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To Plea or Not to Plea: How Plea Bargains Criminalize the Right to Trial and Undermine Our Adversarial System of Justice

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TO PLEA OR NOT TO PLEA: HOW PLEA BARGAINS CRIMINALIZE THE RIGHT TO TRIAL AND UNDERMINE OUR ADVERSARIAL SYSTEM OF JUSTICE

INGA IVSAN*

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I. INTRODUCTION

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Plea bargains are replacing trials in modern criminal cases at an astonishingly fast pace. Statistics confirm that approximately 97%² of all federal criminal cases subject to minimum sentencing guidelines resolve in plea agreements between defendants and prosecutors.³ Once rare and disfavored by judges, plea bargains are now universally used with too much judicial participation via a “partnership with the prosecution.”⁴ Trial lawyers are evolving into “plea lawyers.”⁵ Jury trials are seen primarily in the movies. The plea mentality has even manifested itself in civil litigation: the number of civil cases going to trial in federal courts has declined from 11.5% in 1962 to around merely 1%.⁶

What explains this recent phenomenon? Severe sentencing guidelines and mandatory minimum sentences have armed prosecutors with the near unilateral power to compel a defendant to forego the jury trial and instead enter into a plea agreement. Such unchecked discretion in the hands of prosecutors effectively criminalizes the defendant’s exercise of his right to a jury trial. Moreover, the prosecutorial authority to compel defendants, especially those charged with white-collar crimes, into plea bargains has fundamentally converted the adversarial system of criminal justice into an inquisitorial legal system.

Plea bargaining is not an acceptable substitute for jury trials. Trials rely on the adversarial process to seek out the truth, expose corruption, and protect individual rights. The presence of a jury acts as a constitutional safeguard, shining a light on the actions of prosecutors and judges. By contrast, plea bargaining operates more like an inquisitorial system in which the prosecutor assumes the dual role of fact finder and ultimate decision-

2. In 2010, 89% of all federal criminal defendants who were indicted had their case disposed of through a plea of guilty or nolo contendere. In 85% of all such cases, where federal minimum sentencing guidelines were applicable, 97% of all convictions were obtained through a guilty plea, with merely 3% having been convicted following a trial. See BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE [hereinafter SOURCEBOOK], tbl. 5.22.2010, <http://www.albany.edu/sourcebook/pdf/t5222010.pdf>. See also SOURCEBOOK, tbl. 5.34.2010 (May 26, 2011), <http://www.albany.edu/sourcebook/pdf/t5342010.pdf>.

3. DAVID K. SHIPLER, RIGHTS AT RISK: THE LIMITS OF LIBERTY IN MODERN AMERICA 115,(2012).

4. Interview with Roy Black, Professor, University of Miami School of Law, in Miami, Fla. (2015) (interview notes on file with author); see also J.S. Rakoff, *Why Innocent People Plead Guilty*, THE NEW YORK REVIEW OF BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty> (noting that “it is the prosecutor, not the judge, who effectively exercises the sentencing power, albeit cloaked as a charging decision” and that “there is no way defense counsel can appeal to a neutral third party, the judge, since in all but a few jurisdictions, the judiciary is precluded from participating in plea bargain negotiations.”).

5. Scott W. Howe, *The Perilous Psychology of Public Defending*, 2015 J. PROF. LAW. 157, 169 (2015).

6. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004) (noting that “[t]he portion of federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002.”).

maker, selecting who to indict, what charges to bring, and what sentence to impose. While trials seek to discern guilt from innocence, the plea bargain seeks to expedite the case, relieving the prosecutor from the burden of conducting a trial or meeting the evidentiary burden required for conviction. Unlike trials conducted in open court, plea bargaining is conducted in secrecy.

Plea bargaining is not necessarily bad in and of itself, but its extreme overuse raises concerns about the U.S. criminal justice system.⁷ The plea-bargaining process does not afford any constitutional or ethical protections.⁸ For example, suppose police obtain evidence illegally, without a warrant. Prosecutors would prefer to keep a case built on warrantless evidence out of court rather than have the illegal police conduct exposed at trial.⁹ A defendant arrested on the basis of illegally obtained evidence, and facing the threat of significant jail time, may be pressured to accept a plea agreement without having had any opportunity to review evidence meaningfully.¹⁰

Modern plea bargain practice encourages a defendant to admit guilt to a lesser offense on questionable evidence, and accepts a lesser punishment in exchange for sacrificing the defendant's Sixth Amendment right to trial. As the Fifth Circuit once observed, "[j]ustice and liberty are not the subjects of bargaining and barter."¹¹ The current criminal justice system adopts bargaining as naturally as if the Founding Fathers had indeed incorporated it into the Sixth Amendment.¹²

While plea bargains originally were used as a practical compromise between an overburdened prosecutor and a defendant of certain guilt, modern-day plea bargains resemble one-sided contracts of adhesion¹³ favoring a prosecutor too often holding insufficient evidence¹⁴ against a criminal defendant, particularly a white-collar defendant, who is reasonably and understandably unwilling to risk being sentenced to purgatory under current sen-

7. Audio recording at 10:45-11:02: Attorney Kelly Vomacka, speaking at Smoke Farm Symposium, (Aug. 22, 2015), <http://kuow.org/post/how-plea-bargains-made-jury-trials-anachronism-us>.

8. *Id.* at 13:30.

9. James F. Parker, *Plea Bargaining*, 1 AM. J. CRIM. L. 187, 204 (1972) (stating that "a prosecutor whose case rests upon evidence of dubious admissibility—for example, a confession obtained unconstitutionally or the fruits of an illegal search—may seek to avoid a challenge to his evidence by offering the defendant a particularly attractive 'deal'").

10. *Id.* at 205 ("Since prosecutors will, of course, make the best offers in cases with the weakest evidence, the prevalence of plea bargaining may mean that in the vast majority of criminal cases the exclusionary rule . . . is replaced with a sliding scale of constitutionality.").

11. *Shelton v. United States*, 242 F.2d 101, 113 (5th Cir. 1957), *judgment set aside*, 246 F.2d 571(en banc), *rev'd per curiam on confession of error*, 356 U.S. 26 (1958).

12. Rakoff, *supra* note 4.

13. *Id.*

14. See Gabriel Hallevy, *The Defense Attorney as Mediator in Plea Bargains*, 9 PEPP. DISP. RESOL. L.J. 495, 495 (2009).

tencing guidelines.¹⁵ A rational defendant, particularly in federal court, cannot risk refusing a prosecutor's plea offer: prosecutors punish those who reject plea agreements by stacking additional charges¹⁶ and, particularly in the cases of white-collar crimes, rely on sentencing guidelines that take into account the size of the financial loss without any requirement that the defendant be found to have intended the loss.¹⁷ On average, the defendant who turns down a plea offer and is later convicted receives a sentence three times longer than under a plea agreement.¹⁸ Combined with a growing list of vague and poorly drafted statutes defining various crimes, prosecutors can target individuals and coerce them into plea bargains by promising to drop charges against family members¹⁹ and freezing assets.²⁰

By punishing the defendant with a sentence three times longer if convicted at trial, modern day plea bargaining does not entail the same degree of "voluntary" and "intelligent choice" made by the defendant as authorized by the Supreme Court in *Brady v. United States*.²¹ While acknowledging the utility or impossibility of getting rid of plea bargains in the modern criminal justice system, this article stresses the unconstitutional effect of the unchecked discretion enjoyed by prosecutors when coupled with incredibly long sentences for those who risk conviction at trial, especially in complex white-collar criminal cases. The enormous disparity in sentencing resulting from this practice effectively criminalizes the defendant's right to trial and fundamentally alters the adversarial legal system. First conceived as a convenient procedural tool of expediency, modern plea bargain practice has supplanted trials altogether, severely punishing those few who dare exercise their Sixth Amendment right to trial.²² This article proposes a practical solution, one borrowed from the business world, to restore parity between prosecutors and defendants charged in complex cases popularly associated with white-collar crime.

Totalitarian societies, such as those envisioned by George Orwell in the novel *1984*, rely on an inquisitorial legal system in which the government has absolute, unfettered discretion to selectively punish anyone and every-

15. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2015).

16. A well-known pain physician Dr. Jeri Hassman was charged with over 350 counts of "drug dealing with a pen," which, during plea bargaining, was reduced to merely four counts. HARVEY SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT 58-59 (2d ed. 2011)..

17. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2015).

18. Jamie Fellner, *Plea bargains—the unfair difference between 10 years and life*, HUMAN RIGHTS WATCH (Dec. 4, 2013), <https://www.hrw.org/news/2013/12/04/plea-bargains-unfair-difference-between-10-years-and-life>.

19. See, e.g., *State ex rel. White v. Gray*, 203 N.W.2d 638, 639 (Wis. 1973).

20. See, e.g., *Bauer v. State*, No. A10-1164, 2011 WL 2518929, at *2 (Minn. 2011).

21. 397 U.S. 742, 748 (1970).

22. *Id.* at 746.

one.²³ Orwell grew up in the Soviet Union, where an inquisitorial-style judicial system sought to maximize government power at the expense of individual rights.²⁴ The government enjoyed immense discretion to apply vaguely-written laws to political opponents and other disfavored individuals.²⁵ Even today, countries such as Iran continue to exploit such prosecutorial mechanisms to suppress freedom of discourse.²⁶

The sad irony is that, while the United States may have won the Cold War, its legal institutions have gravitated toward resembling the inquisitorial system of its vanquished foe. In a true Orwellian twist, no citizen of modern American society can possibly know all of his or her individual legal obligations. For example, the Internal Revenue Code, inclusive of criminal and civil statutes, comprises 73,000 pages of fine print.²⁷ With over 5,000 federal criminal laws on the books, one legal scholar has determined that the average person unknowingly commits three felonies every day.²⁸ Doctors accepting Medicare payments, directors of publicly-traded companies, and tax lawyers, among other white-collar professionals, often operate in perpetual fear of the regulation state. Should their behavior attract the interest of a prosecutor, the prosecutor may find some crime, such as obstruction of justice or conspiracy, to threaten in order to gain cooperation.²⁹ Thus, under the current system of plea bargaining, the adversary legal system is being severely undermined and an innocent individual is sacrificed for the pretense of the public good and its insatiable need to regulate every aspect of individual life. As the hero in Arthur Koestler's Stalinist critique novel *Darkness at Noon*, pleads, "I plead guilty to having rated the question of guilt and innocence higher than that of utility and harmfulness. Finally, I plead guilty to having placed the idea of man above the idea of mankind."³⁰

23. See Sinkwan Cheng, *Ressentiment, The Superego, and Totalitarianism: George Orwell's 1984*, 24 CARDOZO L. REV. 1099, 1109-10 (2003).

24. See John H. Minan & Grant H. Morris, *Unraveling an Enigma: An Introduction to Soviet Law and the Soviet Legal System*, 19 GEO. WASH. J. INT'L L. & ECON. 1, 41 (1985).

25. See Ilya Nuzov, *The Role of Political Elite in Transitional Justice in Russia: From False "Nurumberts" to Failed Desovietization*, 20 U.C. DAVIS J. INT'L L. & POL'Y 273, 283 (2014).

26. See Asa Fitch, *Washington Post Condemns Conviction of Its Iran Reporter*, WALL ST. J. (Oct. 12, 2015) <https://www.wsj.com/articles/washington-post-condemns-conviction-of-its-iran-reporter-1444652990>.

27. See Reid Kress Weisbord, *The Advisory Function of Law*, 90 TUL. L. REV. 129, 130 (2015).

28. Silverglate, *supra* note 16, at xxv.

29. See *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do 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 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."). (internal quotations omitted).

30. ARTHUR KOESTLER, *DARKNESS AT NOON* 151 (Scriber 1968).

II. THE PERVERSION OF PLEA BARGAINING AND UNDERMINING THE ADVERSARY SYSTEM

A. *Plea Bargains Are Strictly a Modern Phenomenon*

Plea bargains were “not explicitly noted in [] nineteenth-century dockets.”³¹ American criminal court records of the early nineteenth century reveal that plea agreements were a rare phenomenon:

The judicial practice of discouraging guilty pleas persisted into the second half of the nineteenth century, but at about this time prosecutorial plea bargaining emerged. Of course a history of one hundred years or more may be sufficient, from the perspective of some observers, to render plea bargaining a venerable institution.³²

The infrequent use of plea bargains owes to their disfavor among judges of that era. As at least one court has held “[t]he least surprise or influence causing [the defendant] to plead guilty when he had any defense at all should be sufficient cause to permit a change of the plea from guilty to not guilty.”³³

With judicial hostility and distrust toward plea bargains, a nineteenth-century lawyer would probably not expect to see plea bargains replace trials as the normal resolution for most criminal cases.

Following the Civil War, there was a general increase in crime owing in part to a rise in immigration.³⁴ The subsequent increased use of plea bargaining “was a powerful system of social control through the nonapplication of the law in ways that bore strong parallels to the British system of episodic leniency but with a uniquely American turn.”³⁵ Plea bargains offered a convenient method to process these cases without burdening the criminal justice system.³⁶ Their use gained even greater notoriety in the years after World War II, accounting for the resolution of 80% of all criminal cases.³⁷ Notwithstanding their widespread use, there still seemed to be a fair opportunity for those who chose to go to trial.³⁸ As Judge Rakoff explains:

[T]here were enough cases still going to trial, and enough power remaining with defense counsel and with judges, to “keep the system honest” . . .

31. MARY E. VOGEL, COERCION TO COMPROMISE: PLEA BARGAINING, THE COURTS, AND THE MAKING OF POLITICAL AUTHORITY 29 (2007).

32. ALBERT ALSCHULER, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 5 (1979).

33. *Id.* at 20, (quoting *State v. Williams*, 14 So. 32 (La. 1893)).

34. Rakoff, *supra* note 4.

35. Vogel, *supra* note 31 at 325.

36. Rakoff, *supra* note 4.

37. *Id.*

38. *Id.*

a genuinely innocent defendant could still choose to go to trial without fearing that she might thereby subject herself to an extremely long prison term effectively dictated by the prosecutor.³⁹

The war waged on drug crimes in the 1970s and 1980s resulted in aggressively increased sentencing and the even more expansive use of plea bargains to resolve federal criminal cases.⁴⁰ The federal sentencing guidelines, combined with mandatory minimums, instigated the “virtual extinction of jury trials in federal criminal cases.”⁴¹ This enabled prosecutors “to bludgeon defendants into effectively coerced plea bargains.”⁴² Statistics demonstrate that the percentage of cases resolved through plea agreements skyrocketed at this time: whereas 19% of all federal defendants in 1980 chose to go to a trial, by the year 2000, fewer than 6% did so, and this dropped further to merely 3% of all cases in 2010.⁴³ This trend has not abated and, to this day, less than 3% of all defendants in federal criminal cases opt to risk a substantial sentencing disparity and challenge the indictment.⁴⁴

Supporters of modern plea bargain practice declare that plea bargaining has been part of the judicial system “ever since man was made to account for crimes against society.”⁴⁵ As one judge has proclaimed, “[p]lea bargains have accompanied the whole history of this nation’s criminal jurisprudence.”⁴⁶ However, in his article noted above, Albert Alschuler, self-proclaimed maverick and law professor, disproves these claims through credible research. He notes that “[a]s an opponent of plea bargaining, I have been offended by these rhetorical historical pronouncements, and perhaps even more offended by the seemingly knowledgeable but equally unsupported assertions of scholars that plea bargaining ‘apparently originated in seventeenth-century England as a means of mitigating unduly harsh punishment.’”⁴⁷

The simple fact is that plea bargains were the exception, and not the norm, in historic criminal law practice.⁴⁸ Their widespread use in modern times is an aberration that finds no justification in history.⁴⁹ Rather, the

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. Alschuler, *supra* note 32, at 2.

46. *Id.*

47. *Id.*

48. Vogel, *supra* note 31 at 94, (“Despite occasional instances of compromise, there is no evidence that anything approaching the pervasive and highly routinized practice of plea bargaining gaining common to the United States had developed elsewhere before the late nineteenth century.”).

49. *Id.* (“Pardons and grants of clemency, which tended to occur after sentencing, involved, prior to the 1830s, no element of the direct, albeit often implicit, exchange inherent in plea bargaining.”).

overuse of plea bargains today represents the choice of expediency over justice:

Providing a “break” because the defendant has relieved the victim’s suffering or because he has brought other offenders to justice is not the same as providing this break because the defendant has saved the government the time, the expense, and the risk of trial. A sacrifice of penological interests seems less objectionable when it is incurred for the sake of compensatory interests or law enforcement interests than when it is incurred for the sake of administrative interests.⁵⁰

The reluctance by judges in early American history to permit plea bargaining was likely based in part on the adversary system of justice, which was prevalently regarded as essential to freedom and democracy. As noted by the United States Supreme Court in *Boykin v. Alabama*, “a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality.”⁵¹

The criminal justice system in eighteenth-century England did not permit the criminal defendant to use an attorney to establish facts at trial.⁵² A defendant had to appear *pro se*; while his defense attorney could argue legal issues, the defense attorney “could not present evidence, examine or cross-examine witnesses, or address the jury in opening or closing statements.”⁵³ By contrast, a prosecutor was allowed to have an attorney by his side at all times.⁵⁴ Trial was more like a sentencing hearing rather than a trial, and “guilt was rarely challenged.”⁵⁵ For unknown reasons, beginning in the 1730s, defense counsel was allowed to participate on a limited basis in cross-examinations.⁵⁶

At the time of the American Revolution, the United States chose not to duplicate England’s criminal justice system wholesale, but to instead implement a more balanced adversarial approach.⁵⁷ While England gradually expanded the role of defense counsel at trial over succeeding generations, American courts began permitting a defendant’s counsel to provide complete assistance throughout the trial.⁵⁸ Following the signing of the Declaration of Independence, several states confirmed the adversarial approach

50. Alschuler, *supra* note 32 at 4-5.

51. *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969).

52. Randolph N. Jonakait, *The Rise of the American Adversary System: America Before England*, 14 WIDENER L. REV. 323, 324 (2009).

53. *Id.* at 324-25.

54. *Id.* at 325.

55. *Id.*

56. *Id.*

57. *Id.* at 327.

58. *Id.*

and the critical role of defense counsel in their own state constitutions.⁵⁹ The Founding Fathers also memorialized this adversarial method at the federal level through the Sixth Amendment to the U.S. Constitution.⁶⁰ As one scholar has observed, this form of “[o]rdered conflict is a desirable element of a free and diverse society, not some lingering social disease that should be eradicated. There is a virtue as well as a necessity in ordered conflict that serves vital social purposes.”⁶¹

The adversary system of criminal justice involves both prosecution and defense in the investigatory stage of trial, where each side is equally able to deliver evidence along with arguments in front of an impartial decisionmaker.⁶² The system is founded in part on the belief that the adversary system renders justice more accurately. Its “current ideology extols the adversary system primarily as the best system for protecting individual dignity and autonomy, but some theorists continue to profess the original ideology, which says that adversarial presentation and argument are the best way to arrive at the truth.”⁶³ While intended to serve the aim of truth, the Founding Fathers also recognized the need to protect individual liberty, incorporating the right to a fair trial as the ultimate safeguard against the government’s abuse of power.⁶⁴ As noted by scholar David Barnhizer:

The adversary system is the mechanism by which we balance the inevitable and often healthy disputes between factions. As our political system has become increasingly complex and factious the adversary system’s processes of ordered conflict have become even more vital. If the truth be known, most of us would prefer the noise and irritation of contention to the silence and subordination of tyranny.⁶⁵

Unfortunately, the plea bargaining process has in fact emasculated this right: only *one* party now has access to evidence before a plea is negotiated, and only *one* party gets to argue its version of the case. By contrast, the adversary system of justice is individualistic and allows for reflection of social values: each party is given a fair chance to use its self-interest and deliver the most beneficial evidence and argue its best case.⁶⁶ Self-interest then motivates the defendant to inform the jury of his or her own version of events.

59. *Id.*

60. *Id.*

61. David Barnhizer, *The Virtue of Ordered Conflict: A Defense of the Adversary System*, 79 NEB. L. REV. 657, 660 (2000).

62. Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 302 (1989).

63. *Id.*

64. Barnhizer, *supra* note 61, at 660.

65. *Id.*

66. Sward, *supra* note 62, at 313.

While the American adversary system is not perfect, the Founding Fathers regarded it as superior to England's skewed practice favoring prosecutors.⁶⁷ In *Lochner v. New York*, Justice Holmes observed, the Constitution "is made for people of fundamentally differing views[.]"⁶⁸ As David Barnhizer observed, "[t]he legal system is not a self-contained theoretical construct of ideal justice, but reflects, diffuses, and balances competing claims for political and economic power."⁶⁹ The adversary system of justice, rooted in common law and constitutionally required in the United States, should be contrasted with the inquisitorial system of justice in many civil law countries.⁷⁰ In the inquisitorial system, the parties do not control the legal process, but a supposedly impartial judge takes an active role as a fact finder and decisionmaker.⁷¹ Such a legal system is much "more communitarian than individualistic."⁷² The goal of the inquisitorial system is not to guarantee individual liberties but, instead, to "seek the socially correct solution."⁷³

Modern day plea bargaining in America resembles the inquisitorial system of justice in continental Europe. Yet, this "quasi-inquisitorial" system lacks many of the safeguards designed to curb abuse in an inquisitorial system. For example, in American plea bargaining, it is the prosecutor, rather than a jury, who serves as the primary fact finder.⁷⁴ While judges in continental Europe may be engaged in the fact finding and case resolution process, most American judges are only involved in the formalities of accepting the plea agreement and meting out a sentence.⁷⁵ In addition to demanding "substantial assistance" from the defendant,⁷⁶ most plea agreements require that a defendant "waives several important constitutional rights—the right to a jury trial, the right to confront his accusers, and the privilege

67. Jonakait, *supra* note 52, at 327.

68. *Lochner v. New York*, 198 U.S. 45, 76 (1905).

69. Barnhizer, *supra* note 61, at 662.

70. Sward, *supra* note 62, at 313.

71. *Id.* at 313.

72. *Id.* at 315. Sward argues that "individualism untempered by communitarian values can lead to unremitting selfishness, including an utter lack of concern for the consequences of one's action." *Id.* at 311. However, in the author's personal experience, having been raised in the communitarian value system of the Soviet Union, self-interest is a natural human instinct that can be just as pronounced, if not more so, in a communitarian environment. The author witnessed firsthand how guaranteed outcomes and common ownership remove the social stigma of selfishness.

73. *Id.* at 315.

74. See Rakoff, *supra* note 4.

75. *Id.*

76. See U.S. SENTENCING GUIDELINES MANUAL, § 5K1.1 (2004) ("Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."). See also Colin Miller, *Deal or No Deal: Why Courts Should Allow Defendants to Present Evidence that They Rejected Favorable Plea Bargains*, 59 U. KAN. L. REV. 407, 453 (2011) ("[P]rosecutors can offer plea bargains in exchange for such substantial assistance[.]").

against self-incrimination.”⁷⁷ Modern American plea bargain practice is a perverted situation in which “judge and prosecutor seem to have formed a partnership.”⁷⁸ Judges openly defer to prosecutors, rarely challenging plea agreements and frequently following prosecutors’ sentencing recommendations.⁷⁹

Plea bargains are meant to process convictions rather than allow juries to decide the outcomes of cases, departing from the adversary approach to justice required under the Constitution.⁸⁰ The plea bargain process enables prosecutors to act on what would otherwise be inadmissible evidence at trial (e.g., hearsay) in order to fashion a plea bargain and make sentencing recommendations to the court.⁸¹ A defendant in the modern American legal system faces two sets of injustices brought about by the use of prejudicial and inadmissible evidence: upon indictment and subsequently at sentencing.⁸²

B. Plea Bargaining Is Merely a Tool of Expediency and Convenience, Not Justice

Plea bargaining now purports to be an “inextricable part”⁸³ of the modern criminal justice system, saving time and limited judicial and prosecutorial resources.⁸⁴ Nevertheless, convenience and expediency cannot provide an adequate substitute for the guarantee of trial by an impartial jury under the U.S. Constitution. The United States District Court for the State of Massachusetts recently observed that:

Plea bargaining is no longer a negligible exception to the norm of trials; it is the norm. Nor, given information deficits and pressures to bargain, can we simply trust in an efficient plea market that reflects full information about expected trial outcomes. Thus, plea bargaining needs tailored regulation in its own right, not simply a series of waivers of trial rights.⁸⁵

Unfortunately, the modern purpose of plea bargaining is too administrative, dispensing of any determination whether the government has met the constitutionally required evidentiary burden of “beyond the reasonable

77. Parker, *supra* note 9, at 197.

78. Black, *supra* note 4.

79. *Id.*

80. Rakoff, *supra* note 4.

81. See Roger C. Park, *Procedural Options for Resolving Hearsay Issues*, 13 CARDOZO L. REV. 929, 931 (1991).

82. See Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1724-25 (1992).

83. Philip H. Pennypacker & Alyssa Thompson, *Realignment: A View from the Trenches*, 53 SANTA CLARA L. REV. 991, 1019 (2013).

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

85. United States v. Merlino, 109 F. Supp.3d 368, 369 (D. Mass. 2015).

doubt.”⁸⁶ This “nontrial mode of procedure”⁸⁷ does nothing to ascertain truth or serve justice. Almost all defendants in federal criminal cases are sentenced without the benefit of a jury trial,⁸⁸ notwithstanding past admonition by the U.S. Supreme Court:

The Framers would not have thought it too much to demand that, before depriving a man of [] more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to the unanimous suffrage of twelve of his equals and neighbors, rather than a lone employee of the State.⁸⁹

In the eighteenth century, Sir William Blackstone⁹⁰ foresaw enticements that now affect the way plea bargaining is conducted in the United States. He noted that “[e]xpeditiousness may induce ‘secret machinations, which may sap and undermine’ the jury trial . . . as doubtless all arbitrary powers, well executed, are the most convenient.”⁹¹

Blackstone presciently pointed out that “delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters.”⁹² Implied in Blackstone’s observation is the idea that sacrificing justice for the sake of expediency ultimately diminishes liberty.

The irony here is that, in civil practice, the United States Supreme Court has declared, under the doctrine of “unconstitutional conditions,” that the government cannot require a person – for the sake of convenience or expediency – to give up a constitutional right in exchange for a discretionary benefit conferred by the government.⁹³ While analogizing Fifth and Fourteenth Amendment land use case law to the Sixth Amendment right to a jury trial escapes easy analysis, there is a core notion embedded in Supreme Court precedent: a property owner cannot be required to sacrifice constitutional rights at the discretion of government regulators where there is no nexus between the right sacrificed and the government objective being served.⁹⁴ In the context of plea bargains, one may reasonably question⁹⁵

86. *United States v. Alldredge*, 350 F.Supp. 189, 191 (E.D. Pa. 1972).

87. John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC’Y REV. 261, 261 (1979).

88. Douglas D. Guidorizzi, *Should We Really “Ban” Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 753 (1998).

89. *Blakely v. Washington*, 542 U.S. 296, 313-14 (2004) (internal citations and quotation marks omitted).

90. Sir Blackstone was a respected scholar who helped to codify portions of English common law. Shipler, *supra* note 3 at 108.

91. *Id.* (emphasis omitted).

92. *Id.* at 108.

93. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

94. *Id.*

95. Alschuler, *supra* note 32 at 3. As Alschuler observed:

whether the government can exact a waiver of one's constitutional right to a jury trial for the mere sake of lightening the workload of prosecutors and judges.⁹⁶

The adversary system that was meant to protect the average citizen from the tyranny of its own government is now being abandoned for the mere sake of expediency and the selfish career goals of some prosecutors. Transparency is missing from the current system given that plea bargains are typically negotiated outside open court proceedings. Inferentially, the government lacks sufficient evidence to meet the requisite burden of proof in 97% of criminal cases⁹⁷ by relying exclusively on plea bargains to obtain convictions. If prosecutors truly seek justice, they should not rely on the secrecy of plea bargain negotiations. The constitutionally required burden of proof for conviction was not an incidental development in law, but rather a thoughtful and necessary check to prevent abuse and government overreach. If the plea bargaining process is not brought out into the clear light of day, there is no curb on this form of abuse.

Notwithstanding the universal use of plea bargains to obtain convictions, there is practically no independent and unbiased oversight from the judiciary, much less the free press.⁹⁸ Rather, "as the circle widens to ensnare ever more 'conspirators,' prosecutors trumpet their willingness to 'go wherever the evidence leads,' and the news media are, far more often than not, prepared to report such news without an ounce of insight or skepticism."⁹⁹

C. *Rise of Modern Plea Bargaining: The Impact of Sentencing Guidelines and Mandatory Minimums*

The legal climate in which plea bargains first gained traction did not criminalize many of the activities that constitute modern day white-collar crimes, such as insider trading, tax evasion, accounting fraud, and money laundering. Congress passed¹⁰⁰ the Sentencing Reform Act of 1984 specifically to increase penalties for narcotics violations and endorse mandatory

In the same way that a prosecutor can relieve caseload pressure through plea bargaining, an instructor can alleviate "bluebook backlog" through grade bargaining, and just as it is in a defendant's interest to secure a favorable sentence, it is in a student's interest to secure a favorable grade. Despite the impulses to engage in grade bargaining that both teachers and students may experience, we surely would not regard this process as natural or inevitable. If it arose, we would, to the contrary, view it as a corruption of the grading process.

Id. n.10.

96. Shipler, *supra* note 3 at 115. (noting one case in which a "DA offered [defendant] a five-year sentence if he pleaded guilty to 'save the court the inconvenience and necessity of a trial.'").

97. Rakoff, *supra* note 4.

98. *Id.*

99. Silverglate, *supra* note 16 at xlv.

100. WILLIAM R. KELLY, CRIMINAL JUSTICE AT THE CROSSROADS 71 (2015).

minimums for violent offenders.¹⁰¹ The Act signaled an increased application of the federal sentencing guidelines,¹⁰² which called for severe sentences at the federal level.¹⁰³ Mandatory minimum sentencing laws and sentencing guidelines were also established to limit the discretion of judges considered too lenient.¹⁰⁴ However, this did not resolve disparities in sentencing.¹⁰⁵ As a result of sentencing laws, the power shifted from federal judges to federal prosecutors.¹⁰⁶

Moreover, sentencing guidelines of that era constrained punishment for white-collar crimes to relatively brief prison sentences.¹⁰⁷ The few white-collar convicts sentenced to longer terms in prison could nevertheless qualify for parole after serving one third of their sentence.¹⁰⁸ Plea bargaining at that time “was like a discussion at a gentleman’s table.”¹⁰⁹

D. *The Law of Unintended Consequences: Infringing on Constitutional Rights of Defendants*

As the use of plea bargains increased, the constitutionality of their use was challenged. In 1970, the Supreme Court in *United States v. Brady* upheld plea bargaining as a constitutional method of resolving violent criminal cases.¹¹⁰ What the Court was not asked to consider in 1970, and what it therefore did not elaborate on, was whether plea bargaining raises constitutional issues in its application to non-violent and non-drug-related crimes. In *Brady*, the Court outlined the “voluntariness” and “intelligent choice” requirements for a plea to withstand constitutional challenge.¹¹¹ In the context of drug crimes, the plea bargain offers benefits for both parties.¹¹² Likewise, with respect to relatively straightforward and common law

101. *Id.* at 71-72.

102. *Id.* at 72.

103. *Id.*

104. ANGELA DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 7 (2007).

105. *Id.* at 8.

106. *Id.*

107. *United States v. Levinson*, 543 F.3d 190, 201 (3rd Cir. 2008).

108. According to the Chief Justice of the Missouri Supreme Court: “There is a better way. We need to move from anger-based sentencing that ignores cost and effectiveness to evidence-based sentencing that focuses on results—sentencing that assesses each offender’s risk and then fits that offender with the cheapest and most effective rehabilitation that he or she needs.” Ray Price Jr., Chief Justice, Missouri Supreme Court, *State of the Judiciary Address: Your Missouri Courts* (Feb. 3, 2010), [http://www.nadcp.org/sites/default/files/nadcp/2010%20state%20of%20the%20judiciary%20-%20WRP%2002-03-10%20-%20final%20\(2\)_1.pdf](http://www.nadcp.org/sites/default/files/nadcp/2010%20state%20of%20the%20judiciary%20-%20WRP%2002-03-10%20-%20final%20(2)_1.pdf).

109. Black, *supra* note 4.

110. *Brady*, 397 U.S. 742, 751-52 (1970).

111. *Id.* at 748.

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

crimes,¹¹³ a defendant seems better positioned to evaluate his chances of an adverse verdict and to “voluntarily” bargain with prosecutors.

Modern supporters of plea bargaining rely on the analytical framework of *Brady*, maintaining that plea bargains benefit both sides and pass constitutional muster.¹¹⁴ However, this rationale ignores the reality of modern plea bargaining, particularly with respect to white-collar crimes involving undecided and controversial legal issues. Modern financial crimes involve an element of dishonest behavior: e.g., fraud, tax evasion, insider trading. Notably, many white-collar crimes are non-violent offenses that challenge the prosecution to establish more complex elements of the case beyond a reasonable doubt.¹¹⁵

An unsophisticated defendant charged with a crime such as murder or unlawful narcotics distribution has a general idea of what evidence prosecutors may hold. In contrast, a white-collar criminal may not even be fully aware of the nature of the charges and is heavily dependent on the competency of defense counsel in a complex criminal case. Furthermore, the defendant in a complex criminal case depends on the availability of financial resources to procure competent representation, but often those resources are subject to an asset freeze order.¹¹⁶ Not surprisingly, Alex Kozinski, former Chief Judge of the Ninth Circuit Court of Appeals, criticized the aggressive application of criminal law in complex cases, stating, “[t]his is not the way criminal law is supposed to work. Civil law often covers conduct that falls in a gray area of arguable legality. But criminal law should clearly separate conduct that is criminal from conduct that is legal.”¹¹⁷

For example, few legal professionals are truly conversant in the multiple volumes of statutes and regulations comprising the Internal Revenue Code.¹¹⁸ In 1913, the first year in which one of the major law reporting services began publishing the Internal Revenue Code, an entire volume occupied roughly 400 pages.¹¹⁹ Today, that exact same service spans 25 volumes comprising a total of 73,954 pages.¹²⁰ Yet, at law, every single citizen, as well as foreigners who spend a sufficient number of days in the

113. Vogel, *supra* note 31 at 95. “Guilty pleas, the first element of bargaining, began to be entered in more significant numbers in common law-based cases during the late 1830s.”

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

115. Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1266 (2008).

116. Kelly C. Quinn, *Just Taking*, LOS ANGELES LAWYER 20 (July 2011).

117. Silverglate, *supra* note 16 at xxi-xxii.

118. Wolters Kluwer, Tweet This: The Modern Income Tax Turns 100, CCH Takes a Look Back...and Ahead, (Feb. 25, 2013) <http://news.cchgroup.com/2013/02/25/tweet-this-the-modern-income-tax-turns-100-cch-takes-a-look-back-and-ahead/>.

119. *Id.*

120. *Id.*

United States each year or who draw income from United States sources, are presumed to know the exact dictates of these almost 74,000 pages of complex laws and regulations. Furthermore, every taxpayer is required to file a return, signed under penalty of prosecution, that their filings are completely accurate.¹²¹

It can be difficult to clearly distinguish between aggressive tax planning and criminal behavior¹²². A defendant indicted for the white-collar crime of tax evasion is disadvantaged by the limits of his own knowledge of the subtleties of tax laws. Yet, this same defendant is pressured to take a plea in a very short period of time. Weighing on this decision is the reality that, even if the risk of conviction by a jury is modest, the prosecutor can obtain a sentence that frequently “spirals out of control.”¹²³ Federal sentencing guidelines permit the court to lengthen the sentence based on the amount of the financial loss, which can lead to absurdly long sentences exceeding one’s lifetime.¹²⁴

The Justice Department further emboldens federal prosecutors to enforce “utterly formless ‘anti-fraud’ laws”¹²⁵ in order to intimidate forthright business executives and other professionals, as much as average citizens. In 2003, Michael Chertoff, the former second in command of the Justice Department’s Criminal Division, impudently announced that federal prosecutors should exploit anti-fraud laws in order to indict business executives because “criminal prosecution is a spur for institutional reform.”¹²⁶ Prosecutors armed with a variety of vague statutes may pursue virtually any citizen; “[e]ven the most intelligent and informed citizen (including lawyers and judges, for that matter) cannot predict with any reasonable assurance whether a wide range of seemingly ordinary activities might be regarded by federal prosecutors as felonies.”¹²⁷ Once caught in the prosecutor’s web, the targeted professional faces the Hobson’s choice of cooperating or facing eternal punishment. Cooperating defendants “are taught not only to sing, but also to compose”¹²⁸ their witness testimony, enabling the prosecutor to widen his net and bring in more defendants.¹²⁹

But, is modern plea bargaining consistent with the constitutional underpinnings relied on in *Brady*, particularly as applied to modern day crimes?

121. DEPT OF THE TREASURY INTERNAL REVENUE SERV.: TAX GUIDE (2016).

122. See M.H. Hoefflich, *Of Reason, Gamesmanship, and Taxes: A Jurisprudential and Games Theoretical Approach to the Problem of Voluntary Compliance*, 2 AM. J. TAX POL’Y 9, 13 (1983).

123. Black, *supra* note 4.

124. U.S.. SENTENCING GUIDELINES MANUAL §2B1.1 (2015).

125. Silverglate, *supra* note 16 at xlv.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

Almost forty years ago, in *Bordenkircher v. Hayes*¹³⁰, the Supreme Court justified plea bargaining in part on the basis of relatively equal bargaining powers, with both prosecutor and defendant making sacrifices in exchange for benefits. The court affirmed the idea that “[p]lea bargaining flows from the ‘mutuality of advantage’ to defendants and prosecutors, each with his own reasons for wanting to avoid trial.”¹³¹ By contrast, many decades later, contemporary sentencing practice injects a substantial imbalance in relative bargaining power between the prosecution and defendant, especially for white-collar crimes, leaving little trace of the “mutually beneficial” aspect of the “bargain.”¹³² One former federal judge notes that, particularly in federal cases, most defendants are practically forced to plead guilty. He explains:

Indeed, there were times during my seventeen-year tenure on the federal bench in Massachusetts that inquiring of a defendant as to the voluntariness of his guilty plea felt like a Kabuki ritual. “Has anyone coerced you to plead guilty,” I would ask, and I felt like adding, “like thumbscrews or waterboarding? Anything less than that—a threatened tripling of your sentence should you go to trial, for example—doesn’t count.”¹³³

There is no reasonable alternative to the plea bargain if the white-collar defendant faces even the slightest risk of a potential life sentence.

Today, many innocent individuals, particularly in white-collar criminal cases, are not benefitting at all from so-called “beneficial” plea offers and would rather litigate the ever-expanding grey areas of the law if they did not face such extreme jeopardy at sentencing.¹³⁴ As a consequence of sentencing guidelines that impose harsh punishment on those who are convicted at trial, power is now concentrated in the hands of prosecutors. *Brady* is simply outdated, leaving defendants helpless to the manipulation of prosecutors and the ever-expanding scope of new crimes to waive their constitutional right to trial. Statistics confirm that an alarming number of innocent people plead guilty under a threat of a sentence three times higher than in the plea agreement.¹³⁵ As Judge Rakoff points out:

People accused of crimes are often offered five years by prosecutors or face 20 to 30 years if they go to trial, . . . [t]he prosecutor has the information, he has all the chips . . . and the defense lawyer has very, very little

130. 434 U.S. 357, 362 (1978).

131. *Id.* at 363.

132. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1935 (1992).

133. Nancy Gertner, Bruce Bower & Paul Shechtman, reply to Jed S. Rakoff, *Why the Innocent Plead Guilty: An Exchange*, THE N.Y. REV. OF BOOKS (January 8, 2015), <http://www.nybooks.com/articles/archives/2015/jan/08/why-innocent-plead-guilty-exchange/>.

134. Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823, 841 (2014).

135. Rakoff, *supra* note 4.

to work with. So it's a system of prosecutor power and prosecutor discretion. I saw it in real life [as a criminal defense attorney], and I also know it in my work as a judge today.¹³⁶

III. ABUSE AND CORRUPTION IN MODERN PLEA BARGAINING

A. *Irreconcilable Defects in Modern Plea Bargaining*

White-collar crimes are now almost exclusively prosecuted at the federal level, where the applicable sentence upon conviction is draconian.¹³⁷ “Plea bargaining is no longer a negotiation between equals,”¹³⁸ but a Hobson’s choice in which the white-collar criminal defendant may (i) accept a certain and unfortunate sentence premised on less than overwhelming evidence concerning unresolved issues of law pursuant to a plea agreement, or (ii) risk the severest of punishments meted out under a trebled sentence should the defendant instead choose to be tried by a jury as guaranteed under the Sixth Amendment.¹³⁹ As one scholar has noted:

Cases involving educated, well-to-do victims were frequently prosecuted more vigorously than cases involving poor, uneducated victims. The very few white defendants represented by my office sometimes appeared to receive preferential treatment from prosecutors. Although I saw no evidence of intentional discrimination based on race or class, the consideration of class- and race-neutral factors in the prosecutorial process often produced disparate results along class and race lines.¹⁴⁰

One such defect in modern plea bargaining concerns sentencing for financial crimes based on the size of the loss. Federal sentencing guidelines call for many white-collar criminals to be punished based on the scope of financial loss incurred by their misdeeds.¹⁴¹ Adding insult to injury, the prosecutor need not prove that the loss was intended by the defendant; highly speculative yet objectively foreseeable losses may nevertheless be incorporated into a sentencing recommendation.¹⁴²

136. Simon McCormack, *Tens of Thousands of Innocent People Have Pled Guilty, Judge Jed Rakoff Says*, HUFFINGTON POST (May 29, 2014), http://www.huffingtonpost.com/2014/05/29/thousands-innocent-pled-guilty_n_5412494.html (alteration in original).

137. Telephone Interview with F. Lee Bailey, renowned former trial lawyer (May 2015) (interview notes on file with author).

138. Black, *supra* note 4.

139. See Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL’Y REV. 61, 63 (2015).

140. Davis, *supra* note 104 at 4-5.

141. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b) (2015).

142. See Mirko Bagaric, Jean Du Plessis & Jaclyn Silver, *Halting the Senseless Civil War Against White-Collar Offenders: “The Conduct Undermined the Integrity of the Markets” and Other Fallacies*, 2016 MICH. ST. L. REV. 1019, 1035 (2016).

This opens a door for prosecutors to manipulate the amount of loss, yielding astonishing sentences under the guideline formulae.¹⁴³ For example, Bernard Madoff received a 150-year prison sentence in 2009 after confessing to operating a \$65 billion Ponzi scheme.¹⁴⁴ Similarly, financier R. Allen Stanford was sentenced to 110 years in prison for running a \$7 billion Ponzi scheme.¹⁴⁵ In state courts, violent offenders convicted of murder or intentional manslaughter face an average sentence of approximately 20 years.¹⁴⁶ Many violent offenses command a far lower sentence under current federal guidelines.¹⁴⁷

Whether a defendant murders a wealthy victim or a homeless person, the sentence for the violent crime of murder is the same regardless of the financial condition of the victim. Likewise, the fact that the victim's death results in substantial financial losses for innocent parties does not have any bearing on the defendant's sentence. Rather, proper redress for financial damages is best handled in civil court, not criminal court. Yet, two similarly-situated white-collar criminal defendants can face enormous discrepancies in sentencing (upwards of fifty years in some cases) based solely on the amount of financial loss claimed by prosecutors.¹⁴⁸

The federal sentencing guidelines seek to curtail such absurdities by recommending that the "intended loss" for sentencing purposes be limited to those losses that "the defendant purposely sought to inflict."¹⁴⁹ Still, because of this focus on financial loss, the white-collar defendant faces a disparity in sentencing when compared to those defendants charged with committing violent crimes.¹⁵⁰ With modern plea bargain practice, violent criminals arguably enjoy better treatment than their white-collar counterparts. Because financial loss is often not a significant factor in sentencing for violent crimes, violent criminals stand to benefit from a shorter sentence reached under a plea agreement.

143. See Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After Booker*, 47 WM. & MARY L. REV. 721, 728 (2005).

144. Diana B. Henriques, *Madoff Is Sentenced to 150 Years for Ponzi Scheme*, N.Y. TIMES (June 29, 2009), <http://www.nytimes.com/2009/06/30/business/30madoff.html>.

145. Clifford Krauss, *Stanford Sentenced to 110-Year Term in \$7 Billion Ponzi Case*, N.Y. TIMES (June 14, 2012), <http://www.nytimes.com/2012/06/15/business/stanford-sentenced-to-110-years-in-jail-in-fraud-case.html>.

146. SOURCEBOOK, *supra* note 2, t.5.48.2006.

147. U.S. SENTENCING GUIDELINES MANUAL § 2A1.1. (2015)

148. *United States v. Gupta*, 904 F.Supp.2d 349, 351 (2012).

149. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 Application Note 3(A)(ii) (2015).

150. See Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 501, 515 (2004).

B. *Tainting the Criminal Legal System*

Plea bargains are now used in modern practice to circumvent¹⁵¹ the the Sixth Amendment's guarantee of a fair trial.¹⁵² Under the present system of plea bargains, a convicted criminal, especially a white-collar criminal who rejects a plea, is likely subjected to extended punishment for having availed himself of the Sixth Amendment right to trial.¹⁵³ Those defendants who choose to go to trial and are convicted suffer, on average, sentences that are three times longer than those who are instead sentenced pursuant to a plea agreement.¹⁵⁴ The use of plea bargains has impaired the Sixth Amendment in modern day jurisprudence, creating a new crime called "trial."¹⁵⁵

Post Civil War-era advocates of the widespread use of plea bargaining fail to adequately consider the sheer power that plea bargains afford prosecutors in an era of sentencing guidelines and mandatory minimum sentences.¹⁵⁶ In the absence of defined guidelines, effective prosecutorial accountability and adequate scrutiny,¹⁵⁷ the widespread use of plea bargains in modern times¹⁵⁸ has led to abuse and corruption¹⁵⁹ among judges, defense attorneys, and especially prosecutors:

Much of what passes for legal behavior might in fact be illegal, but because prosecutorial practices are so rarely challenged, it is difficult to define the universe of prosecutorial misconduct. Because it is so difficult to discover, much prosecutorial misconduct goes unchallenged, suggesting that the problem is much more widespread than the many reported cases of prosecutorial misconduct would indicate. As one editorial described the problem, "[i]t would be like trying to count drivers who speed; the problem is larger than the number of tickets would indicate."¹⁶⁰

As famed law professor and attorney Alan M. Dershowitz has observed, "[p]rosecutors are supposed to be interested in justice: the motto on the wall of the Justice Department proclaims that the government 'wins its point

151. *Missouri v. Frye*, 566 U.S. 133, 143 (2012).

152. Michael Nasser Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3606-07 (2013).

153. See Bibas, *supra* note 143, at 728.

154. Nicole Flatow, *Federal Drug Defendants Who Don't Plead Guilty Spend Three Time Longer In Prison, Report Finds*, THINKPROGRESS, (Dec. 5, 2013), <https://thinkprogress.org/federal-drug-defendants-who-dont-plead-guilty-spend-three-times-longer-in-prison-report-finds-5adc67411411>

155. This term was coined by Professor Roy Black. See *supra* note 4.

156. JOHN EMERICH EDWARD DALBERG-ACTON, HISTORICAL ESSAYS & STUDIES 504 (1907) ("Power tends to corrupt and absolute power corrupts absolutely.").

157. Rakoff, *supra* note 4.

158. *Id.* ("In 2013, while 8 percent of all federal criminal charges were dismissed . . . more than 97 percent of the remainder were resolved through plea bargains, and fewer than 3 percent went to trial. The plea bargains largely determined the sentences imposed.").

159. See Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 463-64 (1971).

160. Davis, *supra* note 104, at 126.

whenever Justice is done.’ But in real life, many prosecutors reverse the motto and believe that justice is done whenever the government wins its point.”¹⁶¹

The Supreme Court is partly to blame by imposing extremely high thresholds¹⁶² for judicial review of prosecutorial misconduct.¹⁶³ Indeed:

The Court’s rulings have sent a very clear message to prosecutors—we will protect your practices from discovery; when they are discovered, we will make it extremely difficult for challengers to prevail; and as long as you mount overwhelming evidence against defendants, we will not reverse their convictions if you engage in misconduct at trial.¹⁶⁴

Such jurisprudence shields prosecutors from any accountability, sanctioning their actions as harmless error. A survey by the Center for Public Integrity discovered *only forty-four cases* since 1970 in which prosecutors were held accountable for misconduct that infringed on the constitutional rights of criminal defendants.¹⁶⁵ The range of offending conduct included discovery violations; improper contact with judges, witnesses, defendants, or jurors; prosecuting cases without probable cause; harassing or threatening defendants; and using improper and misleading evidence.¹⁶⁶ In merely *two* of those cases was the prosecutor actually disbarred.¹⁶⁷

Furthermore, the white-collar criminal defense bar consists mostly of former federal prosecutors who later become defense lawyers and who, because of their past experience, know the extreme risks of choosing a trial and challenging the indictment.¹⁶⁸ They routinely advise their clients to take a plea agreement, rationally opting not to challenge the government knowing full well how much the prosecution can stretch the law and stack the counts.¹⁶⁹

Prosecutors have absolute discretion¹⁷⁰ throughout the plea-bargaining process,¹⁷¹ choosing who to indict, what charges to bring,¹⁷² and whether to

161. ALAN M. DERSHOWITZ, *THE BEST DEFENSE* xvi (1982).

162. See, e.g., *United States v. Mechanik*, 475 U.S. 66, 83 (1986) (Marshall, J., dissenting) (“We have recognized that the harmless-error doctrine, denying any remedy in cases of clear prosecutorial misconduct, can work very unfair and mischievous results.”) (internal quotation marks and citation omitted).

163. Davis, *supra* note 104, at 127.

164. *Id.* at 130.

165. Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 *HOFSTRA L. REV.* 275, 291 (2007).

166. *Id.* at 291-92.

167. *Id.* at 292.

168. Silverglate, *supra* note 16, at xlv.

169. *Id.*

170. White, *supra* note 159, at 449.

171. *Id.* at 446 (reporting that one prosecutor’s “assistant also noted that he would be more willing to offer concessions to induce a plea if he considered the defendant’s counsel personally objectionable.”).

stack the charges.¹⁷³ Overcharging – a practice of tacking additional charges – is a common tool a prosecutor can wield for leverage in the plea-bargaining process.¹⁷⁴ Such practice offers a twofold advantage for the prosecutor. First, with more charges on the menu, the prosecution enjoys a distinct advantage at the plea-bargaining stage or even at trial “because the additional charge or charges act as a ‘backup’ in case the jury fails to convict on the more relevant charges.”¹⁷⁵ If all else fails, the prosecution will most often resort to a conspiracy charge.¹⁷⁶ It is understood that:

Prosecutors are the most powerful officials in the criminal justice system. Their routine, everyday decisions control the direction and outcome of criminal cases and have greater impact and more serious consequences than those of any other criminal justice official. The most remarkable feature of these important, sometimes life-and-death decisions is that they are totally discretionary and virtually unreviewable.¹⁷⁷

Second, the prosecution is able to threaten defendants with draconian sentences under current sentencing guidelines. As one defense lawyer at the Public Defender Service for the District of Columbia^[1] remarked:

[P]rosecutors held almost all of the cards, and they seemed to deal them as they saw fit. Although some saw themselves as ministers of justice and measured their decisions carefully, very few were humbled by the power they held. Most wanted to win every case, and winning meant getting a conviction.¹⁷⁸

While a healthy degree of discretion is comprehensible and indispensable for prosecutors in performing their duties, accountability – as a core constitutional value – demands a check on their authority. A prosecutor’s “duty is not to simply represent the state in the pursuit of a conviction but to pursue justice. ‘Doing justice’ sometimes involves seeking a conviction and incarceration, but at other times, it might involve dismissing a criminal case or forgoing a prosecution.”¹⁷⁹ Prosecutors enjoy unchecked discretionary power to influence major stages of criminal legal proceedings while shielded from the public and accountable only to fellow prosecutors.¹⁸⁰ Since prosecutors hold such power, they need to be “held more accountable than

172. Shieler, *supra* note 3 at 115 (“[A] prosecutor can include or ignore elements of the crime. One made a gun magically disappear from a string of robberies to lower the charges and get a guilty plea[.]”).

173. *Id.*

174. See Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701, 703 (2014).

175. Davis, *supra* note 104, at 31.

176. Black, *supra* note 4.

177. Davis, *supra* note, 104 at 5.

178. *Id.* at 4.

179. *Id.* at 13.

180. *Id.* at 164.

other officials, not less.”¹⁸¹ Nevertheless, under modern plea bargaining, “the judiciary, the legislature, and the general public have given prosecutors a pass.”¹⁸²

Experience demonstrates that judges are not effective gatekeepers to filter the widespread use of plea bargains.¹⁸³ Some judges naturally prefer to accept a plea bargain than to preside over a long trial.¹⁸⁴ Judges openly defer to prosecutors and frequently follow their sentencing recommendations.¹⁸⁵ This “partnership” between prosecutors and judges further undermines defendants’ constitutional rights. As comedian Lenny Bruce summarizes: “The halls of justice. That’s the only place you see the justice, is in the halls.”¹⁸⁶

In 2003, a revision to the federal sentencing guidelines¹⁸⁷ required that, in order for a federal judge to issue a sentence lower than that specified in the guidelines, the judge must file a written report stating the reasons for bypassing the guidelines.¹⁸⁸ This step by Congress limited judicial involvement by *de facto* threatening judges; it was understood that:

[I]f you dare to exercise judicial independence and stray from the mandates of the Federal Sentencing Guidelines, you will have to justify your actions, not only to Congress but to the prosecutors who appear before you. Although federal judges have lifetime tenure, many critics of the Feeney Amendment viewed it as a sort of “blacklist” that threatened judicial independence.¹⁸⁹

Some judges reacted with outrage and signed numerous petitions against the Feeney Amendment.¹⁹⁰ Judge Guido Calabresi of the U.S. Court of Appeals for the Second Circuit confronted prosecutors in court over the matter, stating:

You’re telling me that the system we have set up, that has been set up by Congress, which removes discretion from the judges, has given discretion

181. *Id.* at 8.

182. *Id.*

183. According to one well-known jurist:

To take matters out of legislative hands, a rule must be in the Constitution—encoded in a way that puts it beyond the choice of the living. What’s going on here, however, is that Justices are changing the level of generality from the abstract to the concrete. Filling in details is a necessary task, but why does it belong to the Court in a way that the legislature cannot review? When there’s a general statute, the Court goes exactly the opposite way: the agency, not the judiciary, gets extra scope for choice.

Frank H Easterbrook, *Plea Bargaining is a Shadow Market*, 51 DUQUESNE L. REV. 551, 558 (2013).

184. Rakoff, *supra* note 4.

185. Black, *supra* note 4.

186. THE YALE BOOK OF QUOTATIONS 111 (Fred R. Shapiro ed.) (2006).

187. See U.S. SENTENCING GUIDELINES MANUAL (2015).

188. Davis, *supra* note 104, at 109.

189. *Id.*

190. *Id.* at 109.

to your office.... This case is a perfect example of you telling me that your office made some decisions with respect to what is right and just and true, and the district court is thereby prohibited from having any say in the matter.¹⁹¹

Finally, in 2005, the Supreme Court in *United States v. Booker*¹⁹² rendered the Feeney Amendment toothless. The Court held that the Sentencing Reform Act of 1984 was unconstitutional to the extent it requires that the judge sentence a defendant to a period of imprisonment higher than the statutory maximum subject to the judge's determination of certain facts by a preponderance of the evidence.¹⁹³ Judges now consider the guidelines but are allowed then to depart from those guidelines as long as they give their reasons.¹⁹⁴ Finally, sentences may be challenged on appeal and even overturned for unreasonableness.¹⁹⁵

However, the sentencing guidelines continue to be religiously or habitually used, even though judges have more freedom and are not technically bound by them.¹⁹⁶ Also, cooperation agreements allow judges to radically reduce sentences.¹⁹⁷ In reality, to this day, by shaping the plea agreement, prosecutors define the sentence for the defendant, compromising the true ability of the judge to impartially review the charges.¹⁹⁸ Retired Federal Judge Nancy Gertner, Senior Lecturer on law, Harvard Law School, regrets the sentencing decisions given out over the span of her 17-year career, reflecting:

80 percent [of my decisions] I believe were unfair and disproportionate. I left the bench in 2011 to join the Harvard faculty to write about those sto-

191. *Id.* at 110.

192. 543 U.S. 220 (2005).

193. Justice Breyer, writing for the majority on this issue, stated:

We answer the question of remedy by finding the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. §3553(b)(1) (Supp. IV), incompatible with today's constitutional holding. We conclude that this provision must be severed and excised, as must one other statutory section, §3742(e) (2000 ed. and Supp. IV), which depends upon the Guidelines' mandatory nature. So modified, the Federal Sentencing Act, see Sentencing Reform Act of 1984, as amended, 18 U.S.C. § 3551 *et seq.*, 28 U.S.C. § 991 *et seq.*, makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, see 18 U.S.C. A. §3553(a)(4) (Supp. 2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see §3553(a) (Supp. 2004).

Id. at 245.

194. Davis, *supra* note 104, at 112.

195. *Id.*

196. See Norman C. Bay, *Prosecutorial Discretion in the Post-Booker World*, 37 MCGEORGE L. REV. 549, 564 (2006).

197. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2015).

198. Rakoff, *supra* note 4.

ries—to write about how it came to pass that I was obliged to sentence people to terms that, frankly, made no sense under any philosophy.¹⁹⁹

Just this year, the Appeals Court for the Twelfth Appellate District of Ohio vacated a sentence found to reflect a “trial tax” imposed on a defendant.²⁰⁰ In *State v. Noble*,²⁰¹ the defendant declined to enter a plea agreement and was subsequently convicted at trial. At sentencing, the trial court judge imposed a lengthy prison sentence based, in part, on the fact that the defendant had neglected to enter into a plea agreement with prosecutors, stating, “[y]ou don’t get the same kind of leniency you would have gotten if you had just fessed up, taken responsibility and said, okay, I got caught, I screwed up, now what’s my prison sentence.”²⁰² In deciding to vacate the trial judge’s sentence, the appeals court referred to earlier Ohio state court rulings that had found unconstitutional those sentences designed to punish defendants who choose to stand trial.²⁰³ In one such case, *State v. O’Dell*, the court observed that “a defendant is guaranteed the right to a trial and should never be punished for exercising that right[.]”²⁰⁴ Likewise, in *State v. Scalf*,²⁰⁵ the court explained that “[t]he augmentation of sentence based upon a defendant’s decision to stand on his right to put the government to its proof rather than plead guilty is improper.” Citing this precedent, the appeals court in *Noble* concluded that “[s]uch a sentence delivered unclearly does not shine brightly upon the fair and even administration of justice required by law.”²⁰⁶

The overuse of plea bargains has even corrupted defense attorneys.²⁰⁷ It is easier to earn a fee for having concluded a plea agreement than to prepare for and conduct a lengthy and unprofitable trial. Even the most ethical lawyer is challenged by *Lafler v. Cooper*²⁰⁸ to think twice before advising a

199. Nancy Gertner, Senior Lecturer on Law, Harvard Law School, Welcome and Opening Session at the Aspen Ideas Festival (June 25, 2015), <http://thefreethoughtproject.com/federal-judge-admits-drug-war-tearing-country-apart-regrets-80-rulings/#tCQ36lWIE3XdFk03.99>.

200. *State v. Noble*, 2015-Ohio-652, 5 (Ohio Ct. App. Feb. 23, 2015), <http://www.supremecourt.ohio.gov/rod/docs/pdf/12/2015/2015-Ohio-652.pdf>.

201. *Id.* at 4.

202. *Id.* at 3.

203. *Id.* at 6.

204. *State v. O’Dell*, 543 N.E.2d 1220, 1227 (Ohio 1989).

205. *State v. Scalf*, 710 N.E.2d 1206, 1210-11 (Ohio Ct. App. 1998).

206. *Noble*, 2015-Ohio-652, 5-6.

207. See *Lafler v. Cooper*, 566 U.S. 156, 174 (2012); See also Davis, *supra* note 104, at 57.

208. 566 U.S. at 174. According to one scholar:

In [*Missouri v. Frye*, 566 U.S. ___, 132 S.Ct. 1399 (2012)] and *Lafler*, the Supreme Court reinstated plea offers after the defendants successfully claimed ineffective assistance of counsel. The dissents in both cases predict that the Court’s chosen remedy could result in further constitutional litigation with respect to plea bargaining, and that rather than solving a problem, the Court created a new field of litigation.

Mike Work, *Creating Constitutional Procedure: Frye, Lafler, and Plea Bargaining Reform*, 104 J. CRIM. L. & CRIMINOLOGY 457, 459 (2014).

client to refuse a plea offer, lest the lawyer be cited for rendering ineffective assistance of counsel. Furthermore, mandatory minimum sentences invite defense attorneys to advise their clients to take a plea offer that they may have counseled against earlier.²⁰⁹ In support of defense counsel, they often do not have time or resources to properly investigate the case, nor can they discover weaknesses in the government's case under a plea offer made with a demand for immediate acceptance or rejection.²¹⁰ A defendant may have a strong defense, but his attorney may not have the time to evaluate the viability of any defense properly.²¹¹

Moreover, evidence that is inadmissible at trial (e.g., hearsay evidence, unqualified statements of opinion) is gathered by an arm of the court — the probation department — following the plea agreement and used to formulate a sentencing recommendation.²¹² The probation department contacts former employers, business partners, ex-spouses, and many other individuals who may harbor a grievance completely unrelated to any criminal activity.²¹³ As a result, material that would be inadmissible at the trial phase under constitutional principles is admitted by the court for the purpose of sentencing.²¹⁴

IV. FIXING THE BROKEN SYSTEM

A. *Deterring Over-Criminalization of Non-Violent Behavior*

The wrinkles presented by plea bargaining in the era of unchecked prosecutorial power are nothing new. Legal scholars such as Blackstone foresaw these same issues nearly two centuries ago,²¹⁵ and the subject still stirs heated debate. While there are no easy solutions to cure the slow deterioration of justice and expanded governmental power, there are a few ideas for reform.

First, over-criminalizing is not effective if the modern criminal justice system is unable to resolve ever-expanding crimes without violating the U.S. Constitution. As observed by the United States Supreme Court in *Evitts v. Lucey*, “[i]n short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution and, in particular, in accord with the

209. Davis, *supra* note 104, at 57.

210. *Id.* at 57-58.

211. *Id.* at 58.

212. Shipler, *supra* note 3, at 122-23.

213. *See id.*

214. *Id.*

215. *Id.* at 108.

Due Process Clause.”²¹⁶ Over-criminalizing a vast array of behaviors has partly led to the current need for plea bargaining. Some laws, such as those prohibiting fornication or adultery, “stay on the books long after social mores about these behaviors have changed.”²¹⁷ Other laws are designed to have the potential to be applied in a broader context than as perhaps originally envisioned. For example, it may make sense to prosecute a gambling ring in a jurisdiction that prohibits it, “but not for individuals placing small bets during a Saturday night poker game in a private home.”²¹⁸

In 2010, the conservative Heritage Foundation and the liberal National Association of Criminal Defense Lawyers (NACDL) joined in the publication of “Without Intent”, a report detailing a major shortcoming in Congress’s drafting of criminal laws.²¹⁹ The report established that, of the 446 nonviolent and non-drug-related criminal laws proposed in the 109th Congress, more than 50% of these new “crimes” did not require the prosecutor to establish that the defendant had acted with any criminal intent.²²⁰ A separate analysis by civil rights attorney Henry Silverglate has determined that the average citizen unknowingly commits *three federal crimes on any given day*.²²¹ The vast array of potential crimes enables a prosecutor, at his or her absolute discretion, to target any individual.²²² As Robert H. Jackson, U.S. Supreme Court Justice and Chief U.S. Prosecutor at Nuremberg stated, “[i]f the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Here one finds the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted.”²²³

If there are too many crimes on the books, and not enough space to uphold the constitutional rights of the accused, the penal statutes should yield to the Constitution. Besides the exceedingly high number of crimes being added every day, many current laws are vague and open to a liberal interpretation in favor of the government rather than the accused. Congress should form a commission to review the scope of existing crimes with the express purpose of winnowing the list of crimes that subject an accused to

216. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985).

217. *Davis*, *supra* note 104, at 13.

218. *Id.*

219. Edwin Meese III & Norman Reimer, *Foreward* to Brian W. Walsh & Tiffany M. Joslyn, *WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW*, VI (2010).

220. Brian W. Walsh & Tiffany M. Joslyn, *WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW*, IX (2010).

221. Alan M. Dershowitz, *Foreward* to Silverglate, *supra* note 16, at xvix.

222. *Id.*

223. *Id.*

incarceration of a substantial period. As the Roman historian Tacitus stated centuries ago, “The more corrupt the state, the more numerous the laws.”²²⁴

Second, just as every bad act should not necessarily be classified as a crime punishable with imprisonment, not every crime should be resolved through plea bargaining. There is some historic precedent for using plea bargains to resolve common law criminal cases in which the weight of the evidence more than sufficiently favors the prosecution. Historically, public drunkenness was the common law crime most frequently resolved through plea bargaining.²²⁵ By comparison, complex criminal cases involving unresolved issues of law, frequent in white-collar criminal cases, should not be dispatched through plea bargaining.

Legal scholar Doug Lieb argues for the increased use of the doctrine of vindictive prosecution: that a prosecutor should be prohibited from punishing a criminal defendant for having exercised the right to go to trial.²²⁶ Lieb contends that an updated vindictive prosecution standard needs to be adopted, “as a wrong would be responsive to salient problems in today’s criminal justice system.”²²⁷ He further proposes that greater use of the doctrine of vindictive prosecution is feasible, “imposing boundaries on prosecutorial discretion, valuing the constitutional right to trial, and permitting efficient bargains—in minimally disruptive fashion.”²²⁸

B. *The “Texas Shoot Out”: From the Boardroom to the Courtroom*

If we analogize plea bargaining to a business transaction, perhaps one area of guidance is a form of cross-purchase agreement among shareholders of a company that has been regarded for yielding equitable results: The “Texas Shoot Out.”²²⁹ In this type of arrangement, one shareholder seeking to purchase shares from another shareholder offers a price that creates both a call and a call option: the offeror has a call right to purchase the shares at the offer price, but – by virtue of making the offer to purchase – the offeree acquires a call right on the offeror’s own shares at that same offer price.²³⁰

224. OXFORD UNIV. PRESS, OXFORD DICTIONARY OF PROVERBS, 289 (John Simpson & Jennifer Speake eds., 5th ed. 2009). Tacitus is also quoted as saying: “Before, we had ‘crimes’ that oppressed us; Now, we have ‘laws’ that oppress us.” “T” *Quotes On Power*, ONPOWER.ORG <http://www.onpower.org/quotes/t.html> (last visited Apr. 12, 2017).

225. See Robert Schehr, *The Emperor’s New Clothes: Intellectual Dishonesty And The Unconstitutionality of Plea-Bargaining*, 2 TEX. A&M L. REV. 385, 386 (2015).

226. Doug Lieb, Note, *Vindicating Vindictiveness: Prosecutorial Discretion and Plea Bargaining, Past and Future*, 123 YALE L.J. 1014, 1021 (2014).

227. *Id.*

228. *Id.*

229. Manie, Spoelstra, *The ‘Texas Shoot Out’ And Other Ways To Get Out Of Deals!*, MEDIATE.COM (June 2009), <http://www.mediate.com/articles/spoelstra6.cfm>.

230. *Id.*

Under these terms, the offeror needs to consider that too low a purchase price will entice the offeree to purchase the offeror's shares at that low price.²³¹

A similar method with plea bargains would be one where the prosecutor can "call" the defendant to plead guilty and accept punishment under the terms of a plea agreement; simultaneously, the defendant can compel the prosecutor to "put" the charges, opting for a trial in which the charges contained in the plea agreement are the only charges the defendant can face. The prosecutor cannot "stack" additional charges if the defendant chooses to avail himself of a trial. Nor can the prosecutor offer a plea agreement under any other terms except those that limit the charges the prosecutor can bring if the defendant turns down the plea offer.

Some may argue that this scheme would discourage prosecutors from offering plea bargains, but that is the point of this exercise. Restricting the use of the plea bargain under this approach requires that the prosecutor have confidence in its case before offering a plea. Likewise, the defendant would not be penalized for having availed himself of the right to trial under the Sixth Amendment.²³² Those prosecutors who are focused on furthering justice, and not just on advancing their personal careers by winning points, should not have difficulty with such a modest modification of the "bargain."

V. CONCLUSION

Plea bargaining is not evil in and of itself. However, the overuse of plea bargaining has vaporized those individual protections constitutionally guaranteed through our adversary legal system. If plea bargains are systemically important to the criminal justice system, it is equally true that the Constitution requires that counsel engage in plea bargaining to serve the best interests of the defendant. Rather than leaving defendants to the mercy of prosecutors, courts should seek to enforce new constitutional protections, including a bar on secret negotiations, to curb abuse in the plea bargaining

231. Spoelstra's description of the Texas Shoot Out is a reverse of this, but with similar effect: The offeror names a price at which he is willing to sell his shares, creating a put right in the offeree to demand that the offeror instead purchase the offeree's shares at that price. The offeror needs to consider that demanding too high a sales price might require that the offeror buy out the other shareholder at that price. *Id.*

232. Shipler believes that the Sixth Amendment owes its origin to a fundamental value persisting throughout the history of Western society:

From Athens, which assembled a jury of some five hundred for the trial of Socrates, the concept passed to early Rome with jurors drawn from the ranks of nobles, and into the Magna Carta's guarantee that "no freeman is to be taken or imprisoned . . . save by lawful judgment of his peers or by the law of the land.

Shipler, *supra* note 3, at 107.

process. If plea bargains are so essential to the U.S. modern criminal system that 97% of cases end up in plea agreements, then the focus should shift to filtering cases for “grey-litigious areas of the law and unresolved state of mind related charges,” including crimes *mala prohibita*,²³³ which should instead be submitted to trial.²³⁴ As Chief Justice Ryan said in *Wight v. Rindskopf*,

The profession of law is not one of indirection, circumvention, or intrigue. . . . Professional function is exercised in the sight of the world. . . . Private preparation goes to this, only as sharpening the sword goes to battle. Professional weapons are wielded only in open contest. No weapon is professional which strikes in the dark. . . . Justice will always bear litigation; litigation is . . . the safest test of justice.²³⁵

All other crimes, including those *mala in se*,²³⁶ should be resolved through plea bargains negotiated in a more balanced environment, with evidence fully exchanged before a plea may be offered. Furthermore, the drastic disparity in sentences between those convicted at trial and those entering a plea should be eliminated.

One suggested business model for leveling the bargaining powers would bring both parties to the position where each side has something to win and lose. “[I]t is important to formulate guidelines which retain the advantages yet minimize the undesirable consequences of plea bargaining.”²³⁷ According to Professor Davis of American University’s Washington College of Law:

In sum, neither the history of the development of the American prosecutor nor an examination of the intent of the framers of the Constitution justifies the current model of the prosecution function. Our system of checks and balances has proven ineffective in restraining prosecutorial power [especially in regards to plea bargaining]. The judicial branch has failed to

233. According to Black’s Law Dictionary, a crime *malum prohibitum* means, A wrong prohibited; a thing which is wrong *because* prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden **by** positive law; an act involving an illegality resulting from positive law.

Mala prohibita, BLACK’S LAW DICTIONARY (10th ed. 2014).

234. As Thomas Jefferson profoundly stated, “I consider trial by jury as the only anchor yet devised by man, by which a government can be held to the principles of its constitution.” Shipler, *supra* note 3, at 106.

235. *Wight v. Rindskopf*, 43 Wis. 344, 356-57 (1877).

236. A crime *malum in se* is defined as:

A wrong in itself; an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law . . . An act is said to be *malum in se* when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state.

Mala in se, BLACK’S LAW DICTIONARY (10th ed. 2014).

237. White, *supra* note 159, at 441.

check prosecutorial overreaching, and the legislative branch traditionally has passed laws that increase prosecutorial power.²³⁸

The modern plea bargaining system requires reform so as to restore the defendant's right to trial and the adversary process that is an essential aspect of trial. The right to trial pursuant to an adversary system of justice validates our nation's character as much as it serves to satisfy requirements under the U.S. Constitution. Indeed:

The presumption of innocence, the rights to counsel and confrontation, the privilege against self-incrimination, and a variety of other trial rights, matter not only as devices for achieving or avoiding certain kinds of trial outcomes, but also as affirmations of respect for the accused as a human being—affirmations that remind him and the public about the sort of society we want to become and, indeed, about the sort of society we are.²³⁹

238. Davis, *supra* note 104, at 164-65.

239. Laurence H. Tribe, *Trial by Mathematical Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1392 (1971).