GREATER OF TWO EVILS: TRIAL PENALTY OR PLEA PENALTY?

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INTRODUCTION

As the only individual right acknowledged in both the original Constitution and the Bill of Rights,[1] the right to a trial by jury is fundamental in America.[2] But criminal trials have become a "legal artifact" in American jurisprudence, replaced by plea bargaining.[3] Today, in this age of overcriminalization,[4] harsh sentences,[5] and unchecked prosecutorial power,[6] nearly all criminal cases end in guilty pleas.[7] While many scholars and attorneys decry how few criminal cases ever go to trial, most agree that there are few reasonable alternatives in light of the sheer number of criminal cases filed each year.[8] While the plea bargaining system[9] is nothing new in America, the steady swell in the plea bargain rate over the course of the last century has led to a system that not only features pleas but relies on them to keep the entire criminal judicial system afloat.[10] Reliance on a system that funnels people—even those who are innocent or wrongfully charged—into a

[1] Ramos v. Louisiana, No. 18-5924, slip op. at 4 (U.S. Apr. 20, 2020) (asserting that the Constitution guarantees criminal jury trials "*twice*—not only in the Sixth Amendment, but also in Article III.") (emphasis in original); *see also* Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part) ("When this Court deals with the content of this [criminal jury trial] guarantee—the only one to appear in both the body of the Constitution and the Bill of Rights—it is operating upon the spinal column of American democracy.").

[2] U.S. CONST. art. III, § 2; U.S. CONST. amend. VI.

[3] THEA JOHNSON, AM. BAR ASS'N CRIM. JUST. SECTION, PLEA BARGAIN TASK FORCE REPORT 6 (2023), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf [https://perma.cc/U2CE-ZSFA].

[4] Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695 (2017).

[5] Celesta A. Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991-1992*, 31 L. & SOC'Y REV. 789 (1997).

[6] Casey Bastian, *Power of the Prosecutor in America: Abuse, Misconduct, Unaccountability, and Miscarriages of Justice*, CRIM. LEGAL NEWS (March 15, 2023), https://www.criminallegalnews.org/news/2023/mar/15/power-prosecutor-america-abuse-misconduct-unaccountability-and-miscarriages-justice.

[7] NAT'L ASS'N OF CRIM. DEF. LAWS., *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf [https://perma.cc/XP4B-DM4S].

[8] Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 87 (2005). *See also* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979) (discussing the "concept of a bygone golden age in which plea negotiation was unknown, an age from which we departed inadvertently and largely as a result of laziness, bureaucratization, overcriminalization, and economic pressure").

[9] In this Article, the "plea bargaining system" refers to the negotiation in a criminal case between the prosecution and defense that often leads to an agreement and concessions. The simplest form of plea bargaining is as follows: a prosecutor drafts a plea offer, which a defendant accepts, rejects, or negotiates. When a defendant accepts a plea offer, they "exchange pleas of guilty (and thus waive their right to trial by jury) . . . for charge- or sentence-related concessions." Bruce P. Smith, *Plea Bargaining and the Eclipse of the Jury*, 1 ANN. REV. L. & SOC. SCI. 131, 132 (2005).

[10] *See infra* Section A.

guilty plea rather than toward a trial, and the accompanying risk of receiving a longer sentence, runs counter to the individual rights that the Constitution protects and the "justice for all" principle that America purports to guarantee.[11]

Fueling the plea bargaining system is the trial penalty: the consequences that a defendant faces by going to trial, getting convicted, and receiving a longer sentence[12] than that offered by a plea deal.[13] The threat of a trial penalty has its advantages for all players in the criminal legal system. Some practitioners[14] and scholars in the legal community view the trial penalty as more of a "trial privilege."[15] These practitioners and scholars encourage attorneys to use trial penalties to steer defendants toward plea deals, assuming that such deals will "subject[] [defendants] to less time [in prison]."[16] Using the trial penalty to streamline plea negotiations also conserves resources,[17] specifically by freeing up prosecutors and judges to tackle other matters in their endless caseloads.[18] As the Supreme Court noted in *Missouri v. Frye*, "[t]he potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties."[19] Then, there are the prosecutors and defense attorneys who recognize the racism and injustice inherent in the criminal legal system and who use the trial penalty not as a threat but as a means of helping defendants escape a harsh system sooner rather than later.[20]

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[11] Pledge of Allegiance to the Flag, 4 U.S.C. § 4 (2024).

[12] In both state and federal jurisdictions, sentences for crimes are determined by the legislative body and embodied in state and federal criminal statutory codes. *See generally* Paul J. Hofer, *Federal Sentencing After* Booker, 48 CRIME & JUST. 137, 140 (2019). Each crime carries a specified sentence. *Id.* In federal court, judges have discretion when sentencing convicted defendants (since *United States v. Booker*, 543 U.S. 220 (2005)), though sentencing guidelines established by Congress have great "gravitational pull." *Id.* at 140. In state courts, judges generally have discretion in sentencing, except for statutes that carry mandatory minimums, and sentencing guidelines or statutes often recommend ranges for judges to consider. 21 AM. JUR. 2D *Criminal Law* § 749 (2024).

[13] NAT'L ASS'N OF CRIM. DEF. LAWS., *supra* note 7.

[14] In this Article, "practitioners" refers to both criminal prosecution and defense attorneys.

[15] Carrie Johnson, *The Trial Penalty: When Defendants Get A Worse Deal For Going To Trial*, NPR (May 3, 2023), https://www.npr.org/2023/05/03/1172807956/trial-penalty-plea-deal [https://perma.cc/X7SV-4TWT].

[16] *Id.*

[17] *See generally* Missouri v. Frye, 566 U.S. 134, 144 (2012) ("The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties.").

[18] Rory A. Eaton, *Driving A Hard Bargain: Accepting Responsibility for a Significant Curtailment of Federal Prosecutorial Discretion in United States v. Divens*, 57 VILL. L. REV. 111, 136 (2012).

[19] *Id.*

[20] Eva McKend & Brandon Tensley, *Progressive Prosecutors Face Tough Midterm Challenges*, CNN (Nov. 6, 2022), https://www.cnn.com/2022/11/06/us/progressive-prosecution-midterms-reaj/index.html [https://perma.cc/8U6S-CZL7].

It is no wonder that our system relies heavily on plea bargaining. In many ways, resolving cases through pleas benefits all players involved. For practitioners and courts, resolving cases through guilty pleas allows jurisdictions to redirect resources toward other cases that are proceeding to trial.[21] Understaffing in courts, public defenders' offices, and prosecutors' offices, as well as limited funding and sky-high caseloads signify that resources are scarce.[22] Scarce resources lead to delays in adjudication.[23] To demonstrate current delays despite protections such as the Speedy Trial Act,[24] a recent study of over 100 courts found that no court met the following national standard for felony cases: 75% of cases should be disposed of within 90 days, 90% within 180 days, and 98% within one year.[25] This obvious and egregious delay in criminal adjudication might explain some practitioners' interest in plea bargaining as a mechanism of reducing delay and increasing efficiency. Guilty pleas provide a way for practitioners to efficiently resolve cases, which is of great importance in a country where most, if not all, jurisdictions have limited resources.[26]

For defendants who are guilty of the crimes they are charged with (or guilty of those they were not charged with), plea bargaining incentivizes cooperation with prosecutors and accepting responsibility for their actions.[27] Without plea bargaining, hundreds of people across the country would face long wait times to have their day in court, time that would be lengthened exponentially if guilty pleas were not an option and all cases went to trial.[28] Plea deals also provide defendants and their families with finality, saving them the risk of lengthy criminal trials and facing potentially more severe sentences upon conviction.[29] In short, it would seem that plea bargaining benefits all players in the criminal legal system overall—and allows defendants to avoid a trial penalty.

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[21] *Id.*

[22] *See generally* Emily Rose, *Speedy Trial As a Viable Challenge to Chronic Underfunding in Indigent-Defense Systems*, 113 MICH. L. REV. 279 (2014).

[23] *Id.*

[24] 18 U.S.C. § 3161 (2008).

[25] Kat Albrecht, Maria Hawilo, Meredith Martin Rountree & Thomas Geeraghty, *Justice Delayed: The Complex System of Delays in Criminal Court*, 53 LOY. U. CHI. L.J. 747 (2022).

[26] Johnson, *supra* note 3.

[27] *Id.*

[28] I base this claim on the current guilty plea data and common sense. If the percentage of cases that end in pleas dropped, that drop would result in a direct rise in trials, minus only the cases that prosecutors decided to dismiss or divert. With courts already backlogged (*see* Amy Corral, Stephen Stock & Jose Sanchez, *Growing Backlog of Court Cases Delays Justice for Crime Victims and the Accused*, CBS NEWS (Dec. 20, 2022), https://www.cbsnews.com/news/growing-backlog-of-court-cases-delays-justice-for-crime-victims-and-the-accused [https://perma.cc/U4T4-KQCK]), an increase in trial numbers means more backlog and more defendants waiting in queue for their trial.

[29] *Johnson, supra note* 3.

However, the trial penalty and the ensuing prevalence of guilty pleas have dire consequences for people convicted of crimes, especially those wrongfully convicted.[30] By accepting a guilty plea, a defendant foregoes important constitutional rights, such as the right against self-incrimination,[31] the right to a trial by jury,[32] the right to confront and cross-examine one's accusers[33] and the right to appeal.[34] Once a guilty plea has been entered and accepted by a court, it is extremely difficult—and therefore rare—for a defendant to retract their plea.[35] These everlasting consequences, and many others, will be developed through this Article and are here termed the "plea penalty," building off the concept introduced by David Abrams' 2013 critique of the trial penalty in *Putting the Trial Penalty on Trial.*[36] This Article challenges the commonly understood concept of a trial penalty by comparing it to the less-understood but likewise grave plea penalty.

Part I explores both the trial penalty and plea penalty, identifying the role each plays in and the effects each has on our criminal legal system. It expands the plea penalty concept through a qualitative lens, rather than Abrams' economic lens, arguing that reliance on the trial penalty is misplaced and has led to a burdensome plea bargaining system. Part II examines the disadvantages that defendants face by pleading guilty, from losing their constitutional rights to living with a conviction. Finally, rather than suggest a complete overhaul of the plea bargaining system, Part III proposes affirmative steps that practitioners and advocates can take so that justice, rather than efficiency, takes center stage in the criminal legal system. For prosecutors to truly seek justice, for defense attorneys to fiercely advocate on behalf of defendants, and for defendants to make fully informed decisions about their criminal cases, all players must begin to grasp that the plea penalty may be as severe as the trial penalty.

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30 Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice,* 154 U. PA. L. REV. 79 (2005).

31 U.S. CONST. amend. V.

32 *Id.*

33 U.S. CONST. amend. VI.

34 *See* James Lobsenz, *A Constitutional Right to an Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction*, 8 U. PUGET SOUND L. REV. 375 (1985) (arguing that a right to appeal in U.S. Constitution would make a significant difference in criminal law). Lobsenz also notes in this article that "virtually every state recognizes a right to appeal" in significant criminal cases. *Id.* at 376.

35 *See* Fed. R. Crim. Proc. 11. *See also* Dale Chappell, *Attacking the Guilty Plea: Art of Withdrawing a Guilty Plea*, CRIMINAL L. NEWS, Sept.15, 2020), https://www.criminallegalnews.org/news/2020/sep/15/attacking-guilty-plea-art-withdrawing-guilty-plea [https://perma.cc/VN8B-9XBD].

36 David S. Abrams, *Putting the Trial Penalty on Trial*, 51 DUQ. L. REV. 777 (2013). This Article is not without criticism. *See* Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L.J. 1195 (2015).

PART I

This Part takes a detailed and critical look at the plea bargaining system by outlining its history and deconstructing the trial penalty that perpetuates it.[37] Section A discusses the misconceptions that guilty pleas have been a part of United States criminal law since the nation's founding and that guilty pleas were likewise deeply rooted in English common law. It highlights the reticence of courts to "receive pleas of guilty during the formative period of common law and for centuries thereafter,"[38] noting that it was only fifty years ago that the Supreme Court reluctantly conceded the role that guilty pleas have in American law. After years of not only avoiding ruling on the legality and ethics of plea bargaining but actively discouraging it,[39] the Supreme Court noted in *Brady v. United States* that plea bargaining was indeed "inherent in the criminal law and its administration."[40] Section B defines the trial penalty and explains the U.S. criminal legal system's reliance on it.[41] Section B describes the reasons many practitioners put stock in the trial penalty, one of which is the belief that "defendants who *do* go to trial do so against their own best interest."[42] However, just as the trial penalty has its advantages, it also has its disadvantages, which are examined in the plea penalty analysis in Section C. Section C further defines and expands upon Abrams' term "plea penalty," addressing criticism of Abrams' article and suggesting a more nuanced interpretation of the concept.

A. Brief History of Plea Bargaining in America

The percentage of defendants who plead guilty rather than exercise their right to a trial before a court or a jury has been at or above ninety percent since the 1970s.[43] Proponents of plea bargaining[44] often say, without citing historical support or timelines, that the practice has been part of our criminal legal system since its inception.[45] Legal historians refute this claim, arguing

[37] Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt,* 32 STAN. L. REV. 887 (1980).

[38] Alschuler, *supra* note 8, at 40.

[39] *Id.*

[40] Brady v. United States, 397 U.S. 742, 751 (1970).

[41] Part I.B *infra*.

[42] Kim, *supra* note 36, at 1249.

[43] Alschuler, *supra* note 8, at 11.

[44] This Article does not use "plea bargaining" and "guilty pleas" interchangeably. Plea bargaining is the process by which guilty pleas are obtained. It is in plea bargaining where the problems lie, not guilty pleas. I base this conclusion on research included in this Article that sheds light on the severe downsides of using the trial penalty in plea bargaining. A guilty plea, however, could be obtained fairly and justly if the plea-bargaining process is fair and just. In other words, guilty pleas are simply the innocent child of plea-bargaining parents good or bad.

[45] Alschuler, *supra* note 8, at 2.

that "plea bargaining was essentially unknown during most of the history of the common law."[46] It was not until the middle of the nineteenth century that plea bargaining occurred with enough frequency to leave a trace in legal treatises and case reports, the primary records in which American legal history is found.[47] In fact, judges largely discouraged plea bargaining up to that point, as evidenced by the extremely low rate of guilty pleas in the few American criminal courts that kept records in the early nineteenth century.[48]

Even as plea bargaining became more widespread among practitioners, judges continued to discourage the practice well into the second half of the nineteenth century.[49] Legal historians argue that the Supreme Court likely would have ended the practice had they been presented a related case.[50] Nevertheless, plea bargaining continued, expanding with vigor after the enactment of liquor prohibition statutes and the ensuing rise in both laws and crimes.[51] For example, in 1908, guilty pleas constituted about fifty percent of federal convictions, which rose to seventy-two percent in 1917 and ninety percent in 1920.[52] At the state level, the percentage of cases ending in guilty pleas rose at different paces and times depending on the jurisdiction, but the percentage rose nonetheless.[53] The Supreme Court's disdain for the practice persisted.[54] But plea bargaining survived even the due process revolution—

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[46] *Id.*

[47] *Id.* at 5.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 6. *See also* Albert W. Alschuler, *Lafler and Frye: Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 704-05 (2013) (noting that the issue of whether a guilty plea is involuntary if a prosecutor induces it by promises of leniency *did* come before the Supreme Court in 1958, after a panel of the Fifth Circuit held it such in Shelton v. United States, 242 F.2d 101 (5th Cir.), *judgment set aside* en banc, 246 F.2d 571 (5th Cir. 1957), *rev'd per curiam*, 356 U.S. 26 (1958)). "Justice and liberty are not the subjects of bargaining and barter," said Judge Richard Rives, a judge on the *Shelton* Fifth Circuit panel. *Shelton*, 246 F.2d 571. But instead of deciding the issue, the Supreme Court reversed the case on an unrelated procedural issue. *Shelton*, 356 U.S. 26.

[51] Alschuler, *supra* note 8, at 6.

[52] Carroll C. Hincks, BOOK REVIEW, 45 YALE L.J. 189 (1935) (reviewing AM. L. INST., STUDY OF THE BUSINESS OF THE FEDERAL COURTS (1934))

[53] For a survey of just three states, see Alschuler, *supra* note 8, at 27.

[54] *Shelton*, 356 U.S. 26. Judges disdained plea bargaining for a number of reasons, including that pleas were generally distrusted; that the penalty of felonies was death, meaning guilty pleas were essentially a death sentence; the tradition that a guilty plea should not arise from "fear, menace, or duress" (W. STAUNFORDE, LES PLEES DEL CORONE 142-43 (1560)) and that confessions could not be used as evidence (Bram v. United States, 168 U.S. 532, 542-43 (1897)). In addition to the Supreme Court's wariness of plea bargains, state courts also worried over the practice: "The plea should be entirely voluntary by one competent to know the consequences and should not be induced by fear, misapprehension, persuasion, promises, inadvertence, or ignorance." Pope v. State, 56 Fla. 81 (1908). "All courts should so administer the law . . . as to secure a hearing upon the merits if possible." Deloach v. State, 77 Miss. 691, 692 (1900). "The 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." State v. Williams, 45 La. Ann. 1356, 1357 (1893). On the contrary, note that in the early 1900s,

a revolution that only exacerbated the time and strain of trials and bolstered the need for plea bargaining because of expanded due process rights of defendants (such as the incorporation of the Bill of Rights and the requirement for law enforcement officials to administer *Miranda*[55] warnings).[56] Finally, in 1970, the Supreme Court embraced the inevitability of guilty pleas when it declared, in *Brady v. United States*, that plea bargaining was "inherent in the criminal law and its administration."[57] The rise of plea bargaining only continued over the next several decades. Today, ninety-seven percent of criminal cases end in guilty pleas.[58]

The "mounting pressure for self-incrimination" that the plea bargaining system has become embodies an example of a retreat from justice and should lead Americans to question the quality of the criminal legal system.[59] Underpinning this retreat from justice is the trial penalty.

B. The Effects of the Trial Penalty

A trial penalty is the drawback of going to trial and risking a guilty verdict along with a harsh sentence. The trial penalty is expressed in a few ways. It is sometimes interchanged with the term "plea discount,"[60] but both reflect the difference between trial and plea sentences. According to one scholar, "'plea discount' reports this difference as a percentage of the average trial sentence while the 'trial penalty' reports this difference as a percentage of the average plea sentence."[61] More common, however, are the following two ways to express the trial penalty: (1) the difference between the potential trial sentence and the plea sentence or (2) the percentage increase of a trial penalty as compared to a plea penalty.[62] One commonsense conception of the trial penalty is calculated as follows: subtract the plea deal sentence from the potential sentence, and divide that total by the plea deal sentence and multiple that quotient by one hundred. As an example, imagine a prosecutor offers the following: "Defendant faces a potential thirty-year sentence, but if he pleads guilty, he could lock in a sentence of five years in prison." The

"[m]ost of the criticism came from the hawks of the criminal process rather than the doves," meaning that guilty pleas were seen as negative because they were too easy on guilty defendants. Alschuler, *supra* note 8, at 29.

55 Miranda v. Arizona, 384 U.S. 436 (1966).

56 Alschuler, *supra* note 8, at 6.

57 Brady v. United States, 397 U.S. 742, 751 (1970).

58 This statistic is based on data from the Bureau of Justice Statistics. Kim, *supra* note 36, at 1197.

59 Alschuler, *supra* note 8, at 40.

60 *See generally* Allison D. Redlich, Shi Yan, Robert J. Norris & Shawn D. Bushway, *The Influence of Confessions on Guilty Pleas and Plea Discounts*, 24 PSYCHOL. PUB. POL'Y & L. 147 (2018).

61 Kim, *supra* note 36, at n. 1.

62 *See generally* Daniel S. McConkie, *Judges As Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61 (2015).

trial penalty in this example is twenty-five years, or 500 percent of what it would have been.[63]

As previously noted, when presented with the option to go to trial and risk receiving a prison sentence that could be based on harsh sentencing guidelines or mandatory minimums, or the option to accept a shorter sentence by entering a guilty plea, a vast majority of defendants choose the latter.[64] The trial penalty has led to the ubiquity of guilty pleas and the rarity of criminal trials, both of which define modern criminal law in America.[65]

Despite the guilty plea seeming like the lesser of two evils, the plea bargaining system has seen significant, increasing criticism in recent years.[66] To address this criticism and combat the negative effects of plea bargaining, the American Bar Association's ("ABA") Criminal Justice Section formed the Plea Bargain Task Force: a team of judges, prosecutors, defense attorneys, academics, and politicians.[67] The Task Force compiled a report that acknowledged the plea bargaining system's benefits and addressed the critiques of the system.[68] They spent three years interviewing practitioners and those personally affected by the plea bargaining system, combing through related work of legal scholars, and analyzing state and federal criminal codes and patterns.[69] Ultimately, the Task Force concluded that, while the benefits of plea bargaining make sense "in moderation," they come with a cost "when they become the driving force of criminal adjudication."[70] For example, the report found that in the current system of plea bargaining, "efficiency and finality trump truth-seeking."[71]

Additionally, the threat of a trial penalty "short-circuits the process (from discovery to investigation to cross-examination) that can otherwise

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[63] For examples of these latter two expressions of the trial penalty in practice, *see* Brian D. Johnson, *Plea-trial Differences in Federal Punishment: Research and Policy Implications*, 31 FED. SENT'G REP. 256, 257 (April/June 2019).

[64] *See* Mary Price, *Weaponizing Justice: Mandatory Minimums, the Trial Penalty, and the Purposes of Punishment*, 31 FED. SENT'G REP. 309 (April/June 2019) (arguing that "the trial penalty is one of the most lethal tools in the prosecutor's toolkit," and that it is largely made possible through prosecutors' threat of "mandatory minimums"). Price posits that the trial penalty is the "prosecutor's affirmative decision to turn her back" on the duty to allow courts to impose a sentence that is proportionate, individualized, and advancing of the purposes of punishment "in favor of securing a swift conviction." *Id.*

[65] *See* Norman L. Reiner, *The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End*,
31 FED. SENT'G REP. 215 (April/June 2019).

[66] *See* Christina Swarns, *Why the Trial Penalty Must Go*, INNOCENCE PROJECT (June 1, 2023), https://innocenceproject.org/why-the-trial-penalty-must-go [https://perma.cc/74KX-8CDP].

[67] *Johnson, supra note 3.*

[68] *Id.*

[69] *Id.* at 6.

[70] *Id.* at 2.

[71] *Id.*

expose coercion, misconduct, and actual innocence."[72] The trial penalty does this by concluding a case rather than by requiring a prosecutor to prove a case against a defendant through evidence and testimony.[73] A guilty plea is a legal admission of guilt and the precursor to a conviction recorded by the court.[74] A guilty plea therefore reduces practitioners' motivation to seek additional, confirming evidence; dissolves the need to prepare for trial and require a high standard of proof; and rewards the legal but unethical practice of charging high and pleading low that is all-too-common in prosecutorial practice.[75] The "coercive pressure" of this "prosecutorial tool"[76]—the use of the trial penalty to funnel defendants toward plea bargaining—has created a deeply inadequate system in need of change.

C. Defining the Plea Penalty

This Article does not argue that defendants, prosecutors, or defense attorneys should ignore the trial penalty when negotiating pleas. A defendant potentially takes a very serious risk by exercising his, her, or their right to trial, and prosecutors, defense attorneys, and defendants must acknowledge the reality of a trial penalty in their bargaining process. But a trial penalty is not the only trouble that a defendant should weigh, or fear, when deciding to plead guilty. There is also a "plea penalty."

While a "trial penalty" is the defendant's risk of going to trial, a "plea penalty" is the defendant's risk of pleading guilty. The concept of a plea penalty was introduced in a controversial article, *Putting the Trial Penalty on Trial*, by David Abrams, Assistant Professor of Law, Business Economics, and Public Policy at University of Pennsylvania Law School.[77] In his article, Abrams presents the trial penalty as a "myth."[78] Abrams bases his conclusion on empirical research and economic theory, and posits that the plea penalty actually outweighs the trial penalty.[79] Specifically, Abrams' research suggests that judges' prison sentences resulting from guilty pleas are typically one year longer and incarceration is twice as likely as judges' sentences resulting from trials.[80] As the only article of its kind addressing the consequences of the trial, the Abrams study, unfortunately, is not conclusive enough to rely on to definitively show that the plea penalty is

72 Swarns, *supra* note 66.

73 *Id.*

74 *Johnson, supra note 3,* at 26.

75 Swarns, *supra* note 66.

76 McCoy & Mirra, *supra* note 37.

77 Abrams, *supra* note 36.

78 *Id.* at 785.

79 *Id.*

80 *Id.*

greater than the trial penalty. Indeed, the study has been criticized soundly by other scholars.[81] Yet, Abrams' concept of a plea penalty is ingenious and deserves expansion.

This Article borrows Abrams' term "plea penalty" but it does not adopt his conclusions that the trial penalty is only fiction or that the plea penalty outweighs the trial penalty, statistically or otherwise.[82] While Abrams[83] and his critics[84] base their conclusions on empirical data, this Article leans on characteristics and implications of plea bargaining and develops the concept of a plea penalty qualitatively, rather than on its numerical measurements and statistical analyses. Finally, this Article adopts Abrams' critique that the trial penalty is stressed in plea bargaining while the plea penalty is ignored, often to the detriment of the defendant.[85]

PART II: THE EVILS OF THE PLEA PENALTY

Myriad downsides accompany the plea penalty, some obvious and some less so. To begin, defendants forfeit the open, public trial afforded by the Sixth Amendment when they plead guilty and waive their right to a trial.[86] While plea deals are accepted in a public courtroom, the negotiation process typically happens off the record and completely outside the public eye, frustrating values emphasized in America's legal system, such as transparency, accountability, and justice.[87] Another element of the plea penalty relates to the common requirements that defendants must meet when accepting their plea deals—such as becoming an informant for others who

[81] Kim, *supra* note 36, at 1215-16. Kim argues that Abrams used common terminology, such as "trial penalty" and "incarceration rate," in a way not commonly understood or agreed upon in criminal law literature but in a way that reflects an economic model in which a "traditional rational actor model" is employed. *Id*. This reappropriation of common terminology misleads the readership and makes Abrams' conclusions suspect. *Id.* Kim also critiques Abrams' data, noting that Abrams did not include a metric for the severity of crimes, meaning that "his data cannot speak to whether trial defendants receive longer sentences *because* they went to trial or simply because trial defendants commit worse crimes on average than plea defendants." *Id.* For these reasons, Kim argues that Abrams' study does not support his own radical conclusion that defendants receive a worse penalty from pleading guilty rather choosing trial. *Id.* For additional scholars who refute Abrams' study, see McCoy & Mirra, *supra* note 34, at 101 n. 14, arguing that the weaknesses in Abrams' study is that:

> He included dismissed cases in his database, assigning them a sentencing value of zero and computing trial penalties from that standpoint. Prosecutors and defenders see this as an inaccurate modeling of rational choice, because thinking about sentences after a guilty plea compared to predicted sentence after a trial begins after a judge denies a motion to dismiss.

Id.

[82] *See generally* Abrams, *supra* note 36.

[83] *Id.*

[84] Kim, *supra* note 36.

[85] *See generally* Abrams, *supra* note 36.

[86] Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973, 975 (2021).

[87] *Id.* at 993.

might be guilty—that entangle defendants in a system that is set up to hurt rather than help them.[88] Pleading guilty also results in the defendant having a criminal record, which amplifies future sentencing,[89] degrades job opportunities,[90] reduces housing options,[91] and disrupts constitutional rights, such as owning a gun[92] and voting.[93] Additionally, one counterintuitive aspect to pleading guilty is that even if additional evidence arises that exonerates a defendant, the pled-to conviction is not automatically dismissed. Nor are the imposed sentences automatically suspended without the innocent defendant having to navigate difficult procedural hurdles such as seeking federal habeas corpus relief, executive clemency, or state post-conviction review.[94]

The lost or seriously diminished opportunity to hold police and prosecution accountable for their misconduct also falls under the plea penalty classification.[95] When a defendant pleads guilty, they waive their ability to challenge, for instance, evidence that was procured unconstitutionally or not provided at all, and therefore lose the opportunity to expose police misconduct.[96] In a criminal trial, the prosecution is held to the exclusionary rule, which generally prohibits evidence procured unconstitutionally through illegal searches or seizures to be used in trial.[97] Defense counsel uncovers and addresses exclusionary issues in pretrial litigation, something that has a weak counterpart, if one at all, in plea bargaining; in other words, exclusionary issues are rarely addressed in pre-plea litigation.[98] Without pretrial, or here, pre-plea litigation, potential evidentiary problems stemming from police and prosecutorial misconduct often go unnoticed and unresolved.[99]

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[88] Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51 (2012).

[89] *Id.* at 82.

[90] Walter I. Gonçalves, Jr., *"How Much Time Am I Looking at?": Plea Bargains, Harsh Punishments, and Low Trial Rates in Southwest Border Districts*, 59 AM. CRIM. L. REV. 293, 341 (2022).

[91] Teresa Wiltz, *Finding Housing is Hard For Former Prison Inmates. Can These Programs Help?* HUFFPOST (Apr. 23, 2019), https://www.huffpost.com/entry/former-prison-inmates-housing-challenge_b_5cbf2dd2e4b0bc8c0d9f8b59 [https://perma.cc/99EQ-MG8J].

[92] 18 U.S.C. §922(g) (1968).

[93] Maddy Teka, *Felon Voting Laws by State*, FINDLAW, (Nov. 30, 2022), https://www.findlaw.com/voting/my-voting-guide/felon-voting-laws-by-state.html [https://perma.cc/QC3R-CQGG].

[94] *See generally* ROBERT J. NORRIS, CATHERINE L. BONVENTRE, & JAMES R. ACKER, *When Justice Fails: Causes and Consequences of Wrongful Convictions*, 257, 260, 278 (2d ed., Carolina Acad. Press, 2d. ed. 2021).

[95] Johnson, *supra* note 3, at 14.

[96] *Id.*

[97] Mapp v. Ohio, 367 U.S. 643 (1961).

[98] *Id.*

[99] *Id.*

Another right implicated and jeopardized when negotiating plea agreements, and thus another aspect of the plea penalty, is the right to appeal. Without the ability to appeal, defendants waive the opportunity to address and resolve many potential legal issues in their cases.[100] The "appellate process is ill-equipped to address claims of factual accuracy," effectively sealing in factual inaccuracies at the trial level.[101] Even when that right is preserved, defendants "will have forfeited the opportunity to challenge most evidentiary and procedural issues in their cases," because those evidentiary and procedural issues do not have time to arise in the first place.[102]

Another part of the plea penalty is the difficulty in proving a plea was coerced. In order to plead, a defendant must relinquish several constitutional rights, including the right against self-incrimination,[103] the right to confront and cross-examine accusing witnesses,[104] the right to a trial by jury,[105] the right to require a prosecutor to establish all elements of the charged crime beyond a reasonable doubt,[106] and the right to appeal.[107] To ensure that these rights are relinquished constitutionally, a defendant must relinquish them knowingly, intelligently, and voluntarily.[108] Judges are responsible for ensuring that a plea is entered into knowingly, intelligently, and voluntarily, and carry out this charge by engaging in a dialogue with defendants in open court.[109] In that discussion, defendants must respond to the question, "Are you in fact guilty?"[110] Defendants who maintain their innocence and answer in the negative are still allowed to plead guilty.[111] This illogical practice was sanctioned by the Supreme Court in *North Carolina v. Alford*.[112] The defendant in *Alford* received a plea offer that would have been irrational to deny,[113] a type of offer that the ABA today considers "inherently coercive":

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100 NORRIS, BONVENTRE & ACKER, *supra* note 94, at 256, 257, 278.

101 *Id.*

102 *Id.* at 117.

103 McCoy & Mirra, *supra* note 34.

104 Robert Schehr, *The Emperor's New Clothes: Intellectual Dishonesty and the Unconstitutionality of Plea-Bargaining*, 2 TEX. A&M L. REV. 385, 395 (2015).

105 Schehr, *supra* note 104, at 395.

106 Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 229 (2006).

107 NORRIS, BONVENTRE & ACKER, *supra* note 94, at 189.

108 *Id.* at 119.

109 Boykin v. Alabama, 395 U.S. 238 (1969).

110 NORRIS, BONVENTRE & ACKER, *supra* note 94, at 119; *see also* North Carolina v. Alford, 400 U.S. 25 (1970).

111 *Alford,* 400 U.S. 25.

112 *Id.*

113 *Id.* In *Alford*, the defendant plead to second-degree murder so that he would not be tried for first-degree murder. *Id.*

the offer was to plead guilty or receive the death penalty.[114] The defendant in *Alford* was coerced into pleading guilty even though he insisted he committed no crime. To the Supreme Court, the defendant's plea was accepted "willingly, knowingly, and understandingly."[115]

The bar for proving that an offer was coerced—meaning that it was *not* accepted willingly, knowingly, and understandingly—is a high one, partially due to several Supreme Court decisions in the last half-century. For example, since *Brady v. United States*, the threat of the death penalty as the alternative to a guilty plea does not equate to coercion and thus does not meet this bar.[116] Broadly speaking, the "choice occasioned by the possibility of a harsher sentence, even in the case in which the choice may be difficult, does not place an impermissible burden" on defendants.[117] The Supreme Court has even found it permissible for prosecutors to have the goal of making the defendant plead guilty.[118] Prosecutors are free both to *threaten* a higher charge and to *institute* a higher charge than they have evidence or reason for, if a defendant refuses to accept a plea offer.[119] Additionally, mandatory minimums, which are available in every jurisdiction[120] and impose a statutorily set sentence devoid of judicial discretion for certain crimes, give perhaps the greatest force behind these threats.[121] More troubling, however, are the illegal threats that speckle some jurisdictions, such as refusing to offer favorable plea deals to women unless they agree to sterilization[122] or threatening to indict a defendant's child if the defendant chooses to pursue trial.[123]

After police turn over evidence of a criminal act, prosecutors may initiate a criminal case by deciding whether and what crimes to charge a defendant with.[124] Tasked with turning over all *Brady* evidence to the defense, prosecutors still have discretion on what evidence meets the threshold of "material evidence" or evidence that has a reasonable probability to affect the outcome of the case if disclosed.[125] While prosecutors are

114 Johnson, *supra* note 3, at 14.

115 *Alford*, 400 U.S. at 37.

116 Brady v. United States, 397 U.S. 742, 755 (1970).

117 Chaffin v. Stynchcombe, 412 U.S. 17 (1973).

118 NORRIS, BONVENTRE & ACKER, *supra* note 94, at 120.

119 Schehr, *supra* note 104, at 391-92.

120 Alison Siegler, BRENNAN CTR. FOR JUST., *End Mandatory Minimums* (2021), https://www.brennancenter.org/our-work/analysis-opinion/end-mandatory-minimums [https://perma.cc/64Y5-EDY6].

121 Johnson, *supra* note 3, at 15.

122 *Tennessee Prosecutor Fired Over Plea Bargains Involving Female Sterilization*, THE GUARDIAN (Apr. 1, 2015), https://www.theguardian.com/us-news/2015/apr/01/tennessee-prosecutor-fired-female-sterilization-plea-bargains [https://perma.cc/J7DT-EDBY].

123 United States v. Seng Cheng Yong, 926 F.3d 582 (9th Cir. 2019).

124 McCoy & Mirra, *supra* note 34, at 894.

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

forbidden from knowingly presenting false testimony,[126] prosecutors may present unproven and uncorroborated testimony if it helps their case, even if they are uncertain of its truthfulness. To show a prosecutor knowingly presented false testimony, a defendant must meet the nearly impossible standard of proving that the prosecutor acted in bad faith and that the testimony was "material either to guilt or to punishment."[127] Similarly, prosecutors are only disciplined for not preserving evidence if they do it in bad faith, a subjective standard that, like most subjective standards in the law, is all but impossible to prove.[128]

Prosecutors enjoy absolute immunity for nearly every courtroom action.[129] While this means they are shielded from frivolous attack by unhappy defendants, they are also free from being held accountable for their misdeeds. Avenues of relief for prosecutorial abuse are slim to none for defendants, so injustices such as failing to disclose exculpatory evidence go essentially unchecked.[130] As of 2019, only one prosecutor has ever served jail time for prosecutorial misconduct.[131] In that case, prosecutor Ken Anderson withheld exculpatory evidence and put an innocent man, Michael Morton, in prison for his wife's murder.[132] Although the innocent man, Michael Morton, served twenty-five years in prison, Ken Anderson served less than ten days.[133]

As mentioned previously, *Brady* left somewhat of a loophole in the prosecutorial duty to provide exculpatory evidence that is material to the case.[134] Even though prosecutors are required to provide exculpatory evidence, they are not explicitly required to do so promptly, thoroughly, or carefully.[135] In some jurisdictions, prosecutors wait without penalty until the day before trial to turn over key evidence, such as names of witnesses.[136] In many other jurisdictions, prosecutors are not required to turn over *Brady*

126 Miller v. Pate, 386 U.S. 1 (1967).

127 *Brady*, 373 U.S. at 87.

128 Arizona v. Youngblood, 488 U.S. 51 (1988).

129 Imbler v. Pachtman, 424 U.S. 409 (1976).

130 *Imbler,* 424 U.S. 409.

131 Michael Morton Case, INNOCENCE PROJECT (2024), https://innocenceproject.org/cases/michael-morton [https://perma.cc/4SUH-7HBS].

132 *Id.*

133 *Id.*

134 Gerard E. Lynch, *Our Administrative System of Criminal Justice,* 66 FORDHAM L. REV. 2117, 2148 (1998).

135 *Id.*

136 Beth Schwartzapfel, *Defendants Kept in the Dark About Evidence Until It's Too Late*, N.Y. TIMES (August 7, 2017) https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html.

material before a plea is entered.[137] Combining the ease of coercion and the high bar for proving it cultivates fertile ground for coerced pleas to survive.

Nowhere is the injustice of the plea penalty more egregious than when the defendant is falsely accused. One scholar described the plea bargaining system as a "nearly perfect system for convicting the innocent."[138] Another scholar posits, "[I]f the system is premised on guilty pleas, but prosecutors tell defendants who ask for trials that their sentences will be much more severe if they are convicted, will innocent people plead guilty? There is good evidence that they will, and have."[139] A criminal system that induces even the most vulnerable—the innocent—to enter guilty pleas is nothing short of evil.

Serious inequities plague the current plea bargaining system, inequities that jeopardize defendants' constitutional protections and gut their ability to hold the government accountable for potential legal misconduct. To have a just criminal legal system, all parties must deeply understand that pleading guilty can come with disadvantages as grave as proceeding to trial. The next part of this Article will explore ways to address these inequities and mitigate the plea penalty in the criminal legal system.

PART III: HOW TO CURB THE PLEA PENALTY

As mentioned, the likelihood that plea bargaining is going anywhere anytime soon is slim. Thus, we must first learn how to operate within it before we can mitigate its disadvantages. This part of the Article highlights best practices for prosecutors, defense attorneys, and general advocates in reducing the plea penalty. It suggests how to conduct plea deals in a way that centers the interests and rights of the accused.

A. Prosecutors

The duty of prosecutors exceeds that of nearly any other role in the criminal legal system. Though not legally binding, the ABA's "Standards for the Prosecution Function" describe the duty of prosecutors as ideally one

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[137] *Id.*

[138] Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALB. L. REV. 919 (2016). In this population of falsely accused are among the most vulnerable in society: youth. When youth are induced to plead guilty to a crime never committed, they wed themselves to a system that will torment them the rest of their lives. *Id.* Scholars have reported at length that youth cognitive development limits understanding of things like the consequences of waiving their *Miranda* rights, of speaking as opposed to remaining silent, of believing a judge cannot penalize them for staying silent, of confusing an interrogation—a conversation had with police—with an adjudicative hearing, and of pleading guilty when they are innocent. Hana M. Sahdev, *Juvenile Miranda Waivers and Wrongful Convictions*, 20 U. PA. J. CONST. L. 1211, 1216 (2018).

[139] Candace McCoy, *The Coercive Trial Penalty: Timing Is Everything*, 35 FED. SENT. R. 100, 104 (2022).

that "serves the public interest," not just the interest of the victimized.[140] The Standards further recommend that prosecutors should use integrity and balanced judgment in their efforts to "seek justice within the bounds of the law, not merely to convict."[141] Decisions of whether to charge a defendant or how much to recommend at sentencing should be appropriate and balanced with the interests of victims and the constitutional rights of the accused.[142] This perspective is reflected in our method of styling case names: "People versus Defendant" or "The State versus Defendant," as opposed to the victim's or prosecutor's name.[143]

Greater than prosecutors' duty, however, is their power. As mentioned, prosecutors enjoy "absolute immunity," meaning that they are rarely held accountable in any meaningful way for any transgressions in their official capacity.[144] However, in the 2010s, the consequences of this lack of accountability began to surface in public discourse, casting a negative light on prosecutors. As Miriam Aroni Krinsky, the Executive Director of Fair and Just Prosecution indicated:

> [A]mid mounting criticism and protest directed against an incarceration rate in our nation that is second to none, as well as police violence, wrongful convictions, racial disparity in criminal law theenforcement, and the complicity of prosecutors in producing these pathologies, tough-on-crime incumbent DAs who once felt safe in their seats suddenly faced credible threats from reform-minded candidates who promised to be fundamentally different kinds of prosecutors.[145]

Thus, reform efforts took hold, albeit in stops and starts.[146]

Arguably, the best prosecutors are reform-minded. They are those who hold themselves accountable, who are cognizant of their power, and who seek alternative practices that will lead away from mass incarceration, wrongful convictions, and police misconduct.[147] Alternative practices such as

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[140] ABA Crim. Just. Standards for the Prosecution Function (4 ed.), Standards 3-1.2(b), AM. BAR ASS'N (2021).

[141] Johnson, *supra* note 3, at 19.

[142] *Id.*

[143] I credit this observation to a discussion I had with criminal law professor Laura Gomez at the University of New Mexico School of Law.

[144] Miriam A. Krinsky, Justin Murray & Maybell Romano, *Preface: New Directions in Prosecutorial Reform,* 60 AM. CRIM. L. REV. 1369, 1373 (2023).

[145] *Id.* at 1374.

[146] Keri Blakinger, *Prosecutors Who Want to Curb Mass Incarceration Hit a Roadblock: Tough-on-crime Lawmakers*, NBC (February 2, 2022), https://www.nbcnews.com/news/us-news/progressive-prosecutors-conservative-pushback-rcna14467 [https://perma.cc/5Z38-VQVB].

[147] Krinsky, Murray & Romano, *supra* note 144, at 1369; *see also* Johnson, *supra* note 3.

diversion programs and drug courts fit this bill.[148] Reform-minded prosecutors recognize the harsh penalties that plague the criminal justice system.[149] They use plea deals as a merciful way out of harsh penalties, which have continuously been ratcheted up by detached legislatures.[150] By offering pleas deals, a prosecutor can assist the defendant in agreeing to legal fictions—what plea deals are made of—that allow the defendant to bypass collateral consequences.[151]

For example, a prosecutor can craft a plea deal that allows a defendant to agree to a lesser included offense,[152] such as a misdemeanor rather than a felony, so that the defendant can maintain their housing or their job. But legal fictions such as these are only operative in plea negotiations; when a defendant proceeds to trial, these legal fictions disappear, and facts and evidence dominate.[153] Only by offering plea deals, then, can reform-minded prosecutors help defendants escape a jury that may be unsympathetic to their situation.[154] Reform-minded prosecutors are those who wield their discretion not as a sword, forcing defendants into negotiations with harsh penalties, but as a shield, to protect defendants from an unjust system.

Building on these reform-minded practices, prosecutors can utilize the following suggestions in their efforts to seek justice. First, prosecutors could modify the steps they take before charging defendants. Charging practices that are in the interest of justice require prosecutors to avert their focus away from what they *can* charge to what justice *requires* them to charge.[155] In line with the ABA "Standards for the Prosecution Function,"[156] prosecutors need only seek or file criminal charges if they reasonably believe the "charges are supported by probable cause" and if "admissible evidence will sufficiently support conviction beyond a reasonable doubt."[157]

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148 Miriam Krinsky & Liz Komar, *"Victims' Rights" and Diversion: Furthering the Interests of Crime Survivors and the Community*, 74 SMU L. REV. 527 (2021).

149 *Id.*

150 Rory Pulvino, *Critiquing the ABA Plea Bargaining Principles Report*, MEDIUM, JUSTICE INNOVATION LAB (Feb. 1, 2024), (accessed March 16, 2024), https://medium.com/@Lab4justice/critiquing-the-aba-plea-bargaining-principles-report-b245cb7ea2ea (last visited March 16, 2024) [https://perma.cc/PJ4N-ETGT].

151 *Id.*

152 Michael H. Hoffheimer, *The Rise and Fall of Lesser Included Offenses*, 36 RUTGERS L.J. 351, 356 (2005).

153 Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855 (2019).

154 Pulvino, *supra* note 150.

155 Johnson, *supra* note 3, at 18.

156 ABA Crim. Just. Standards for the Prosecution Function, *supra* note 134, Standard 3-4.3.

157 *Id.*

To ensure that prosecutors[158] are charging in the interest of justice, the ABA recommends a standardized charging process that includes things like assigning initial charging—one of the most critical stages of the criminal process—to the most experienced prosecutors rather than to rookies learning the ropes.[159] The ABA recommends that prosecutors base their charging decisions on written and publicly accessible policies that ensure uniform application to all defendants.[160] To make sure charges are not set up to punish a defendant for exercising their right to trial, the ABA likewise urges lead prosecutors to require supervisor oversight before plea offers are amended and to dismiss cases with weak evidence rather than try to resolve them through plea bargaining.[161] Prosecutors should recognize, though, that too much standardization and "uniformity may lead to a systematically more punitive system."[162] As is made clear by mandatory minimums and sentencing guidelines—which are not based on the best ways to rehabilitate defendants but rather on deterrence and culpability[163]—standardization must be dealt with carefully to avoid impersonal, inflexible, and often oppressive punishment.[164]

In deciding whether and what crime to charge a defendant with, prosecutors can demand more evidence of guilt before formally charging arrestees, at least as much as the ABA recommends—enough to support a conviction beyond a reasonable doubt.[165] Prosecutors should answer defense attorneys' requests for all *Brady*[166] material before plea negotiations begin, because "[i]f the guilty-plea procedure discourages or even explicitly penalizes the defense for insisting on full investigation of the facts and negotiation over them in a plea-bargaining session, serious concerns about lack of due process arise."[167] Prosecutors can wait for police officers to fully and thoroughly document evidence to ensure that both the prosecutors and defendants have access to more robust and complete information prior to a

158 This Article notes that practices such as these largely fall on the shoulders of lead district attorneys rather than on assistant district attorneys to implement and require. *See generally* ABA Crim. Just. Standards for the Prosecution Function, *supra* note 134. The use of the term "prosecutors" in this Article implies prosecution offices, with special emphasis on the lead district attorney making top-down policy guidelines for the subordinate prosecutors.

159 Johnson, *supra* note 3, at 18.

160 *Id.*

161 *Id.* at 19.

162 Pulvino, *supra* note 150.

163 U.S. SENT'G COMM'N, AN OVERVIEW OF THE FEDERAL SENTENCING (2024), https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf.

164 Pulvino, *supra* note 150.

165 Johnson, *supra* note 3, at 18.

166 Brady v. Maryland, 373 U.S. 83 (1963).

167 McCoy, *supra* note 139, at 100.

defendant's decision to plead guilty.[168] More rigorous screening of cases by prosecutors could eliminate the cases that have weak evidence, reducing the number of people charged, and thus the number of people who plead guilty.[169]

Once prosecutors have decided whether and what crime to charge a defendant with, the next step of reform-minded prosecution that would mitigate the plea penalty comes at the actual charging stage. Prosecutors' offices should require a supervisor to review the evidence before a charge is approved.[170] This review would serve as a check on the charging prosecutor's discretion.[171] Also, requiring that the prosecution give the judge more information—including evidence and plea terms—before the judge conducts a plea colloquy would bolster a showing of just plea negotiation.[172]

After a charge is filed, prosecutors can implement reform-minded plea-bargaining practices. Prosecutors could refuse to resort to threats, even if doing so is legal.[173] Threatening or imposing a heightened charge if a defendant rejects a plea offer—especially a charge that would result in the death penalty or mandatory minimum sentences—has been argued to be coercive and unjust.[174] District and United States Attorney's offices should insist that their prosecutors avoid this practice, and instead champion policies that prevent prosecutors from being lulled by quick resolutions and using threats to achieve them. Charges should only be adjusted after the initial plea offer if additional evidence warrants a change.[175] Finally, prosecutors could consider creative avenues of reaching an agreement, such as borrowing from the common practice of settlement used in civil law.[176]

After a plea is offered, prosecutors should not "punitively inflate" the charges that are then brought to trial "simply because [the defendant] exercised a fundamental right" by not accepting the offer.[177] In one recent federal trial in New Mexico, four defendants charged with both kidnapping

168 Johnson, *supra* note 3, at 18.

169 *Id.* at 19.

170 *Id.*

171 *Id.*

172 *Johnson, supra note 3*, at 22-23.

173 Bordenkircher v. Hayes, 434 U.S. 357 (1978) ("The Due Process Clause of the Fourteenth Amendment is not violated when a state prosecutor carries out a threat made during plea negotiations to have the accused reindicted on more serious charges on which he is plainly subject to prosecution if he does not plead guilty to the offense with which he was originally charged.").

174 Johnson, *supra* note 3, at 15.

175 *Id.* at 18, 19.

176 Richard Lorren Jolly & J.J. Prescott, *Beyond Plea Bargaining: A Theory of Criminal Settlement*, 62 B.C. L. REV. 1047 (2021).

177 *Johnson, supra note 3, at* 15.

resulting in death and acts of terrorism were offered time served as a plea.[178] When they rejected the plea, the government underscored that the crimes carry mandatory life sentences and fifteen years in prison, respectively; all four were eventually convicted.[179] The extreme sentencing differential in this example is neither just, nor uncommon.[180]

The prosecutors who in the last few years have sought appointment or election as district attorneys or United States attorneys to reduce incarceration and address racism have faced severe obstacles, such as governor-canceled elections and redrawn boundaries.[181] Their persistence in the face of criticism has inspired other reform-minded prosecutors to join the ranks.[182] Reform-minded prosecutors instituting the above suggestions can begin to shrink the plea penalty.

B. Defense Attorneys

Representing someone charged of a crime does not equate to justice: defense attorneys must represent them by carefully navigating the plea bargaining system with full awareness of the plea penalty. Many defense attorneys—including public and private defense—pin their career choice on their belief that social factors such as poverty, abuse, and addiction drive people to commit crimes.[183] Many defense attorneys detest a system that has put at least 197 innocent people on death row since 1973[184]—and that statistic is just the beginning. Exoneration work, such as that done by the Innocence Project,[185] is only increasing this number. Others believe they play an important role in maintaining democracy and eliminating the racism inherent in the American criminal legal system.[186] Although defending people convicted of crimes is a noble career choice, the responsibility to seek justice

178 Susan M. Bryan, *Father and Other Family Members Are Convicted in New Mexico Kidnapping and Terrorism Case*, AP NEWS (Oct. 17, 2023), https://apnews.com/article/new-mexico-terrorism-trial-compound-boy-muslim-6cdd0420895b2f079bc424c7454cc6be [https://perma.cc/N29H-549U].

179 *Id.*

180 *See generally* Ken Strutin, *Truth, Justice, and the American Style Plea Bargain*, 77 ALB. L. REV. 825 (2014).

181 Blakinger, *supra* note 146.

182 Allan Smith, *Progressive DAs Are Shaking up the Criminal Justice System. Pro-police Groups Aren't Happy*, NBC NEWS (Aug. 19, 2019), https://www.nbcnews.com/politics/justice-department/these-reform-prosecutors-are-shaking-system-pro-police-groups-aren-n1033286 [https://perma.cc/HN4G-4GAR].

183 Jon May, *An Ethos for Criminal Defense Lawyers,* 38 CRIM. JUST. 31 (2023).

184 *Innocence: Death-Row Exonerations*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/innocence (last visited Mar. 11, 2024) [https://perma.cc/9RXH-8EQ9].

185 *About*, THE INNOCENCE PROJECT, https://innocenceproject.org/about [https://perma.cc/487B-R6H5].

186 May, *supra* note 183, at 32.

does not end there. Seeking justice is no easy task in a system where the odds are stacked against your clients; at least seventy percent of federal criminal trials result in convictions each year.[187] Such poor odds can dishearten even the boldest defense attorneys and lead them to give in "to the pressure of playing on the government's court and by the government's rules."[188] This section suggests ways to defeat rather than succumb to this pressure.

First, to mitigate the plea penalty, the best defense attorneys apply the "art of trial" to plea bargaining.[189] Since ninety-nine percent of federal defendants plead guilty, trial attorneys are more accurately plea attorneys.[190] Defense attorneys who seek to reduce the plea penalty treat the plea process with the same kind of assiduous advocacy they would a trial.[191] The plea process is far less time-consuming and exhausting than a trial but is no less deserving of earnest dedication.[192] A guilty plea begins sentencing procedures and creates an arena for presenting evidence to depart or vary from the prescribed sentencing guidelines.[193] Knowing clients, their personal history, their strengths and weaknesses, and their potential is critical in reducing or avoiding harsh sentences.

Another important aspect of applying the "art of trial"[194] is putting off plea negotiations until the prosecution has turned over all *Brady* material.[195] Defendants and their attorneys need not be discouraged by case law such as *United States v. Ruiz*, which held that prosecutors are under no constitutional obligation under *Brady* to provide impeachment materials before entering a plea agreement, and that a defendant waiving their right to affirmative defense materials by entering a "fast track" plea agreement does not make the plea involuntarily.[196] *Ruiz* complicates but does not obviate a defendant's right to *Brady* materials before entering a plea.[197] For support in making this argument, defense attorneys can use the Due Process Protection Act of 2020[198]—which requires a federal judge in criminal proceedings to issue an

187 *Id.* at 33.

188 *Id.*

189 Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2670 (2013).

190 *Id.*

191 *Id.*

192 *Id.*

193 *Id.*

194 *Id.*

195 May, *supra* note 183, at 34.

196 United States v. Ruiz, 536 U.S. 622 (2002).

197 Gerard Fowke, *Material to Whom?: Implementing Brady's Duty to Disclose at Trial and During Plea Bargaining*, 50 AM. CRIM. L. REV. 575 (2013) (arguing that the Supreme Court has tended to support the following, despite their holding in *Ruiz*: "Before accepting a guilty plea, the judge must ensure that the prosecutor has disclosed all material, favorable, non-impeachment evidence.").

198 Pub. L. N. 116-182, 234 Stat. 894 (2020).

order confirming the obligation of the prosecutor to disclose exculpatory evidence—and case law finding that *Ruiz* does not apply to exculpatory material.[199]

Delaying negotiations until all *Brady* material has been turned over by the prosecution is not only a good idea, but it is a practice that was sanctioned by Congress in 2020.[200] Serving the federal realm, the Due Process Protection Act of 2020 is an amendment to Rule 5 of the Federal Rules of Criminal Procedure, which requires judges to "issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under *Brady* . . . and its progeny, and the possible consequences of violating such order under applicable law."[201] This Act arms defense attorneys with the ability to threaten sanctions against prosecutors who fail to provide *Brady* materials.[202] It arms defense attorneys with the legal support to push back against a court or prosecutor who tries to request a deadline for a plea agreement before counsel has had the chance to review all *Brady* material.[203] It arms defense attorneys with the support to file a notice that they cannot deliver effective assistance of counsel with too little time.[204] Finally, it arms defense attorneys with the reasoning to file a petition for supervisory mandamus with the federal circuit court if the court refuses to extend the deadline.[205] Often, just the mention of seeking court sanctions can encourage a prosecutor to take action and provide *Brady* materials; likewise, the mention of filing a petition for supervisory mandamus can induce a court to grant requests for a reasonable amount of time to review *Brady* materials.[206]

In addition to leaning on the Due Process Protection Act[207] to argue that clients are entitled to *Brady* material before pleading guilty despite the holding in *Ruiz*,[208] defense attorneys can research case law that finds *Ruiz* to apply to impeachment evidence, but not to exculpatory evidence. Defense attorneys can highlight the plain text of *Ruiz*, that "the Constitution does not require the Government to disclose material impeachment evidence prior to

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199 *See generally* State v. Huebler, 275 P.3d 91 (Nev. 2012); McCann v. Mangialardi, 337 F.3d 782 (citing *Ruiz*, 536 U.S. 622) (7th Cir. 2003) (reasoning it "highly likely," based on language in *Ruiz* indicating "a significant distinction between impeachment information and exculpatory evidence," that Supreme Court would require prosecution to disclose exculpatory evidence before guilty plea is entered).

200 Pub. L. N. 116-182, 234 Stat. 894 (Oct. 21, 2020).

201 *Id.* at § 2(f)(1).

202 *Id.*

203 May, *supra* note 183, at 34.

204 *Id.* at 35.

205 *Id.* at 34.

206 *Id.*

207 Pub. L. N. 116-182, 234 Stat. 894 (Oct. 21, 2020).

208 United States v. Ruiz, 536 U.S. 622 (2002).

entering a plea agreement."[209] They can introduce cases such as *McCann v. Mangialardi* (7th Cir. 2003)[210] and *United States v. Ohiri* (10th Cir. 2005).[211] These cases combat the decisions that interpret *Ruiz* to permit the nondisclosure of both impeachment and exculpatory information.[212] In addition to using *Mangialardi* and *Ohiri* as persuasive support, they can find similar cases in their own federal and state jurisdictions to strengthen their argument that the prosecution is obligated—by both statutory and case law—to provide exculpatory evidence even in plea negotiations.[213] Defense attorneys can insist on receiving and reviewing exculpatory evidence before entering a plea agreement.

Another tactic of applying the "art of trial"[214] to plea bargaining is to take advantage of the minimal evidentiary rules, both in plea negotiations with the prosecution, and in motions and hearings before the court.[215] For example, the rule that hearsay is admissible at sentencing allows even more evidence than would be available at trial.[216] This additional evidence can bolster the defense's arguments for downward variances and departures, as well as their arguments against sentencing enhancements, as long as the sentence is not a mandatory minimum.[217]

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[209] *Id.* at 633.

[210] McCann v. Mangialardi, 337 F.3d 782 (7th Cir. 2003). In *McCann*, the Seventh Circuit held that exculpatory evidence is distinct from impeachment evidence and is thus subject to constitutional obligations of disclosure. *Id*. The court asserted that the Supreme Court's holding in *Ruiz* acknowledged that the weight of impeachment evidence is far less than that of exculpatory evidence, confirming the notion that the Supreme Court left "exculpatory evidence" out of its holding purposefully. *Id.*

[211] United States v. Ohiri, 133 Fed. Appx. 555 (10th Cir. 2005). *Ohiri* is another case showing that the *Ruiz* court treated exculpatory and impeachment evidence differently, again confirming prosecutors' obligation to disclose exculpatory evidence under *Brady*:

> By holding in *Ruiz* that the government committed no due process violation by requiring a defendant to waive her right to impeachment evidence before indictment in order to accept a fast-track plea, the Supreme Court *did not imply* that the government may avoid the consequence of a *Brady* violation if the defendant accepts an eleventh-hour plea agreement while ignorant of withheld exculpatory evidence in the government's possession.

Id. (emphasis added)

[212] *See* United States v. Conroy*,* 567 F.3d 174, 179 (5th Cir.2009) (citing *Ruiz*, 536 U.S. 622) (rejecting the argument that "the limitation of the Court's discussion [in *Ruiz*] to impeachment evidence implies that exculpatory evidence is different and must be turned over before entry of a plea" because "Ruiz never makes such a distinction nor can this proposition be implied from its discussion"); *see also* United States v. Moussaoui, 591 F.3d 263, 287-88 (4th Cir. 2010) (discussing the issue in dicta, but leaving it unresolved because the prosecutor had not suppressed exculpatory evidence).

[213] *See* State v. Huebler, 275 P.3d 91, 97-100 (citing *Ruiz*, 536 U.S. 622) (holding that, post-*Ruiz*, exculpatory evidence must be disclosed during plea-bargaining).

[214] *See generally* Roberts, *supra* note 189.

[215] May, *supra* note 183, at 34.

[216] *Id.*

[217] May, *supra* note 183, at 34.

Second, defense attorneys must advocate for pretrial diversion programs and remember that not every case must result in either a plea or a trial. In 2022, Attorney General Merrick Garland issued a memorandum for all federal prosecutors in which he said, "[e]very district should develop an appropriate pretrial diversion policy."[218] Attorney General Garland encouraged "non-criminal alternatives to prosecution," leaving out any distinction between serious and less serious crimes.[219] This means that even for serious crimes, it still may be in the best interest of the person convicted, their families, their victims, and their communities to make amends by contributing to society rather than go to prison.[220] For those defense attorneys who face an uphill climb in establishing pretrial diversion programs, or in overcoming hurdles that thwart access to them, they should address those holding the highest positions in the district or U.S. attorneys' offices.[221] Defense attorneys should be familiar with the programs' policies before accepting that a client truly does not qualify.[222]

Third, beyond applying the "art of trial"[223] and advocating for diversion programs, defense attorneys can mitigate the plea penalty by taking education into their own hands. Despite the paucity of trials defense attorneys will see in their careers, the ABA, the Federal Bar Association ("FBA"), and the National Association of Criminal Defense Lawyers ("NACDL") have failed to devote extensive continuing education on perfecting the plea process.[224] It was not until 2019 that the ABA finally took a serious look at the American criminal legal system and established a task force to "address the persistent criticism of the plea bargaining system."[225] Although late to the game, the ABA's Plea Bargaining Task Force devoted several years to gathering data about and crafting suggestions for plea bargaining, culminating in a useful report in 2023 addressed to all practitioners in the field.[226] This report has been long-awaited and helpful; however, additional presentations, seminars, and webinars focused on plea bargaining are rarely offered by the ABA,

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218 Merrick Garland, OFFICE OF THE U.S. ATT'Y GEN., *Memorandum for All Federal Prosecutors* at 2 (Dec. 16, 2022).

219 *Id.*

220 May, *supra* note 183, at 33-34.

221 *Id.* at 34.

222 *Id.*

223 *See generally* Roberts, *supra* note 189.

224 May, *supra* note 183, at 31.

225 *See generally* Johnson, *supra* note 3.

226 *Id.* at 14.

FBA, and NACDL.[227] Thus, defense attorneys often must take it upon themselves to learn tactics and best practices of plea bargaining.

Finally, defense attorneys must rid themselves of the current practice of trusting in the trial penalty to secure justice for defendants.[228] They must share the mindset that those who go to trial and win suffer no penalty at all.[229] They must think twice before discouraging defendants to proceed to trial, and certainly delay a defendant's choice to plead until the client meaningfully understands the plea penalty.

C. General Advocates

Finally, everyone can play a role in making changes to the plea bargaining system. The ABA Plea Bargain Task Force noted in their 2023 report something that should serve as an advocate's mantra: "plea bargaining is not one monolithic practice."[230] Rather, it varies by state and federal court, by rural and urban setting, and even by community and culture.[231] While this variety means that a "one-size-fits-all" fix is unlikely, small and steady efforts such as legislative advocacy and voting can bear fruit in the system overall and, importantly, in each individual defendant's life.[232]

Reform starts by assessing the systems that would abolish plea bargaining altogether. As the ABA Plea Bargain Task Force puts it, the excessive harshness of our criminal legal system has birthed plea bargaining, not as a benefit but as a "safety valve for quotidian injustice."[233] Just the consideration of abolishing such a heavily relied-on system might persuade lawmakers to "rethink more fundamental issues, such as what behaviors should be made criminal in the first place."[234]

The drastic changes that would be required to abolish the plea bargaining system could lead changemakers to ask themselves the following question: are gains in expediency and conservation of resources really more important than allowing individuals to exercise their constitutional rights? Hopefully, reflections such as these will galvanize decriminalization efforts, which, in turn, would result in young people, vulnerable populations, and other marginalized communities having less contact with the criminal legal

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227 This assertion is based on the webinars posted on each organizations' website as of November 2024. *NACDL Webinars & Web Series*, NACDL, https://www.nacdl.org/Landing/NACDL-Webinars [https://perma.cc/45PX-9AJX] (last visited Nov. 2024).

228 Jeffrey Bellin, *Plea Bargaining's Uncertainty Problem*, 101 TEX. L. REV. 539 (2023).

229 *Id.* at 539.

230 Johnson, *supra* note 3, at 6.

231 *Id.*

232 *Id.*

233 *Id.*

234 NORRIS, BONVENTRE & ACKER, *supra* note 94, at 124.

system and allow law enforcement to focus their time on more serious crimes.[235]

We all must advocate for legislative and executive policy reform at the federal, state, and local levels. Such actions work.[236] "Thousands of lives have been saved by legislation enacted as a result of lobbying by the ABA, the NACDL, FAMA, and others to reduce mandatory minimums and permit the early release of prisoners who qualify for compassionate release."[237] Those interested in political and legislative advocacy—practitioners and everyday advocates alike—can start with the myriad of suggestions in the ABA's Plea Bargain Task Force Report, all of which would better ensure justice in plea bargaining if enacted into law.[238] The legislative actions proposed by the Plea Bargain Task Force can restore judges' power to "regulate plea bargaining,"[239] grant authority to judges to depart from mandatory minimums,[240] abolishing mandatory minimums altogether,[241] imposing policy that limits the differential between the plea offer and the sentence imposed at trial,[242] prohibiting the threat of the death penalty in plea negotiations, [243] and requiring plea offers to be written and filed with the court.[244]

Our democracy has its weaknesses, but it allows each of us to speak up and act in the interest of justice. Only when advocates—attorneys, politicians, scholars, community members—unite will the plea penalty diminish.

CONCLUSION

The critiques of the plea bargaining system are well-known,[245] but change has been slow. The first step in improving the system is reducing the severity of the plea penalty, which starts with understanding it. As criminal defense expert Jon May puts it, "[i]f we wait for the system to eliminate the trial penalty, make plea bargaining fair, and enact procedural rules to give

235 *See generally* Lucian E. Dervan, *Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J.L. ECON. & POL'Y 645 (2011). *See also* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U.L. REV. 703 (2005).

236 May, *supra* note 183, at 34.

237 *Id.*

238 Johnson, *supra* note 3.

239 *Id.* at 16.

240 *Id.* at 15-16.

241 *Id.* at 17.

242 *Id.*

243 *Id.* at 16.

244 *Id.* at 28.

245 George F. Will, *Sentencing Reform Is Just One Part of the Criminal-Justice Puzzle*, NAT'L REVIEW, March 17, 2016.

defendants the rights that civil litigants enjoy, hundreds of thousands of human beings will suffer."[246] Hundreds of thousands already have.[247]

In the effort to become more aware of the plea penalty, one important thing to keep in mind is that pushing more cases to trial is not the end goal, although this Article acknowledges some benefits of doing so. But pushing more cases to trial will not fix the system. One report critiquing the ABA Plea Bargain Task Force's 2023 Report asked, who is to say that the strain and stress of trials aren't the very thing that spurred more pleas?[248] Trials are "strenuous and traumatic" for all participants.[249] They take up far more time than plea negotiations.[250] As Rory Pulvino points out in his critique of the ABA report, "There is no survey of defendants or rigorous study between those that accepted pleas and those that went to trial as to the myriad social and judicial costs to the defendant, but any proposed solutions should consider this."[251]

Taking this valid critique into account, this Article contends that the ongoing trend of decreasing trials undermines the criminal justice system's ability to fulfill its fundamental functions and must be addressed.[252] Every person in America has fundamental rights, but these rights are often not acknowledged in practice. The current plea bargaining system and the trial penalty that fuels it are evidence of this disconnect. America cannot claim liberty and justice while this injustice "for all"[253] persists. Awareness of the plea penalty and advocacy to eradicate it are paramount in the journey to dismantle the evils in our system.

246 May, *supra* note 183, at 34.

247 *See generally* Tina Wan, *The Unnecessary Evil of Plea Bargaining: An Unconstitutional Conditions Problem and a Not-So-Least Restrictive Alternative*, 17 S. CAL. REV. L. & SOC. JUST. 33 (2007).

248 Pulvino, *supra* note 150.

249 *Id.*

250 *Id.*

251 *Id.*

252 Johnson, *supra* note 3.

253 4 U.S.C. § 4.