot be proven wrong, and the attorney can convince himself that had he taken his client to trial, he probably would have been convicted and given a harsher sentence.

## Counterplans

### CP – Fixed Discounts

#### Previous abolition attempts have failed, use a fixed discount system solves best

Covey 08

Covey, Russell D. (Russell is a Professor at Georgia State University College of Law. With a J.D. from Yale Law School; M.A., Princeton University and A.B., Amherst College.) "Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings," Tulane Law Review vol. 82, no. 4 (March 2008): p. 1237-1290. http://heinonline.org/HOL/Page?handle=hein.journals/tulr82&div=37&g\_sent=1&casa\_token=&collection=journals [Premier]

Numerous commentators have proposed a variety of methods to reduce the sentence differential. Abolition of plea bargaining, advocated by some of plea bargaining's most prominent critics, by definition would erase any plea/trial sentence "differential."" A few jurisdictions have attempted abolition, at least in part, but those experiments have produced no lasting successes and certainly have not inspired widespread emulation.'2 Most observers of the criminal justice system have come to believe (rightly or wrongly) that abolition is simply not feasible.'3 In recognition of the unlikelihood of abolition, others have advocated a less radical approach to plea-bargaining reform involving so-called "fixed discounts."' Fixed discounts regularize the guilty-plea process by establishing a fixed and nonnegotiable discount for pleading guilty.'5 In a fixed-discount system, defendants who plead guilty receive a set reduction in sentence in exchange for their guilty plea." To be effective, the fixed discount must be large enough to provide an incentive for guilty defendants to plead guilty, but it must not be so large that it induces all defendants, guilty and innocent alike, to relinquish their trial rights." Fixed discounts only work, however, if they are really fixed. Unfortunately, the Achilles' heel of virtually all fixed-discount proposals offered to date is their utter failure to confront realistically the problem of enforcement. Most fixed-discount proposals assume that courts will police plea bargaining by rejecting guilty pleas whenever the terms of the plea are "overly lenient."'8 But this is a job judges are poorly suited to perform. Any system of fixed discounts that depends on preventing prosecutors from making and defendants from accepting overly lenient plea offers is doomed. Prosecutorial discretion over charging decisions, including the important discretion not to charge at all, is far too deeply embedded to be abolished, or even substantially limited. This Article argues that fixed discounts offer the most promising practical solution to the plea-bargaining epidemic and that an effective fixed-discount system can be devised, but only if the traditional fixed discount paradigm is radically shifted.'9 Rather than try to constrain the discretion of prosecutors to make lenient plea offers (or of defendants to accept and judges to approve them), ° which is a fool's errand, this Article argues that the better strategy is to attack the other pole of the differential. Accordingly, it proposes a way to eliminate the punitive trial sentences that coerce defendants to accept the plea bargained alternative through adoption of a device referred to herein as "plea-based ceilings." As the name suggests, plea-based ceilings would establish mandatory caps or ceilings on trial sentences. Pursuant to the ceiling, no defendant could receive a punishment after trial that exceeded the sentence he could have had as a result of a plea offer by more than a modest, predetermined amount. Ceilings would thus limit the sentencing differential and enforce a fixed discount by capping the punishment that could be imposed on the defendant who pleads not guilty.

#### CP solves innocent pleading guilty, prosecutorial screening, overcharging, and ends barter justice

Covey 08

Covey, Russell D. (Russell is a Professor at Georgia State University College of Law. With a J.D. from Yale Law School; M.A., Princeton University and A.B., Amherst College.) "Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings," Tulane Law Review vol. 82, no. 4 (March 2008): p. 1237-1290. http://heinonline.org/HOL/Page?handle=hein.journals/tulr82&div=37&g\_sent=1&casa\_token=&collection=journals [Premier]

Fixed-plea discounts offer four primary benefits, which will be discussed in detail below. First, where large discounts are routinely offered, all defendants have strong incentives to plead guilty, including defendants in weak cases (presumably including a disproportionately large number of innocent defendants)." Fixed discounts prevent prosecutors from offering discounts so large that innocent defendants are essentially coerced to plead guilty to avoid the risk of a dramatically harsher sentence. Second, because fixed discounts limit prosecutors' ability to dispose of weak cases through plea bargaining by changing the defendant's incentive structure, fixed discounts directly impact prosecutorial screening practices, creating strong incentives to dismiss weak cases rather than try them. Third, fixed discounts reduce prosecutorial incentives to overcharge criminal defendants by eliminating the bargaining leverage that can be obtained through strategic overcharging." Absent those incentives, a prosecutor is more likely to select charges based on the prosecutor's actual evaluation of the defendant's culpability. Fourth, precisely because the discounts are fixed and available to every defendant who decides to plead guilty rather than contest guilt at trial, fixed discounts put an end to "barter justice," an aspect of the criminal process that is highly corrosive to the system's legitimacy in the eyes of the public, professionals who work in the criminal courts, and, perhaps most importantly, criminal defendants themselves.35

#### Causes spillover that creates prosecutorial screening reforms

Covey 08

Covey, Russell D. (Russell is a Professor at Georgia State University College of Law. With a J.D. from Yale Law School; M.A., Princeton University and A.B., Amherst College.) "Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings," Tulane Law Review vol. 82, no. 4 (March 2008): p. 1237-1290. http://heinonline.org/HOL/Page?handle=hein.journals/tulr82&div=37&g\_sent=1&casa\_token=&collection=journals [Premier]

In short, imposing limits on plea bargaining through fixed discounts would necessitate reforms in prosecutorial screening just as much as tightened screening would lessen pressure to plea bargain. This is a significant insight. After all, there is no reason to believe that prosecutors have any particular interest in adopting hard-screening policies without some external inducement. Fixed-plea discounts would provide the required inducement by making it difficult to dispose of weak cases later.' The more effective the fixed-discount system is-that is, the more difficult it is to negotiate a plea bargain that exceeds the maximum discount permitted-the stronger prosecutors' incentives are to screen out weak cases early rather than suffer the embarrassment of dismissing cases after charges have been filed or, worse yet, losing at trial.72 In sum, fixed discounts would compel prosecutors to diminish the number of weak cases they pursue by screening cases more carefully early in the investigative process, making more conservative charging decisions, and investing more resources into the investigation of those cases to ensure that they do not get stuck with unpleadable and untriable cases later.

#### Solves overcharging (vertical)

Covey 08

Covey, Russell D. (Russell is a Professor at Georgia State University College of Law. With a J.D. from Yale Law School; M.A., Princeton University and A.B., Amherst College.) "Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings," Tulane Law Review vol. 82, no. 4 (March 2008): p. 1237-1290. http://heinonline.org/HOL/Page?handle=hein.journals/tulr82&div=37&g\_sent=1&casa\_token=&collection=journals [Premier]

Fixed discounts discourage prosecutors from engaging in both types of strategic overcharging. Fixed discounts discourage vertical overcharging (assuming, of course, that fixed discounts cannot be circumvented through charge bargaining), by negating the leverage that accompanies pursuit of charges that are hard to prove but, in the event of conviction, carry extremely severe punishment.79 Because the highest charge carries a low [probability of conviction] POC, when the plea discount is fixed, the prosecutor cannot offer a large enough discount to make a guilty plea to that charge attractive. She also has little incentive to pursue the charge at trial given its low likelihood of success. As a result, in a fixed-discount regime that bars charge bargaining, prosecutors can be expected to refrain from charging defendants with offenses they are unlikely to be able to prove at trial.

#### Solves overcharging (horizontal)

Covey 8, Russell D. (Russell is a Professor at Georgia State University College of Law. With a J.D. from Yale Law School; M.A., Princeton University and A.B., Amherst College.) "Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings," Tulane Law Review vol. 82, no. 4 (March 2008): p. 1237-1290. http://heinonline.org/HOL/Page?handle=hein.journals/tulr82&div=37&g\_sent=1&casa\_token=&collection=journals [Premier]

Fixed discounts render horizontal overcharging similarly unattractive for a different reason. Although the evidence might well permit convictions on redundant counts and increase the sentence a defendant receives upon conviction, as long as the prosecutor cannot bargain away the added counts, they do not increase bargaining leverage. Because the plea discount is fixed, the additional counts merely increase the plea sentence by the same proportion that they increase the trial sentence.0 Therefore, the prosecutor obtains no advantage in securing a guilty plea merely by charging extra counts of the same offense or additional overlapping offenses.' In a fixed discount regime, because overcharging does not increase bargaining leverage, the prosecutor will be less likely to engage in strategic charging behavior and more likely to make charging decisions based on her evaluation of what charges the evidence supports and the type of sentence she believes to be proportionate to the offense and the offender.

#### Also solves secretive nature of plea bargaining process

Covey 8, Russell D. (Russell is a Professor at Georgia State University College of Law. With a J.D. from Yale Law School; M.A., Princeton University and A.B., Amherst College.) "Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings," Tulane Law Review vol. 82, no. 4 (March 2008): p. 1237-1290. http://heinonline.org/HOL/Page?handle=hein.journals/tulr82&div=37&g\_sent=1&casa\_token=&collection=journals [Premier]

Fixed discounts also diminish the secretive nature of the bargaining process. Because the terms of plea bargains are fixed and not subject to negotiation, the decision to plead guilty or go to trial turns primarily on the value of contesting the case, which is almost entirely a function of the strength of the prosecutor's evidence. Fixed discounts, therefore, decrease the need for secret deals negotiated out of the public eye. As a result, the factors underlying most guilty plea decisions would be significantly more transparent.

### CP – Jury Waiver

#### A jury waiver system protects the defendants 4th amendment rights and is quite efficient

Wan 07. Wan, Tina. J.D., University of Southern California Gould School of Law, 2008; B.A., Criminology, Law & Society, University of California, Irvine, 2005. The Unnecessary Evil of Plea Bargaining: An Unconstitutional Conditions Problem and a Not-So-Least Restrictive Alternative. 2007. <https://www.academia.edu/13567828/The_Unnecessary_Evil_of_Plea_Bargaining_An_Unconstitutional_Conditions_Problem_and_a_Not-So-Least_Restrictive_Alternative?auto=download> [Premier]

Yet, the Court has never seriously considered any alternatives to plea bargaining other than providing “a full-scale [jury] trial” for every defendant.20 A jury waiver system, wherein a defendant waives his or her right to a jury trial and receives instead a bench trial, is a less restrictive alternative that is arguably just as efficient as plea bargaining.21 A bench trial replaces the jury with a judge, but preserves the defendant’s various other constitutional liberties, among others, the privilege against self incrimination, the right to confront adverse witnesses and the right to compulsory process for obtaining favorable witnesses.22 Thus, unlike plea bargaining, a bench trial still allows the defendant “an unfettered opportunity to present a defense” and a chance to be heard.23 A jury waiver system also conforms more closely to due process than plea bargaining, in that it is a better process to determine guilt, because it allows for “formal proof in open court.”24 Furthermore, as will be discussed in greater detail below, bench trials require little more time and resources than plea bargaining, thus providing the same “efficiency benefits.”25 For instance, bench trials utilize much of the same resources currently used in plea bargaining,26 and since there is no jury, time and money are saved from not having to perform voir dire, opening statements and other “time-consuming” features of jury trials.2

### CP – No Mandatory Minimums

#### the CP is to revoke prosecutorial coercion for entering plea deals in favor of restoring sentencing discretion to the federal judiciary and reforming mandatory sentencing laws. Our solvency advocate breaks down the procedure of implementation;

Fellner et al 13 An Offer you cant refuse: How US Federal Prosecutors force Drug Defendants to Plead Guilty December 5th 2013 <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead> Jamie Fellner, senior advisor in the US Program of Human Rights Watch, researched and wrote this report. Brian Root, the quantitative analyst at Human Rights Watch, helped analyze and develop graphic representations of the sentencing data presented in the report. Paul Hofer, adjunct assistant professor at Johns Hopkins and former special project director at the United States Sentencing Commission, was a consultant to Human Rights Watch for this report. He provided invaluable assistance regarding federal sentencing practices and policies, helped edit this report, and also developed statistics on the sentencing differential in drug convictions secured by plea versus trial. Alison Parker, director of the US Program of Human Rights Watch and Danielle Haas, senior editor of Program edited the report, and Dinah Pokempner, general counsel, provided the legal review. Samantha Reiser, US Program associate, provided research and production assistance. Layout and production were coordinated by Samantha Reiser. Fitzroy Hepkins, administrative manager, provided production assistance. DOA 12/11/17 [Premier]

Human Rights Watch offers the recommendations below to end the prosecutorial practice of coercing drug defendants into guilty pleas with threats of draconian sentences. Our recommendations address both the need for reform of the federal sentencing regime and the need for constraints on prosecutorial plea bargaining practices. Our most important recommendation is for Congress to restore sentencing discretion to the federal judiciary. While mandatory punishment is not the only factor that convinces defendants to plead guilty, there is no question prosecutors coerce many pleas because they can threaten exorbitant mandatory sentences for defendants who go to trial. If federal judges had authority to review and revise drug sentences to ensure they satisfy the requirements of justice, it would diminish the power of prosecutorial threats**. Our recommendations would not eliminate plea bargaining**. Prosecutors could offer modest sentence reductions to reward defendants who choose to plead guilty. But prosecutors would no longer be able to force defendants to plead to avoid grotesquely long sentences. They would be required to charge offenses carrying sentences proportionate to the defendant’s crime and culpability, they would be limited in the extent of the discount from those sentences that could be offered in exchange for the defendant’s willingness to plead guilty, they would be prohibited from threatening superseding indictments with higher charges in order to secure a plea and, finally, they would be prohibited from filing such indictments to punish defendants who refuse to plead. To Congress End mandatory minimum drug sentences and restore to judges the ability to calculate proportionate sentences in all drug cases, taking into account the sentencing guidelines for federal drug defendants. Congress should enact legislation to: Abolish federal mandatory minimums for drug offenders based upon the quantity of the drug involved. Abolish mandatory sentence increases based on the number and nature of prior convictions. Abolish mandatory consecutive sentences for drug defendants who use, carry, or possess firearms in connection with their drug crime. To the Attorney General Establish just sentences as a Department of Justice goal for all drug offenders regardless of whether they plead guilty or go to trial. Define just sentences as those which are proportionate to the defendant’s individual conduct and culpability and which are no longer than necessary to further the purposes of punishment in each individual case. Direct prosecutors to seek indictments only for charges that would yield a fair and proportionate sentence for each individual defendant in light of the facts known about that defendant. If an offense carrying a fair sentence has been charged, prosecutors may offer a modest sentencing benefit to reward a defendant for pleading guilty, but should not offer to reduce the defendant’s sentence to such an extent as to coerce the defendant into waiving the right to trial. We urge the Department of Justice to establish parameters for what such a modest reward might be. In addition, the Department of Justice should explicitly prohibit prosecutors from: 1) threatening higher sentences to secure pleas from drug defendants and 2) filing superseding indictments that raise the sentence faced by a defendant solely because the defendant refused to plead guilty.

#### Momentum is growing in the squo – eliminate mandatory minimums, solves most of the case

Fellner et al 13 An Offer you cant refuse: How US Federal Prosecutors force Drug Defendants to Plead Guilty December 5th 2013 <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead> Jamie Fellner, senior advisor in the US Program of Human Rights Watch, researched and wrote this report. Brian Root, the quantitative analyst at Human Rights Watch, helped analyze and develop graphic representations of the sentencing data presented in the report. Paul Hofer, adjunct assistant professor at Johns Hopkins and former special project director at the United States Sentencing Commission, was a consultant to Human Rights Watch for this report. He provided invaluable assistance regarding federal sentencing practices and policies, helped edit this report, and also developed statistics on the sentencing differential in drug convictions secured by plea versus trial. Alison Parker, director of the US Program of Human Rights Watch and Danielle Haas, senior editor of Program edited the report, and Dinah Pokempner, general counsel, provided the legal review. Samantha Reiser, US Program associate, provided research and production assistance. Layout and production were coordinated by Samantha Reiser. Fitzroy Hepkins, administrative manager, provided production assistance. DOA 12/11/17 [Premier]

As an organization dedicated to enhancing respect for and protection of human rights, Human Rights Watch insists that individuals who violate the rights of others be held accountable for their crimes. We also insist that all people accused of crimes have fair legal proceedings to determine their guilt. Plea agreements do not necessarily violate human rights; defendants may choose to give up their right to trial in return for a sentencing concession. Nevertheless, plea bargaining as practiced in US federal drug cases raises significant human rights concerns. It is one thing for prosecutors to offer a modest reduction of otherwise proportionate sentences for defendants who plead guilty and accept responsibility for their offense. Such a discount does not offend human rights. But the threat of a large trial penalty is unavoidably coercive and contrary to the right to liberty and to a fair trial. In some cases, the sentences imposed on drug defendants who refused to plead are so disproportionately long they qualify as cruel and inhuman. Momentum is growing to end nearly three decades of harsh sentences for federal drug offenders amid growing realization that the US cannot incarcerate its way out of drug use and abuse, and that long sentences neither ensure public safety nor strengthen communities. There is also growing and welcome national recognition that meaningful reform of federal drug laws must include restoring sentencing discretion to federal judges. We believe Congress should eliminate mandatory minimum drug sentences: the one-size-fits-all approach of the mandatory minimum statutes prevents sentences tailored to the individual case. Congress should also eliminate mandatory penalties based on prior convictions or guns. With sentencing guidelines and appellate review to keep judicial sentencing discretion within appropriate bounds, there is no need for mandatory punishments that primarily serve to coerce defendants into pleading guilty, an unacceptable exercise of government power. A sound criminal justice system, like all forms of good government, needs checks and balances. Prosecutors should have charging discretion and be encouraged to exercise it carefully and fairly. But the final say over sentences defendants receive must come from independent federal judges who have no personal or institutional stake in the outcome of a case other than to ensure justice is done and rights are respected. Judges with sentencing discretion could end the disgraceful trial penalty in federal drug cases and ensure defendants receive sentences reflecting their crimes, not their willingness to plead.

### CP – Partial Ban

#### A partial ban on plea bargaining solves innocent convictions due to necessary tradeoffs.

Ayal-Gazal and Bar-Gill 6. Ayal-Gazal, Oren (Dean of the Faculty of Law at University of Haifa, member of the Israel Young Academy and the director of the Center for the Study of Crime, Law and Society. He is an expert in criminal law and procedure, in sentencing law and in law and economics) and Oren Bar-Gill (Harvard law professor, leading expert on the law and economics of contracts and contracting). “Plea Bargains Only for the Guilty.” The Journal of Law and Economics, vol. 49, no. 1, pp. 353-364. The University of Chicago Press for The Booth School of Business, University of Chicago and The University of Chicago Law School. April 2006. [Premier]

The influence of the plea bargaining system on innocent defendants is fiercely debated. Many scholars call for a ban on plea bargaining, arguing that the practice coerces innocent defendants to plead guilty. Proponents of plea bargaining respond that even an innocent defendant is better off when he chooses to plea bargain in order to assure a lenient result, if he concludes that the risk of wrongful trial conviction is too high. They claim that since plea bargaining is only an option, it cannot harm the defendant whether he is guilty or innocent. This paper argues that both supporters and opponents of plea bargaining overlook its most important effect on innocent defendants: its effect on Prosecutorial screening. When plea bargaining is available, prosecutors can extract a guilty plea in nearly every case, including very weak cases, simply by adjusting the plea concession to the defendant's chances of acquittal at trial. When almost every case results in a plea of guilty, regardless of the strength of the evidence, prosecutors have much less interest in screening away weak cases. Since some cases are weak because the defendant is innocent, however, more innocent defendants are charged and as a result more are convicted. When the screening process is taken into account, there is no reason to believe that innocent defendants gain from plea bargaining. Yet, a total ban on plea bargaining is not the optimal response to the system's deficiencies-and not only because such a ban would be unsustainable in an overloaded criminal justice system. A better response would be a partial ban on plea bargaining, meaning a system that only prohibits plea bargains when the concession offered to the defendant in return for his guilty plea is large. With plea concessions restricted in such a way, defendants with relatively high chances of acquittal at trial would refuse to plea bargain. That way, prosecuting a weak case would usually result in a trial while a strong case would be disposed of through plea bargaining. Since prosecution resources do not allow for a high trial rate, prosecutors will be forced to refrain from bringing weak cases in order to direct scarce resources to stronger cases that can be settled. A partial ban therefore encourages prosecutors to refrain from bringing weak cases and reduces the risk of an innocent person being charged.

#### **Partial ban on plea bargains solves prosecutorial coercion.**

Ayal-Gazal and Bar-Gill 6. Ayal-Gazal, Oren (Dean of the Faculty of Law at University of Haifa, member of the Israel Young Academy and the director of the Center for the Study of Crime, Law and Society. He is an expert in criminal law and procedure, in sentencing law and in law and economics) and Oren Bar-Gill (Harvard law professor, leading expert on the law and economics of contracts and contracting). “Plea Bargains Only for the Guilty.” The Journal of Law and Economics, vol. 49, no. 1, pp. 353-364. The University of Chicago Press for The Booth School of Business, University of Chicago and The University of Chicago Law School. April 2006. [Premier]

Very few issues in the American criminal justice system generate such fierce controversy as plea bargainingl'-and very few allegations against the practice are as severe as the assertion that it leads to the conviction of innocent defendants. 2 Controversy over the "innocence problem ' 3 takes a leading role in today's plea bargaining debate. Opponents of the plea bargaining system argue that the practice is inherently dangerous to innocent defendants. A defendant might plead guilty, not because he is guilty, but because the prosecutor offers some concession in return. Even an innocent defendant may rationally prefer a specified lenient sentence to the risk of a much harsher sentence resulting from a wrongful conviction at trial. Based on this argument, some opponents conclude that plea bargaining should be prohibited.4 Others, recognizing the impracticality of such a prohibition, suggest 5 milder remedies. Supporters of the plea bargaining system claim that the above argument ignores the crux of the practice. Plea agreements are not forced on defendants, supporters note-they are only an option. Innocent defendants are likely to reject this option because they expect an acquittal at trial. Of course, sometimes even an innocent defendant faces a risk of conviction. The prosecutor might gather evidence that could lead to his wrongful conviction in a jury trial. In such a case, the innocent defendant might prefer the more lenient outcome that results from a guilty plea. Even in this case, however, plea bargaining is the least aggravating alternative. Prohibiting plea bargaining for the innocent defendant forces him to face the high risk of a jury trial conviction. But since he would have chosen the plea bargain, one could fairly assume that he thinks that the risk of a guilty verdict at trial is too high. Thus, forcing the innocent defendant to go to trial would be against his best interests. 6 Both the opponents and supporters of plea bargaining miss the essence of the innocence problem. The danger that plea bargaining poses to innocent defendants is not rooted in the practice of plea bargaining itself. Instead, the innocence problem is the result of the practice's effect on the prosecutor's screening decisions.7 When plea bargaining is available, the prosecutor can reach a guilty plea in almost every case, even a very weak one. When the case is weak, meaning when the probability that a trial would result in conviction is relatively small, she can assure a conviction by offering the defendant a substantial discount-a discount big enough to compensate him for foregoing the possibility of being found not guilty. Knowing that gaining convictions in weak cases is not difficult, the prosecutor cares less about the strength of the cases she brings. As a result, she is more likely to prosecute weak cases where defendants are more likely to be innocent. Given that the innocent defendant is prosecuted, he might realize that he is better off accepting a plea bargain offer. At that stage, the offer cannot harm him. The point is that the defendant would have been much better off if the prosecutor had not been able to offer him a plea bargain in the first place because then she probably would not have charged him at all. Therefore, solving the innocence problem requires discouraging the prosecution of weak cases. A total ban on plea bargaining, however, would only be partially effective-at best-in achieving this goal. As many scholars have shown, a total ban on plea bargaining is hardly feasible in the overloaded American criminal justice system. 8 But even if it were possible, there are other reasons to look for alternate solutions to the innocence problem. A total ban would force trials in all cases, making all cases, weak and strong, more expensive to prosecute. As a result, prosecutors would be forced to process fewer cases, but not necessarily the stronger ones. 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.9

#### Partial ban solves better

Gazal-Ayal 06

Gazal-Ayal, Oren. (Assistant Professor, University of Haifa, Faculty of Law) "Partial Ban on Plea Bargains," Cardozo Law Review vol. 27, no. 5 (March 2006): p. 2295-2350. <http://heinonline.org/HOL/Page?handle=hein.journals/cdozo27&div=95&g_sent=1&casa_token=&collection=journals> [Premier]

The influence of the plea bargaining system on innocent defendants is fiercely debated. Many scholars call for a ban on plea bargaining, arguing that the practice coerces innocent defendants to plead guilty. Proponents of plea bargaining respond that even an innocent defendant is better off when he chooses to plea bargain in order to assure a lenient result, if he concludes that the risk of wrongful trial conviction is too high. They claim that since plea bargaining is only an option, it cannot harm the defendant whether he is guilty or innocent. This paper argues that both supporters and opponents of plea bargaining overlook its most important effect on innocent defendants: its effect on prosecutorial screening. When plea bargaining is available, prosecutors can extract a guilty plea in nearly every case, including very weak cases, simply by adjusting the plea concession to the defendant's chances of acquittal at trial. When almost every case results in a plea of guilty, regardless of the strength of the evidence, prosecutors have much less interest in screening away weak cases. Since some cases are weak because the defendant is innocent, however, more innocent defendants are charged and as a result more are convicted. When the screening process is taken into account, there is no reason to believe that innocent defendants gain from plea bargaining. Yet, a total ban on plea bargaining is not the optimal response to the system's deficiencies-and not only because such a ban would be unsustainable in an overloaded criminal justice system. A better response would be a partial ban on plea bargaining, meaning a system that only prohibits plea bargains when the concession offered to the defendant in return for his guilty plea is large. With plea concessions restricted in such a way, defendants with relatively high chances of acquittal at trial would refuse to plea bargain. That way, prosecuting a weak case would usually result in a trial while a strong case would be disposed of through plea bargaining. Since prosecution resources do not allow for a high trial rate, prosecutors will be forced to refrain from bringing weak cases in order to direct scarce resources to stronger cases that can be settled. A partial ban therefore encourages prosecutors to refrain from bringing weak cases and reduces the risk of an innocent person being charged.

#### Prosecutors will drop weak cases and the plan creates better incentives

Gazal-Ayal 06

Gazal-Ayal, Oren. (Assistant Professor, University of Haifa, Faculty of Law) "Partial Ban on Plea Bargains," Cardozo Law Review vol. 27, no. 5 (March 2006): p. 2295-2350. <http://heinonline.org/HOL/Page?handle=hein.journals/cdozo27&div=95&g_sent=1&casa_token=&collection=journals> [Premier]

This Section compares the advantages of the partial ban with the "no ban" and "total ban" approaches. To simplify the analysis, throughout most of this Section I will assume that only sentence bargaining is available, leaving the issue of charge bargaining for later. In this simplified system, the prosecutor offers the defendant a sentence and the defendant can accept the offer or reject it and go to trial. If he accepts the offer, the judge will impose the recommended sentence. If a partial ban is imposed, courts will reject the plea bargain whenever the suggested sentence is significantly lower than the post-trial sentence. For convenience, I will call such plea bargains "exceedingly lenient bargains." Exceedingly lenient bargains are unique because they signal weak cases. A defendant who knows that the probability of acquittal at trial is substantial will only agree to plead guilty in return for an exceedingly lenient bargain. 57 In stronger cases, the prosecutor will not offer exceedingly lenient bargains, knowing that the defendant will settle for much less. Therefore, by comparing the post-trial sentence to the bargained-for sentence the court can discern information about the strength of the case. It may be argued-in the spirit of the arguments against a total ban-that a partial ban would force potentially innocent defendants to face a trial instead of allowing them to plea bargain. 58 But unlike the total ban, the most substantial effect of the partial ban is not an increase in the rate of trials-it is a change in the prosecutor's choice of cases. With a partial ban in place, the prosecutor would not be able to reach a plea agreement in most weak cases. At the same time, unlike a total ban, almost all strong cases would be settled. As a result, prosecutions of weak cases would cost much more than those of strong cases. The prosecutor would have to dismiss multiple strong cases in order to bring charges in one weak case. 59 This would serve as a substantial incentive against bringing charges in weak cases.60

#### Also solves for allowing rich defendants to get off

Gazal-Ayal 06

Gazal-Ayal, Oren. (Assistant Professor, University of Haifa, Faculty of Law) "Partial Ban on Plea Bargains," Cardozo Law Review vol. 27, no. 5 (March 2006): p. 2295-2350. <http://heinonline.org/HOL/Page?handle=hein.journals/cdozo27&div=95&g_sent=1&casa_token=&collection=journals> [Premier]

The partial ban can have a positive side effect in very costly cases. Currently, when prosecution is very expensive, the defendant's bargaining power increases. 63 Sometimes this results in exceedingly lenient bargains even though the case is strong. The partial ban ties the prosecutor's hands and prevents her from offering such lenient bargains. Knowing that [they] he cannot exploit the unique trial aversion of the prosecutor, the defendant would thus agree to a milder discount. The partial ban, therefore, restricts the defendant's ability to gain an excessive concession.

### CP – Reforms

#### Simplify the jury trial, involve judges in plea negotiations, and share evidence prior to a plea

Walsh ’17 Dylan(Dylan Walsh is a freelance writer based in Chicago) Why U.S. Criminal Courts Are So Dependent on Plea Bargaining, The Atlantic, May 2, 2017, <https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/> accessed 12/9/17 [Premier]

Consistent with this, reformers are exploring two avenues to make plea bargaining either more accountable or less common: The process could be altered to afford defendants more protection, or the jury trial could be simplified to ensure more people take advantage of this right.“Plea bargaining in the United States is less regulated than it is in other countries,” said Jenia Turner, a law professor at Southern Methodist University who has written a book comparing plea processes in several U.S. and international jurisdictions. As a result, states are independently adopting measures to inject the process with more transparency here, more fairness there. In Connecticut, [for example](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=871979), judges often actively mediate plea negotiations, sometimes leaning in with personal opinion on an offer’s merit. In Texas and North Carolina, along with a few other states, both sides share evidence prior to a plea. Turner suggests that replicating some of these practices across state lines, or standardizing the plea process nationally, could go a long way to equalizing the power between defendants and prosecutors. She also [argues that](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2930521) agreements should be recorded in writing, and that sentencing discounts for pleading guilty should be nonnegotiable. In the United Kingdom, for instance, sentence reductions in exchange for a guilty plea follow strict schedules based on when the plea is entered.

#### Adopting national guidelines for plans and strategies in the plea bargaining process can help improve Americas criminal justice system.

Roberts 2013. Roberts, Jenny. Roberts is a Professor of Law and Co- Director of the Criminal Justice Clinic at American University College of Law. “Effective Plea Bargaining Counsel.” American University Washington College of Law. 2013 [https://digitalcommons.mainelaw.maine.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/scholar?start=50&q=plea+bargaining+and+finding+criminals&hl=en&as\_sdt=0,44&as\_ylo=2013&httpsredir=1&article=1078&context=faculty-publications[Premier](https://digitalcommons.mainelaw.maine.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/scholar?start=50&q=plea+bargaining+and+finding+criminals&hl=en&as_sdt=0,44&as_ylo=2013&httpsredir=1&article=1078&context=faculty-publications%5bPremier)]

**The National Legal Aid and Defender Association’s Performance Guidelines for Criminal Defense** Representation offer detailed guidance on “The Contents of the Negotiations.”86 This guideline **covers developing a negotiation plan and strategy and conducting negotiations**. **Developing the plan** **calls for awareness of, among other things, the “consequences of conviction such as deportation, and civil disabilities,”** any “likely sentence enhancements or parole consequences,” “the possible and likely place and manner of confinement,**” and “the effect of good-time credits on the sentence of the client.”87 Strategic considerations call for counsel to be “completely familiar” with “concessions that the client might offer” and “benefits the client might obtain,” including: giving up the right to litigate a pretrial motion; cooperation in a** law enforcement **investigation**; lack of opposition to bail pending sentence or appeal; the ability to enter a conditional plea, preserving the right to appeal certain issues; **and “specific benefits concerning the accused’s place and/or manner of confinement.”**88 Significantly, the guideline calls for familiarity with local custom: “[C]ounsel should attempt to become familiar with the practices and policies of the particular jurisdiction, judge and prosecuting authority which may affect the content and likely results of negotiated plea bargains.”89 Anthony Amsterdam’s Trial Manual for the Defense of Criminal Cases offers similarly detailed guidance for plea negotiations.90

#### Making it harder to charge defendants with crimes would help solve Plea Bargaining’s innocence problem.

Covey 2009. Covey, Russell. Russell is a Professor at Georgia State University College of Law, with a J.D. from Yale Law School and A.B from Amherst College. “Signaling and Plea Bargaining’s Innocence Problem”. Georgia State University College of Law. 2009 <https://pdfs.semanticscholar.org/8147/d0bb347a3b407dd8178c764d8d20077ba136.pdf> [ Premier]

**A less drastic way to ameliorate plea bargaining’s innocence problem might be to encourage the dismissal of charges against all defendants where evidence of guilt falls below some minimum threshold**.45 Several scholars haveurged various reforms intended to protect innocent defendants by inducingprosecutors to screen out cases in which the probability of conviction is low.Ronald **Wright and** Marc **Miller have argued that "hard" prosecutorial screening of weak cases would diminish the pressure on prosecutors to plea bargain and would protect innocent defendants** **who otherwise** might **feel compelled to enter guilty pleas.4**6 Similarly, proposals to impose a fixed pleadiscount, plea-based ceilings, or a partial ban on plea bargaining are allpredicated at least in part on the idea that discouraging pleas in weak cases bylimiting the size of the plea discount not only will force more of those cases to trial, and thus lead to more acquittals, but also induce prosecutors to dismiss those cases rather than try them. **These proposals, unlike abolition** per se, **would in fact** marginally **improve** **the position of some innocent defendants. Indeed, anything that increases the** **cost of prosecuting weak cases would reduce the number of convictions of** **innocent defendants**, not only **because any reduction in total convictions will** **necessarily reduce the number of convictions of innocent defendants, but also** **because innocent defendants presumably make up a larger fraction of weak** **cases.48** But, while reducing the number of weak cases prosecuted may be a desirable goal, there are many ways to accomplish it that have nothing to do with plea bargaining. For instance, an evidentiary rule barring convictions on the basis of the uncorroborated testimony of a single eyewitness would also weed out some of the weakest cases on the docket.49 Greater protections against the use of deceptive interrogation tactics would limit the number of false confessions.50 More vigorous sufficiency of the evidence review by appellate courts would discourage prosecutors from bringing cases in which the evidence of guilt was marginal.5

#### Plea deal reform gives more power to defendants and solves court clog.

Walsh 17. Walsh, Dylan. Editor and freelance writer specializing in criminal justice, science, and the environment. “Why U.S. Criminal Courts Are So Dependent on Plea Bargaining.” The Altantic. May 2, 2017. <https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/> [Premier]

In theory, abolishing the use of plea bargains wouldn’t take much: Prosecutors would simply stop offering deals. That would be that, though the massive influx of trials would jam courts. (Michelle Alexander, author of The New Jim Crow, discussed defendants’ deliberately going to trial and “crashing the courts” as a form of resistance to mass incarceration.) But both sides of the debate agree the odds of this happening are infinitesimal. Even Alschuler, who throughout his career remained one of the staunchest critics of plea bargaining, admitted in 2013 that “the time for a crusade” had passed. Instead, he suggested people work to make the criminal-justice system “less awful.” Consistent with this, reformers are exploring two avenues to make plea bargaining either more accountable or less common: The process could be altered to afford defendants more protection, or the jury trial could be simplified to ensure more people take advantage of this right. “Plea bargaining in the United States is less regulated than it is in other countries,” said Jenia Turner, a law professor at Southern Methodist University who has written a book comparing plea processes in several U.S. and international jurisdictions. As a result, states are independently adopting measures to inject the process with more transparency here, more fairness there. In Connecticut, for example, judges often actively mediate plea negotiations, sometimes leaning in with personal opinion on an offer’s merit. In Texas and North Carolina, along with a few other states, both sides share evidence prior to a plea. Turner suggests that replicating some of these practices across state lines, or standardizing the plea process nationally, could go a long way to equalizing the power between defendants and prosecutors. She also argues that agreements should be recorded in writing, and that sentencing discounts for pleading guilty should be nonnegotiable. In the United Kingdom, for instance, sentence reductions in exchange for a guilty plea follow strict schedules based on when the plea is entered. There is no obvious recipe for fomenting this kind of reform. The drivers vary “greatly from one jurisdiction to the next,” Turner said. But she did concede one common thread that unites jurisdictions invested in changing the plea process: They must be motivated by some overarching values besides efficiency, “like seeking justice,” she said, “however that’s defined.” The alternative to improved pleas is more trials. A half-step in this direction has long been practiced in Philadelphia, where bench trials—before a judge but no jury—are common. By avoiding the jury-selection process, known as voir dire, bench trials dramatically shorten the length of the proceedings while a defendant’s guilt must still be proven beyond a reasonable doubt. In 2015, excluding cases that were dismissed, only 72 percent of criminal defendants in Philadelphia pled guilty, as opposed to 97 percent federally; 15 percent pursued a bench trial. “The solution in Philadelphia is a very good one given the alternatives,” said Keir Bradford-Grey, the chief public defender for the city. “We firmly believe in putting evidence to the test and litigating cases. This program allows for far more trials than we see in other jurisdictions.” John Rappaport, a law professor at the University of Chicago, proposes a more radical idea: If pretrial bargaining with the prosecutor is going to take place, it should embrace more than the basic exchange of guilt for leniency. Defendants should be able to bargain across the trial process itself, offering simplicity in exchange for a lesser charge. What if a defendant agreed to a trial before six or three jurors, instead of 12? Or what if the standards of evidence were downgraded, from beyond a reasonable doubt to a preponderance of the evidence? “It’s all fairly straightforward, and wouldn’t require any real administrative framework, but it’s foreign,” Rappaport said. “If a defense lawyer approached a prosecutor and said, ‘Hey, let’s do away with voir dire and take the first 12 jurors who walk in the room,’ the prosecutor would be taken aback.” He suggests that reforming the plea system to incorporate more trials would expose other problem areas. “Trials are an important window into how the system is functioning—they’re a form of audit,” Rappaport said. “They shine light on investigatory and prosecutorial behavior and air them publicly.” If the police behave badly, this remains buried when defendants take a plea. In this regard, even a heavily pruned trial is favorable to no trial at all. And such a bargaining process would not exist without limits. “The outcome of the trial still has to stem from the application of general legal principles to facts of individual cases,” he said. A defendant could not agree to a coin flip, for example, as the determinant of guilt. Though plea-bargaining started in shadow—fixers, cops twisting inmates’ arms—it has since risen to become judicial custom. It is the daily bread of every criminal court in every jurisdiction in the country, and virtually all in service to economics. “We put together the most cumbersome and expensive trial system that the world has ever seen, and then we decided we can’t do it for all but a tiny, tiny portion of people,” Alschuler said. He reached for a metaphor that he first used almost a quarter-century ago, in an article that sought alternatives to plea deals. His frustration seemed undiminished with time: “It’s like trying to solve the transportation problem by giving Cadillacs to 2 percent of the population and making everybody else walk.”

### CP – Victim Statement?

#### Connecticut has successfully integrated victims into the plea bargaining process

Jones 14. Jones, Elizabeth. Jones is a Professor at Western State College of Law “ The Ascending Role of Crime Victims in Plea-Bargaining and Beyond”. West Virginia Law Review, Vol. 117, No. 100. 2014. [https://ssrn.com/abstract=2515536](https://ssrn.com/abstract%3D2515536) [Premier]

While **Connecticut[‘s]** does not specify the right to participate in the offering of a plea bargain, it does use detailed language regarding the plea-bargaining process. Its **constitutional amendment,** passed by 79% of the voters in 1996,137 **provides that crime victims may voice their opposition to, or approval of, a plea bargain “entered into by the accused” and may speak to the court prior to the acceptance of the plea**.138 At first glance, this language seems to connote a rather passive role by the victim. It is merely a comment on an already-offered plea bargain. However, it is possible that the judge might change her mind after hearing the victim speak. In fact, **case law has suggested** that **the right of crime victims to meaningfully participate in the plea bargaining phase of the criminal justice system is** in fact **taken very seriously by the Connecticut courts**.139

**For example, in the 2010 case of *State v. Thomas*,** defendant Dereck **Thomas was charged with multiple counts of sexual assault** upon a child.140 **At first, the 15-year-old victim told the prosecutor that she favored a more lenient sentence for the defendant**, **and** so **the prosecutor asked for five years of state prison**.141 The judge indicated that the court would accept a plea bargain giving the defendant five years in prison, which would be suspended after only one year was served, followed by ten years of probation.142 **However, between the initial plea negotiations and the sentencing, the young victim changed her mind, instead recommending** to **the** probation department that the **defendant** should **be incarcerated for 100 years.143** **The judge allowed the victim to appear in court and to testify pursuant to Connecticut’s victims’ rights amendment**. Uponhearing her testimony, the judge refused to honor the initial lenient plea agreement, and instead vacated the defendant’s plea and set the matter for trial.14**4 The court emphasized that** “in accordance with the victims’ rights amendment of our state constitution, **the court must provide an opportunity for** **the victim to** meaningfully **participate in the defendant’s sentencing** . . . **when the victim chooses to make a statement, acceptance of a guilty plea must be contingent upon hearing from the victim in order to provide the victim with a meaningful right to participate in the plea-bargaining process**.”145

## Disadvantages

### Court Clog

#### Plea bargains help ease massive caseloads, thus eliminating them will lead to court clogs

Walsh 2017
(Walsh, Dylan, “Why US Criminal Courts Are So dependent on Plea Bargaining”, The Atlantic (2017) [Premier]

Plea bargains were almost unheard of prior to the Civil War. Only in its aftermath, as waves of displaced Americans and immigrants rolled into cities and crime rates climbed, did appellate courts start documenting exchanges that resemble the modern practice**.** The plea became a release valve for mounting caseloads. Appellate courts “all condemned it as shocking and terrible” at the time, said Albert Alschuler, a retired law professor who has studied plea bargains for five decades. The courts raised a range of objections to these early encounters, from the secretiveness of the process to the likeliness of coercing innocent defendants. Pleas, wrote the Wisconsin Supreme Court in 1877, are “hardly, if at all, distinguishable in principle from a direct sale of justice.” The practice nonetheless continued, and, by the turn of the century, a minor economy had settled in its orbit. “Fixers” could be hired to arrange for alternatives to a prison sentence.Police regularly toured jails to “negotiate” with the inmates. One New York City defense attorney and friend to local magistrates loitered in front of night court hawking 10 days in jail for $300, 20 days for $200, and 30 days for $150. By the 1920s, as violations of the federal liquor prohibition flooded court dockets, 88 percent of cases in New York City and 85 percent in Chicago were settled through pleas. When the Supreme Court in 1969 finally heard a case concerning the legality of the issue, it unanimously ruled that pleas are constitutionally acceptable. They are “inherent in the criminal law and its administration,” the Court declared… In theory, abolishing the use of plea bargains wouldn’t take much: Prosecutors would simply stop offering deals. That would be that, though the massive influx of trials would jam courts**. (**Michelle Alexander, author of The New Jim Crow, discussed defendants’ deliberately going to trial and “crashing the courts” as a form of resistance to mass incarceration**.)** But both sides of the debate agree the odds of this happening are infinitesimal. Even Alschuler, who throughout his career remained one of the staunchest critics of plea bargaining, admitted in 2013 that “the time for a crusade” had passed. Instead, he suggested people work to make the criminal-justice system “less awful.

#### Banning plea bargaining drastically increases the caseload, leads to overcrowding and dismissals

**Mirsky and Kahn 97**
Chester L. Mirsky and Gabriel Kahn, “Special Report: The Crime Debate,” The American Prospect (1997) (Gabriel Kahn is a writer for the Wall Street Journal and Chester L. Mirsky is professor of clinical law at the New York University School of Law)
<http://prospect.org/article/special-report-crime-debate> [Premier]

With no new court-rooms under construction, no new judges being appointed (the Bronx actually has 9 percent fewer judges than it did in 1992), and no limit on the number of felony arrests, pending cases in the Bronx mounted. At the end of September 1992, **just prior to ban's imposition, 2,275 pending felony indictments--or 51 percent of the Bronx total--exceeded the six-month statutory period allotted for a speedy trial. A year later, despite a drop in crime that resulted in 7.5 percent fewer indictments, the number of felony cases pending over six months had risen to 2,820, or 60.5 percent of the total**. The proportion of all pending cases over 365 days jumped from 18 percent to 30 percent, while cases pending over 450 days exceeded 18 percent of the total inventory. Today, 60 percent of pending felony indictments in the Bronx remain over six months old. The aging of cases has had a dramatic effect on pre-trial detention costs. By September 1993, **the average days in custody for Bronx defendants increased to over 160 days, while the average for the rest of the city decreased to under 120 days. The number of Bronx defendants detained over one year increased to 423, a proportionate increase of 47 percent over 1992, accounting for almost half of all New York City's one-year or over detainees, at an annual cost of $41,588 each. Today, the Bronx continues to lead all other major New York City counties in days in custody**. Has the investment at least translated into stiffer penalties, as promised? Not really. **Overcrowding has become such a problem that judges must frequently dismiss charges altogether simply because there's nowhere to keep all the defendants with pending cases**. Lockup at Riker's Island is no picnic, but the Bronx has become so well known for acquittals and dismissals--its acquittal rate in jury trials between 1992 and 1996 was 35 to 40 percent, the highest in New York City--that defendants are willing to wait it out.

#### Plea bargains avoid conviction of innocents and court clog due to the selection-of-cases effect.

Ayal-Gazal 6. Ayal-Gazal, Oren. Dean of the Faculty of Law at University of Haifa, member of the Israel Young Academy and the director of the Center for the Study of Crime, Law and Society. He is an expert in criminal law and procedure, in sentencing law and in law and economics. “Partial Ban on Plea Bargains.” Cardozo Law Review. 2006. [Premier]

About 95 percent of all convictions in the United States are secured with a guilty plea, most of them through plea bargaining (U.S. Department of Justice 2003a, 2003c). Yet despite their prevalence, or perhaps owing to it, plea bargains remain one of the most controversial practices in the criminal justice system (Church 1979; Brunk 1979; Kipnis 1979; Easterbrook 1983; Schulhofer 1988, 1992; Scott and Stuntz 1992a, 1992b; Wright and Miller 2002; Alschuler 2003). The fear that innocent defendants would plead guilty animates the often heated debate over plea bargains (Alschuler 1981; Fin- kelstein 1975). And imposing sanctions on the innocent is not only morally wrong but also inefficient (Kaplow and Shavell 1994). The breadth of the prosecutor’s discretion in negotiating plea bargains directly affects the magnitude of the “innocence problem.” Unfettered discretion translates into more plea bargains, including more plea bargains accepted by innocent defendants. Specifically, an unconstrained prosecutor will often be able to extract a guilty plea even from an innocent defendant who is likely to be acquitted by offering a sufficiently light plea sentence. But prosecutorial discretion is not unconstrained. Prosecutors, and especially federal prosecutors, generally cannot offer plea bargains with unlimited sentence discounts.1 It is well recognized that such a restriction on prosecutorial discretion reduces the number of plea bargains accepted by innocent defendants (Note 1972; Alschuler 1976; Guidorizzi 1998). The explicit or implicit assumption in this literature is that the innocent defendants who do not plea bargain will stand trial (Note 1972; Alschuler 1976; Vorenberg 1981). We question the veracity of this assumption. Imagine a prosecutor facing an innocent defendant (of course, the prosecutor may not know that the defendant is innocent, at least not for sure). The prosecutor cannot plea-bargain this case, because this defendant, facing a low probability of conviction, would accept only a plea sentence below the minimum sanction the prosecutor is authorized to offer (we assume a positive correlation between the probability of conviction and actual guilt). The prosecutor can try the case. But often the prospect of a costly trial with unfavorable odds is not very attractive. Alternatively, the prosecutor can drop the case and in its stead select a case with a guilty defendant and a higher probability of conviction—a case that can be quickly resolved via plea bargain within the bounds of the prosecutor’s discretion. We argue that in many cases, prosecutors will follow this alternative route: substitute weaker cases against innocent defendants with stronger cases against guilty defendants.2 Constrained prosecutorial discretion thus serves the interest of innocent defendants. It may seem counterintuitive that innocent defendants can benefit from a restriction on the range of permissible plea bargains. After all, most of the responsibility for the wrongful-convictions problem lies not on the plea bargain institution but rather on the inherent inaccuracy of the adjudication process. In an ideal, error-free adjudication system, no innocent defendant would ever plead guilty. In fact, given the imperfections of the system, it has been argued that plea bargains can only help the risk-averse defendant, guilty or innocent (Landes 1971; Scott and Stuntz 1992a, 1992b). Facing a credible threat by the prosecutor to proceed to trial, an innocent defendant may indeed benefit from a plea bargain. But the prosecutor cannot credibly threaten to take every case to trial. Her budget constraint will generally allow for only a very small number of trials. The prosecutor’s ex ante decision of which cases to pursue is, therefore, of central importance. And since the prosecutor’s goals will generally diverge from the social objective, there is a real danger that the prosecutor will choose the wrong cases.3 Specifically, society’s preference for wrongful acquittals over wrongful convictions might not be reflected in the prosecutor’s choice of cases.4 And since plea bargains increase the number of cases the prosecutor can pursue within a given budget constraint, the plea bargain institution exacerbates the consequences of this divergence between social objectives and the prosecutor’s private goals. Can the law cure this divergence, or at least minimize it? This paper argues that it can, and in fact it already does, albeit inadvertently. The Federal Sentencing Guidelines allow a maximal sentence reduction of approximately 25 percent from the benchmark sentence for the offense (including relevant circumstances surrounding the offense) in return for a guilty plea. Under the guidelines, a defendant can receive a two-level reduction in the offense level, which translates into a sentence reduction of about 20–25 percent, if he “clearly demonstrate[s] acceptance of responsibility” (U.S. Sentencing Commission 2002, sec. 3E1.1).5 While acceptance of responsibility is not equivalent to pleading guilty (United States v. Bennett, 161 F.3d 171 [3rd Cir. 1998]), in practice only (or almost only) defendants who plead guilty are considered eligible for these sentence reductions. By restricting the prosecutor’s ability to offer a significantly reduced sentence as part of a plea bargain, the guidelines induce the selection of stronger cases in which the defendant is more likely to be guilty. To see how the Sentencing Guidelines reduce the number of innocent defendants who are pursued by the prosecutor, divide the universe of cases into two subgroups: cases with a high probability of conviction (H cases) and cases with a low probability of conviction (L cases). The 3 (! ) 4 plea bargain sanction would have to be lower in the L cases, often lower than three-quarters of the sentence that the defendant would have received at trial, if convicted. Under the guidelines, however, such a plea bargain would be unenforceable. Accordingly, the prosecutor would have to choose between trying L cases and substituting L cases with H cases (the guidelines, in effect, create a societal precommitment to try L cases). As demonstrated below, the rule adopted by the Sentencing Guidelines leads to the selection of fewer L cases and to a smaller overall number of cases. As long as the probability of conviction is positively correlated with the probability of guilt, this implies a reduced number of innocent defendants.6 We show that the selection-of-cases effect that reduces the number of innocent defendants pursued by the prosecutor is most powerful when the benchmark sentence is well defined. Our analysis thus supports the limited sentencing discretion that was permitted under the Federal Sentencing Guidelines before the recent Supreme Court holding in United States v. Booker (125 S. Ct. 738 [2005]), which reduced the guidelines’ legal status from binding to advisory. The broader discretion permitted under state-level sentencing guidelines as well as in the federal system post Booker, while not eliminating the selection-of-cases effect, does dilute the force of this effect. Discretion in sentencing clearly serves an important social purpose. The cost of greater discretion, however, cannot be ignored. Our analysis thus provides another reason, in addition to those detailed in the Booker dissent, for Congress to restore the binding status of the guidelines. The selection-of-cases effect is the result of a restriction imposed on the set of tools available to the prosecutor when dealing with weaker cases. By restricting the prosecutor’s ability to use sentence reduction as a means to secure conviction in weaker cases, the guidelines induce the prosecutor to select fewer weak cases. This intuition can be generalized. There are other weapons in the prosecutor’s arsenal for dealing with weaker cases. Restricting use of any such weapons will produce a similar selection-of-cases effect. For example, faced with a weak case, the prosecutor can increase the probability of conviction by investing more resources into this case. Accordingly, tightening the prosecutor’s budget constraint will generate a selection-of-cases effect. Moreover, the tighter-budget example interestingly interacts with the guidelines’ rule: one way to effectively increase the relative cost of weak cases is to raise the cost of trials. Combined with the guidelines’ rule, such a measure will significantly enhance the selection-of-cases effect.

#### Banning plea bargaining increases court clog.

Hessick and Saujani 02 F. Andrew III Hessick; Reshma M. Saujani. Andrew Hessick-A.B. 1998, Dartmouth College; J.D. Candidate 2002, Yale Law School. Fall 2002, a clerk for Judge Raymond Randolph of the United States Court of Appeals for the District of Columbia Circuit. Reshma Saujani-B.A. 1996, University of Illinois, Urbana-Champaign; M.P.P. 1999, John F. Kennedy School of Government, Harvard University; J.D. Candidate 2002, Yale Law School. Fall 2002, an associate at Davis Polk & Wardwell. “Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defense Counsel, and the Judge.” 16 BYU J. Pub. L. 189 (2002) <http://heinonline.org/HOL/Page?handle=hein.journals/byujpl16&div=13&g_sent=1&casa_token=&collection=journals> [Premier]

The rising caseload of each individual state and federal judge has created a disincentive for a more exacting analysis by the judge. Since 1938, the federal courts have experienced an increasingly large caseload. 235 This growth can be attributed to the increase in the population, the creation of new rights and wrongs, the increase of lawyers, and the expansion of attorney fee incentives to litigate.236 Beginning in the 1960s, social scientists and commentators began to describe the judiciary's looming backlog as a "crisis in the courts" created by "lazy judges devoting little time to their work., 237 It has been said that most trial judges look for guilty pleas the way "a salesman looks for orders."2'38 The pressures for judges to be efficient and effective have led many judges to embrace the plea bargaining process. While judges point to their administrative need to process a large number of cases with limited resources as their greatest reason for plea bargains, growing criticism of case backlog has undoubtedly pressured widespread acceptance. 239 A judicial system that works at a maximum level of efficiency generates social utility in an already overloaded judicial system. A mere reduction of ten percent in the number of defendants plea bargaining would require more than twice the amount of judicial manpower and resources.240 While a surge in new trials would generate administrative complications for the judiciary, the utility of foregoing this cost is contingent upon the assumption that citizens spend fewer resources for pleas than trials while getting the same result. If scholars and commentators are correct in maintaining that plea bargaining facilitates the incarceration of innocent defendants, then this perverse result would reduce any social utility gained by cost savings from foregoing trial. Additionally, some supporters of plea bargaining may argue that if caseloads were increased they would prevent judges from making an exacting analysis of the facts. This obstacle would have devastating effects for the plight of innocents because it would hinder the search for actual guilt or innocence. Some commentators argue that trials would become less stringent and more casual, thereby increasing the possibility that innocents will be found guilty. 241

### Judicial Error

#### Plea bargaining decreases the reversible error committed by judges.

Hessick and Saujani 02 F. Andrew III Hessick; Reshma M. Saujani. Andrew Hessick-A.B. 1998, Dartmouth College; J.D. Candidate 2002, Yale Law School. Fall 2002, a clerk for Judge Raymond Randolph of the United States Court of Appeals for the District of Columbia Circuit. Reshma Saujani-B.A. 1996, University of Illinois, Urbana-Champaign; M.P.P. 1999, John F. Kennedy School of Government, Harvard University; J.D. Candidate 2002, Yale Law School. Fall 2002, an associate at Davis Polk & Wardwell. “Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defense Counsel, and the Judge.” 16 BYU J. Pub. L. 189 (2002) <http://heinonline.org/HOL/Page?handle=hein.journals/byujpl16&div=13&g_sent=1&casa_token=&collection=journals> [Premier]

Judges are guided by concerns of reputation that may affect the inquiry into actual guilt. Every party involved in the plea bargaining process engages in various tradeoffs. The prosecutor relinquishes his right to seek the highest sentence in exchange for certainty that the defendant will serve time. The defendant in turn releases his right to trial in exchange for certainty of a lower sentence.2 30 Finally, the judge relinquishes his right to facilitate the truth finding process in exchange for the certainty that his decision will not be subjected to reversible error.231 While one can argue that judges, prosecutors, and defense attorneys are similarly situated in that each have a mutual interest in reducing the uncertainty discussed above, judges may face more severe injury to reputation than prosecutors in the face of reversal. Plea bargaining forecloses this possibility because without a trial, a judge cannot commit a reversible trial error. 32 Plea bargaining, therefore, reduces the total number of reversible errors committed by judges across the country. If the number of plea bargains made by defendants were either to cease or decrease, this would inevitably increase the total number of trials. 33 Statistically, the increase in the number of trials would lead to an increase in the likelihood of error rate at these trials. Trials are elaborate, costly, and complex, which increases the potential for mistake. If plea bargaining were suddenly to be phased out, thereby increasing the number of trials in a system that was previously operating at one-fourth of its capacity, the risk of mistake would be high. 34 Thus, trial judges have the incentive to allow or at least not to impede the plea bargaining process because it decreases the risk to reputation caused by reversible errors.

## Kritiks

### Prison Abolition

#### The argument that racism is the problem is non-unique as Incarceration will always be parasitic historically violence, we must abolish prisons.

Davis 2014
Angela, “Angela Davis on Prison Abolition, the War on Drugs, and Why Social Movements Shouldn’t Wait on Obama”, Democracy Now, March 6th [Premier]

Well, of course, in 1977, when the Attica rebellion took place, that was a really important moment in the history of mass incarceration, the history of the prison in this country. The prisoners who were the spokespeople for the uprising indicated that they were struggling for a world without prisons. During the 1970s, the notion of prison abolition became very important. And as a matter of fact, public intellectuals, judges, journalists took it very seriously and began to think about alternatives**.** However, in the 1980s, with the dismantling of social services, structural adjustment in the Global South, the rise of global capitalism, we began to see the prison emerging as a major institution to address the problems that were produced by the deindustrialization, lack of jobs, less funding into education, lack of education, the closedown of systems that were designed to assist people who had mental and emotional problems. And now, of course, the prison system is also a psychiatric facility. I always point out that the largest psychiatric facilities in the country are Rikers Island in New York and Cook County in Chicago. So, the question is: How does one address the needs of prisoners by instituting reforms that are not going to create a stronger prison system? Now there are something like two-and-a-half million people behind bars, if one counts all of the various aspects of what we call the prison-industrial complex, including military prisons, jails in Indian country, state and federal prisons, county jails, immigrant detention facilities—which constitute the fastest-growing sector of the prison-industrial complex. Yeah, so how—the question is: How do we respond to the needs of those who are inside, and at the same time begin a process of decarceration that will allow us to end this reliance on imprisonment as a default method of addressing—not addressing, really—major social problems?

## Morals/Framework

### Constitution

#### SCOTUS ruled that not only that plea bargains are a constitutional right but also that the guarantee of effective legal counsel also extends to plea deals.

Barnes 12. Barnes, Robert. Robert Barnes has been a Washington Post reporter and editor since 1987. He joined the paper to cover Maryland politics, and has served in various editing positions including metropolitan editor and national political editor. He has covered the Supreme Court since November 2006. “Supreme Court expands plea bargain rights of criminal defendants.” The Washington Post. March 21, 2012. <https://www.washingtonpost.com/politics/supreme-court-expands-plea-bargain-rights-of-criminal-defendants/2012/03/21/gIQA6vIZSS_story.html?utm_term=.9c879a954a05> [Premier]

A divided Supreme Court ruled for the first time Wednesday that the guarantee of effective legal representation applies to plea bargain agreements, significantly expanding the constitutional rights of defendants as they move through the criminal justice system. In a pair of cases decided by 5 to 4 votes, the court opened a new avenue for defendants to challenge their sentences on grounds that their attorneys gave them faulty advice, lawyers on both sides of the issue said. The vast majority of criminal cases end with a guilty plea rather than a trial, and the ruling could affect thousands of cases. “The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities . . . that must be met to render the adequate assistance of counsel that the Sixth Amendment requires,” Justice Anthony M. Kennedy wrote. He was joined by the court’s liberal justices, Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan. That is the case, the majority said, even if the defendant is unquestionably guilty or has received a fair trial after turning down a plea bargain. Since more than nine in 10 cases involve a plea rather than trial, the decision will mean greater constitutional scrutiny of the negotiations central to almost every prosecution. “It seems to me the court has created a new body of constitutional law,” said Connecticut Assistant State’s Attorney Michael J. Proto, who wrote a brief for 27 states urging the court not to extend the constitutional guarantee to plea bargains. “There are a lot of unanswered questions, and it is going to spawn a lot of litigation.” Margaret Colgate Love, who helped write an American Bar Association brief that advocated for the court’s action, agreed about its impact. “What makes these cases so important is the Supreme Court’s full-on recognition of the centrality of plea bargaining in the modern criminal justice system and its extension of constitutional discipline to the outcome of the plea process,” she said. The decisions prompted a scathing rebuttal from Justice Antonin Scalia, delivered from the bench to signal his displeasure. Scalia called the rulings “absurd” and said the majority had twisted the constitutional right to ensure defendants get a fair trial into one in which they have a chance “to escape a fair trial and get less punishment than they deserve.” He added in a written dissent, “Today, however, the Supreme Court of the United States elevates plea bargaining from a necessary evil to a constitutional entitlement.”

### Privacy

#### Plea deals are necessary for protecting private and sensitive personal information.

Johnson 2017. Johnson, Thea. Thea is an Associate Professor of Law at the University of Maine School of Law. “Measuring the Creative Plea Bargain. University of Maine School of Law Digital Commons. 2017. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2975882 [Premier]

**Much of what happens in plea bargaining will never be** **formally recorded, especially sensitive information on immigration status**. **As Metzger and Ferguson point out, many defenders would have legitimate concerns about memorializing a client’s immigration status in a computer system,** particularly for the use of wide scalecollection and analysis.202 **Even less sensitive information about the client for example, a strong desire to hold on to a job— may be kept close to the vest during negotiations but have an impact on the defender’s** actions and **ultimate out comes. These sorts of facts may be brought up in off-the-record conversations between the defense attorney and the prosecutor, but more likely than not, they remain in the private files of the** defense **attorney**. These limitations must be acknowledgedwhen measuring public defender effectiveness at securing outcomes.

### AT Defendants’ Interests

#### Defendants’ interests shouldn’t necessarily be part of the morality/justice equation

Young 11. Young, Michael. Michael received his J.D., magna cum laude, from the Ohio State University and his LL.M. in legal theory from New York University and is an associate in the Technology, Privacy & IP Transactions Group and a member of the Privacy & Data Security Team. A Moral Defense of Plea Bargaining. SSRN Electronic Journal. 10.2139/ssrn.2118336. 2011. <https://law.onu.edu/sites/default/files/251%20-%20Young.pdf> [Premier]

For example, the critic charges that plea-bargaining enforces a “trial penalty” by failing to treat like cases alike. 32 Simply pointing out that the opportunity to bargain could be aligned with a defendant’s rational interest in minimizing punishment leaves this charge unanswered.33 The economic defender is undoubtedly correct that, given a bare choice to bargain or not, rational defendants should obviously prefer the opportunity to bargain since bargaining is a chance to manage the risks of punishment.34 But it is not **clear why the critic must** be wrong to discount or disregard the defendant’s interests in this respect. In general, we do not demand that our institutions should satisfy the preferences of every person they might affect, nor do we generally treat interest-satisfaction as a criterion of institutional justice. Consider the institution of criminal punishment itself, for example: if, as we generally seem inclined to think, criminal punishment may sometimes be morally appropriate,35 it will almost certainly be in spite of the preferences of criminal defendants. This just shows, then, that we do not think that defendants’ interests give the measure of justice. But if not, the critic may well protest that the defendant’s interests will not always make a moral difference to the special justice or injustice of plea-bargaining.

### AT Arbitrariness

#### Plea bargaining is not immoral because differential sentencing is not morally problematic.

Young 11. Young, Michael. Michael received his J.D., magna cum laude, from the Ohio State University (Order of the Coif) and his LL.M. in legal theory from New York University and is an associate in the Technology, Privacy & IP Transactions Group and a member of the Privacy & Data Security Team. A Moral Defense of Plea Bargaining. SSRN Electronic Journal. 10.2139/ssrn.2118336. 2011. <https://law.onu.edu/sites/default/files/251%20-%20Young.pdf> [Premier]

Addressing the charge that sentencing differences between plea bargaining and non-plea-bargaining defendants are an unfair inequality, I argued against any view that sees equality as primarily concerned about differential distributions of some stuff.154 Instead, equality expresses the concern to avoid subordination in social relations.155 So, plea-bargaining does not fail morally just because it fails to distribute quantities of punishment according to some preferred pattern.156 Given this, we need not think that differential sentencing is morally problematic; what matters for the critic’s case is being able to show that differential sentencing subordinates or dominates the more harshly treated non-plea-bargaining defendants.157 Moreover, the only way a critic can maintain that the convicted non-plea-bargaining defendant is subordinated by his differential sentencing treatment is by denying that the defendant is responsible for his choice and its proximate consequences.158 But there is no obvious reason for accepting this in the abstract or in advance.159 It seems that cases can be constructed in which we have the contrary intuition that the defendant who opts against a plea-bargain is responsible for that choice.160 If the critic means to press the “trial penalty” objection as an in-principle objection to the institution of plea-bargaining itself, he must give some independent reason for discounting this intuition and for thinking that defendants generally will not be, or cannot be, responsible for their choices in a plea bargaining system. 161 But he cannot just rely on the idea that differential sentencing is itself a matter of essential concern.

# Topicality

### Plea Bargin Definition

#### Plea bargaining is a negotiation between prosecutor and defendant that leads to a reduced charge

Merriam Webster 17 Merriam Webster since 1928, definition of plea bargain <https://www.merriam-webster.com/dictionary/plea%20bargaining> accessed 12/9/17, [Premier]

the negotiation of an agreement between a prosecutor and a defendant whereby the defendant is permitted to plead guilty to a reduced charge

### **Abolish**

#### Aff must end a law

Merriam Webster 17 Merriam Webster since 1928, definition of abolish [https://www.merriam-webster.com/dictionary/abolish accessed 12/9/17](https://www.merriam-webster.com/dictionary/abolish%20accessed%2012/9/17) [Premier]

to end the observance or effect of (something, such as a law) : to completely do away with