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## Plea Bargaining: From Patent Unfairness to Transparent Justice

Mirko Bagaric\*  
Julie Clarke\*\*  
William Rininger\*\*\*

### ABSTRACT

*The United States is in the midst of an unprecedented mass incarceration crisis. It imprisons more of its citizens than any other country – and by a considerable margin. It is now widely acknowledged that there is no community dividend stemming from an overly punitive sentencing system. Over-incarceration does not make the community safer and diverts billions of dollars annually from productive social services, such as health and education. Lawmakers have failed to find overarching solutions to this crisis. This Article proposes to change that paradigm by offering concrete reforms to remedy a key shortcoming of the sentencing system. Emerging evidence suggests that one of the main reasons for the mass incarceration crisis relates to the dysfunctional plea bargaining process, in which the prosecution has the stronger negotiating power and often uses it to press for harsh penalties. The reality is that most defendants in the United States do not receive a trial, let alone a fair one. Their fate is determined by a negotiation with a prosecutor. More than ninety percent of all criminal matters in the United States are finalized in this manner. There is a wide-ranging consensus that this process is flawed. It results in a large portion of defendants receiving harsher penalties than is commensurate with the seriousness of their offense. Sometimes it also leads to defendants, who are innocent, pleading guilty in order to avoid the uncertainty of a trial. The process is especially unfair to minority groups, with evidence establishing that African Americans, in particular, receive harsher penalties than similarly situated white defendants. This Article proposes reforms to the plea bargaining process that will demonstrably and profoundly reshape the framework for plea negotiations. The central plank of the proposed reform is to shift more discretion and power from prosecutors, who invariably agitate for tougher sentences, into the hands of (impartial) sentencing judges. This can be achieved by conferring a discount to offenders who plead guilty. The size of the discount should be up to thirty percent. A similar system already operates effectively in Australia. In addition to this, defendants who plead guilty in circumstances when there is a weak prosecution case (and who are tenably innocent) should*

receive a discount of up to seventy-five percent. This proposal would considerably reduce incarceration numbers in a way that does not compromise community safety and preserves the cost-saving benefits of the current plea bargaining process. The reform will also reduce the discriminatory operation of the sentencing system against offenders who come from socially and economically deprived backgrounds.

## INTRODUCTION

The sentencing system in the United States is in crisis. America imprisons more of its people than any other country in the world by a massive margin – on average five times more than other developed countries.<sup>1</sup> Mass incarceration is arguably the greatest human rights crisis currently in the United States.<sup>2</sup> There are a number of reasons for this, including overly harsh penalties and mandatory sentences for a large number of offenses. Recent evidence suggests that another major cause of the crisis is the process by which most defendants are sentenced and, in particular, the role of the prosecution in this process.<sup>3</sup>

Most defendants in the United States are not found guilty following a trial.<sup>4</sup> Instead more than ninety-seven percent of federal defendants and ninety-four percent of state defendants are sentenced pursuant to a plea bargain with the prosecutor.<sup>5</sup> As noted by Justice Anthony Kennedy, “the reality [is] that criminal justice today is, for the most part, a system of pleas, not a system of trials.”<sup>6</sup> He adds, “horse trading [between the defendant and the prosecution] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice

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1. See *infra* Part I.

2. See generally Mirko Bagaric, Sandeep Gopalan & Marissa Florio, *A Principled Strategy for Addressing the Incarceration Crisis: Redefining Excessive Imprisonment as a Human Rights Abuse*, 38 CARDOZO L. REV. 1663 (2017).

3. See, e.g., Cynthia Alkon, *An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining*, 15 U. MD. L. J. RACE RELIGION GENDER & CLASS 191, 198–99 (2015).

4. See *Missouri v. Frye*, 566 U.S. 134, 143 (2012).

5. For an overview of the plea-bargaining process in the United States and a comparison with other countries, see Carol A. Brook et al., *A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States*, 57 WM. & MARY L. REV. 1147 (2016) and its frequency of use; see also *Frye*, 566 U.S. at 142–44; Cynthia Alkon, *The U.S. Supreme Court’s Failure to Fix Plea Bargaining: The Impact of Lafler and Frye*, 41 HASTINGS CONST. L.Q. 561, 565 (2014); Laurie L. Levenson, *Peeking Behind the Plea Bargaining Process: Missouri v. Frye & Lafler v. Cooper*, 46 LOY. L.A. L. REV. 457, 459–63 (2013).

6. Aditi Juneja, Note, *A Holistic Framework to Aid Responsible Plea-Bargaining by Prosecutors*, 11 N.Y.U. J. L. & LIBERTY 600 (2017).

system.”<sup>7</sup> Plea bargaining is so prevalent and one-sided that it has been asserted that “[the] constitutional right [to trial by jury], for most, is a myth.”<sup>8</sup>

In nearly all instances, the plea bargain reached by the prosecutor and the defendant is implemented by the court.<sup>9</sup> Prosecution officials are often motivated to push for heavy penalties.<sup>10</sup> In addition to this, they have considerably more negotiating power than defendants, given that they are normally better resourced and their personal interests are not at stake. This imbalance is so profound that it even leads to many innocent defendants pleading guilty and many others accepting harsher penalties than is commensurate with the seriousness of their crimes.<sup>11</sup> Further, studies have shown that minority groups, including African Americans, are dealt with especially harshly by the plea bargaining process.<sup>12</sup>

There is a growing recognition that the pervasive and overly punitive manner of prosecutorial power in plea bargaining is a key cause of mass incarceration. Massachusetts Institute of Technology Economist Professor Peter Temin notes that one of the major causes of increasing prison numbers over the past few decades is the manner in which the plea bargaining process is constructed and in particular the

increasing power of public prosecutors. The number of line prosecutors, that is, those that try cases, rose from 17,000 in 1970 to 20,000 in 1990 and to 30,000 in 2007. The number of public defenders did not rise, and the result was increasing power of public prosecutors. They used their power to seek plea bargains, and jurisprudence moved from the courtroom to the offices of public prosecutors. Prosecutors used their new power to increase the sensitivity of incarceration to the crime rate . . . .<sup>13</sup>

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7. *Frye*, 566 U.S. at 144 (alteration in original) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1912 (1992)).

8. Dylan Walsh, *Why U.S. Criminal Courts Are So Dependent on Plea Bargaining*, ATLANTIC (May 2, 2017), <https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/>; see also John L. Kane, *Plea Bargaining and the Innocent*, MARSHALL PROJECT (Dec. 26, 2014), <https://www.themarshallproject.org/2014/12/26/plea-bargaining-and-the-innocent>; Suja A. Thomas, *Has Plea Bargaining Destroyed the Jury Trial?*, CRIME REP. (Nov. 28, 2017), <https://thecrimereport.org/2017/11/28/what-happened-to-the-american-jury-trial/>.

9. See *infra* Part II.

10. See *infra* Part II.

11. See *infra* Part II.

12. See Emily Yoffee, *Innocence Is Irrelevant*, ATLANTIC (Aug. 7, 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/>.

13. Peter Temin, *The Political Economy of Mass Incarceration: An Analytical Model* 11–12 (Inst. for New Econ. Thinking Working Paper Series No. 56, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2993969](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2993969).

In a similar vein, Professor Lissa Griffin, an expert in criminal law at Pace University School of Law, and Ellen Yaroshefsky, a professor of legal ethics at Hofstra University School of Law, observe that the dynamics of plea bargaining is an under-researched area of the law and that there is growing evidence that aggressive prosecution practices are a major cause of mass incarceration:

Surprisingly, in looking for the causes and cures for the mass incarceration state, very little, if any, attention has been paid to the role of the most powerful actor in the criminal justice system: the prosecutor. It is the prosecutor who exercises virtually unreviewable discretion in seeking charges, determining bail, negotiating a resolution, and fixing the sentence. Now, however, there is data that identifies aggressive prosecutorial charging practices as the major cause of the explosion in our prison population.<sup>14</sup>

It is now widely acknowledged that the plea bargaining process is seriously flawed.<sup>15</sup> At the same time, it has been noted that it is an entrenched part of the criminal justice system and that its abolition is untenable.<sup>16</sup> As noted by Emily Yoffee, an editor at *The Atlantic*, American legislators have criminalized so many forms of behavior that police are arresting and charging millions of people annually – eleven million in 2015.<sup>17</sup> Court resources have now increased commensurate with this. And “[t]aking to trial even a significant proportion of those who are charged would grind proceedings to a halt . . . [T]he criminal-justice system has become a ‘capacious, onerous machinery that sweeps everyone in,’ and plea bargains, with their swift finality, are what keep that machinery running smoothly.”<sup>18</sup>

Thus, there is a pressing need to reform the plea bargaining system.<sup>19</sup> This Article proposes a fundamental reform of this process that will lead to fairer and more balanced outcomes. This requires some of the influence and

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14. Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 301 (2017).

15. See *infra* Part III; see generally Brook et al., *supra* note 5.

16. See *infra* Part II.

17. Yoffee, *supra* note 12.

18. *Id.*

19.

There is no obvious recipe for fomenting this kind of reform . . . . But she did concede one common thread that unites jurisdictions invested in changing the plea process: They must be motivated by some overarching values besides efficiency, ‘like seeking justice,’ [a law professor] said, “however that’s defined.”

Walsh, *supra* note 8. For a suggestion that prosecutors should be less punitive, see Juneja, *supra* note 6; see also Colin Miller, *Plea Agreements as Constitutional Contracts* (July 5, 2017), <https://ssrn.com/abstract=2997499>.

power in the process to be removed from prosecutors and allocated to the sentencing judges – who have a more dispassionate and objective role in the sentencing system. We suggest that the sentencing system would be considerably enhanced if there is a legislated discount for defendants who plead guilty. The exact size of the discount would be determined by the sentencing judge, but the parameters of the discount would be between ten to thirty percent of the maximum penalty for the offense. This is similar to the system that currently operates successfully in Australia. In addition to this, a large discount of up to seventy-five percent should apply in circumstances when defendants plead guilty where the prosecution's case is very weak. This larger discount reflects the fact that this cohort of defendants not only saved the community time and money by not exercising their right to trial but also relinquished a tenable chance of acquittal.

Certainly, the reform is not a perfect solution to the imbalance inherent in the plea bargaining process. Prosecutors would continue to have a large degree of influence regarding the ultimate choice of charges. However, their authority regarding the exact penalty would be considerably diminished.

The innovation of our proposal is that it will give considerably more control over the sentencing outcomes to judges without meaningfully over-burdening them, thereby preserving the cost saving benefits stemming from plea bargaining. Moreover, it will lead to the imposition of less severe sanctions and reduce prison numbers without compromising community safety.

In Part I of the Article, we discuss the scope and extent of the current crisis in the United States sentencing system. This is followed in Part II by a discussion of the causes of the crisis, with a focus on the role of prosecution officials. In Part III, we outline our reform proposal. Possible objections to our reform are examined in Part IV. In the concluding remarks, we summarize the reform proposal and the manifest benefits that it would bring to the criminal justice system.

## I. THE CURRENT CRISIS THAT IS UNITED STATES SENTENCING LAW AND PRACTICE

Prior to discussing the need for reform in the sentencing process, we first provide an overview of the current shortcomings with the United States sentencing system and highlight the need for urgent, systematic reform.

### *A. The Alarming Rate of Incarceration in the United States*

The United States incarcerates more people, by a considerable margin, than any other nation.<sup>20</sup> Its incarceration rate is around five times the average

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20. It has been estimated there were more than 2.2 million prisoners in the United States in 2016. ROY WALMSLEY, INST. CRIM. POL'Y RES. WORLD PRISON POPULATION LIST: ELEVENTH EDITION 2 (2016), [http://prisonstudies.org/sites/default/files/resources/downloads/world\\_prison\\_population\\_list\\_11th\\_edition\\_0.pdf](http://prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf). China had the

of other Organisation for Economic Co-operation and Development (“OECD”) countries<sup>21</sup> and up to ten times higher than some Scandinavian countries.<sup>22</sup> The rate of incarceration has grown considerably since the 1970s.<sup>23</sup> It has more than doubled in the fifteen years leading up to 2011.<sup>24</sup> Although there have been some marginal decreases in prison numbers since 2011,<sup>25</sup> estimates show that at the current rate of decline it would take in excess of three decades to return the prison population to the size it was before the climb toward mass incarceration.<sup>26</sup> The magnitude of this mass incarceration crisis was highlighted in a recent report in the New York Bar Association:

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next highest incarceration level with estimated incarceration rates exceeding 1.65 million. *Id.* After the United States and China, the Russian Federation incarcerates approximately 640,000. *Id.* On a per capita basis, the United States has the highest incarceration rate with the exception of Seychelles. *Id.* Its incarceration rate of 698 per 100,000 of national population is almost five times the world average of 144 and more than eight times the median rate for western European countries. *Id.*

21. MELISSA S. KEARNEY ET AL., THE HAMILTON PROJECT: TEN ECONOMIC FACTS ABOUT CRIME AND INCARCERATION IN THE UNITED STATES 9 (2014), [http://www.hamiltonproject.org/assets/legacy/files/downloads\\_and\\_links/v8\\_THP\\_10CrimeFacts.pdf](http://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/v8_THP_10CrimeFacts.pdf). Rates in the OECD range from 47 to 266 per 100,000 adult population. *Id.* at 10.

22. By comparison, for example, the rates of incarceration per 100,000 adults in other countries are New Zealand (192); United Kingdom (147); Canada (118); Germany (78); and Sweden (67). *Id.*

23. See JEREMY TRAVIS ET AL., NAT’L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 1 (2014) [hereinafter THE GROWTH OF INCARCERATION IN THE UNITED STATES]. In fact, during this period it has quadrupled. *Id.*

24. Albert Hunt, *A Country of Inmates*, N.Y. TIMES (Nov. 20, 2011), <http://www.nytimes.com/2011/11/21/us/21iht-letter21.html>.

25. There was a reduction of about three percent in 2011 and 2012 and slight reductions in 2014 and 2015. See Matthew Friedman, *The U.S. Prison Population Is Down (A Little)*, BRENNAN CTR. FOR JUST. (Oct. 29, 2015), <http://www.brennan-center.org/blog/us-prison-population-down-little>. In 2014, there was a slight decrease in federal and state prison numbers, but this was partially offset by an increase in local jail numbers. *Id.* State and federal prison numbers decreased by 15,400 people from December 31, 2013, to December 31, 2014. *Id.* However, county and city jail numbers increased by 13,384 inmates from mid-year 2013 to mid-year 2014. *Id.* While these time periods are not aligned, they are indicative of a larger trend. The increasing jail numbers are eclipsing the progress made by decreasing prison numbers. In 2015, the number of prisoners dropped by 51,300 to 2,173,800 (i.e., a drop of about 2.5%). LAUREN GLAZE & DANIELLE KAEBLE, BUREAU OF JUST. STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015, at 1 (2016), <https://www.bjs.gov/content/pub/pdf/cpus15.pdf>. By contrast, there was an increase of 4,300 prisoners in 2013 when compared with 2012. While the federal prison population decreased for the first time since 1980, it was more than offset by an increase in the state prison population (the first increase since 2009). See E. ANN CARSON, BUREAU OF JUST. STATISTICS, PRISONERS IN 2013, at 1 (2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

26. Daniel Denvir, *America’s Durable Monstrosity*, JACOBIN (Jan. 9, 2017), <https://www.jacobinmag.com/2017/01/mass-incarceration-prison-bureau-justice-statistics/>.

The American criminal justice system currently holds more than 2.2 million people in an estimated 1,719 state prisons . . . . No matter how many times the statistics are repeated, they remain shocking: The United States has 4% of the world's population and 21% of the world's prisoners, nearly 40% of whom are African-American.<sup>27</sup>

The most obvious, though not exclusive, reason for the mass incarceration crisis has been the increase in the severity of penalties over the past half century. Although different sentencing systems exist between the states and the federal system,<sup>28</sup> they share many common objectives, including community protection, general and specific deterrence, rehabilitation, and retribution.<sup>29</sup> The objective of community protection has assumed paramount importance over the past few decades,<sup>30</sup> which is reflected in part by the increase in harsh prescriptive penalty laws – including fixed, minimum, or presumptive penalties<sup>31</sup> – that apply to varying degrees in all U.S. jurisdictions.<sup>32</sup>

Sentencing grids are typically used to set out prescribed penalties, which are calculated principally by reference to an offender's criminal history<sup>33</sup> and the seriousness of the offense.<sup>34</sup> There is an abundance of evidence to suggest that the increased adoption of guidelines and mandatory minimums has increased both the rate and duration of incarceration in the face of an overall

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27. TASKFORCE ON MASS INCARCERATION, N.Y. CITY BAR ASS'N, MASS INCARCERATION: WHERE DO WE GO FROM HERE? 1–2 (2017), [http://documents.nycbar.org/files/mass\\_incarceration\\_where\\_do\\_we\\_go\\_from\\_here.pdf](http://documents.nycbar.org/files/mass_incarceration_where_do_we_go_from_here.pdf). This followed an earlier report by the New York City Bar Association. See generally MARIA CILENTI, N.Y. CITY BAR ASS'N, MASS INCARCERATION: SEIZING THE MOMENT FOR REFORM (2015), [http://www2.nycbar.org/pdf/report/uploads/Mass\\_Incarceration\\_Seizing\\_the\\_Moment\\_for\\_Reform-20150928.pdf](http://www2.nycbar.org/pdf/report/uploads/Mass_Incarceration_Seizing_the_Moment_for_Reform-20150928.pdf).

28. Sentencing – and more generally, criminal law – in the United States is mainly the province of the states. See *United States v. Morrison*, 529 U.S. 598, 613 (2000) (citing *United States v. Lopez*, 514 U.S. 549, 564 (1995)).

29. See U.S. SENTENCING COMM'N, UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL 2 (2016), <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf> [hereinafter U.S. SENTENCING COMM'N 2016].

30. See THE GROWTH OF INCARCERATION IN THE UNITED STATES, *supra* note 23, at 9 (discussing the social benefits and effects of incarceration).

31. For the purposes of clarity, these both come under the terminology of fixed or standard penalties in this Article.

32. THE GROWTH OF INCARCERATION IN THE UNITED STATES, *supra* note 23, at 72–73, 76–78.

33. This is based mainly on the number, seriousness, and age of the prior convictions. Alexis Lee Watts, *In Depth: Sentencing Guideline Grids*, ROBINA INST. OF CRIM. L. & CRIM. JUST. (Jan. 11, 2018), <https://sentencing.umn.edu/content/depth-sentencing-guideline-grids>.

34. *Id.*



decrease in crime rate.<sup>35</sup> Studies have demonstrated, for example, that the average duration of prison terms has increased more than thirty percent since the late 1990s<sup>36</sup> and that there has been a four hundred percent rise in prisoners serving life sentences since the 1980s.<sup>37</sup> This is the case despite a declining crime rate during that time.<sup>38</sup>

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35. See, e.g., MICHAEL MITCHELL & MICHAEL LEACHMAN, CTR. ON BUDGET & POL'Y PRIORITIES, CHANGING PRIORITIES: STATE CRIMINAL JUSTICE REFORMS AND INVESTMENTS IN EDUCATION 13 (2014), <https://www.cbpp.org/sites/default/files/atoms/files/10-28-14sfp.pdf>; see also *More Prisoners, Less Probation for Federal Offenders*, PEW CHARITABLE TR. (2016), [http://www.pewtrusts.org/~media/assets/2016/01/pspp\\_fs\\_moreprisonlessprobation\\_v1.pdf](http://www.pewtrusts.org/~media/assets/2016/01/pspp_fs_moreprisonlessprobation_v1.pdf). For example, Michael Tonry references the “litany of tough-on crime sentencing laws” enacted in the 1980s and 1990s, which required “sentences of historically unprecedented lengths of broad categories of offenses and offenders” as the “primary causes of contemporary levels of imprisonment.” Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL'Y 503, 514 (2014); see also Michael Tonry, *The Questionable Relevance of Previous Convictions to Punishments for Later Crimes*, in PREVIOUS CONVICTIONS AT SENTENCING 91 (Andrew von Hirsch & Julian V. Roberts eds., 2010). For further criticism of the Guidelines, see Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 92–93 (2005); Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 40 (2006); James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL'Y REV. 173 (2010). John Pfaff's “Locked In” and James Forman's “Locking Up Our Own” argue that the key reason for the increase in incarceration numbers is stricter prosecution practices, reflected by a higher rate of felonies being charged. See JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017); JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017); see also Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691 (2010).

36. See, e.g., PEW CHARITABLE TR., TIME SERVED, THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 3 (2012), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing\\_and\\_corrections/prison-time-servedpdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/prison-time-servedpdf.pdf). From 1990 to 2009, there has been an 37% increase of time served for violent crimes, 24% for property crimes, and 36% for drug crimes. *Id.*

37. Ashley Nellis, SENT'G PROJECT, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 7 (2017), <http://www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf>.

38. *Id.* at 6. The Sentencing Project also reported a significant increase in inmates serving life sentences without the possibility of parole since 2008, and a more recent study showed that the number of offenders serving life terms is now at a record high. *Id.* at 7. There are currently 161,957 prisoners serving a life term and a further 44,311 offenders serving a virtual life sentence (that is, a term of fifty years or more). *Id.* This amounts to 13.9% of the entire prison population. *Id.* at 10. Nearly half of these prisoners (48.3%) are African American. *Id.* at 5. Incredibly, the United States' incarceration rate for life terms is approximately fifty per 100,000 of the population, which is about the same as the entire incarceration rate of Finland, Sweden, and Denmark. *Id.*

Fundamental reform of the sentencing system is required in order to reduce the levels of incarceration in the United States. Reform must be driven by empirical data regarding the efficacy of sanctions to achieve sentencing goals and normative considerations regarding the appropriateness of certain forms of punishment.<sup>39</sup> These considerations suggest that, in broad terms, the sentencing system would be vastly improved if prison was reserved for offenders who commit serious sexual and violent offenses.<sup>40</sup>

The key rationale for this conclusion stems from a number of findings. Empirical evidence establishes that key sentencing objectives used to justify longer prison terms are unattainable.<sup>41</sup> It has been repeatedly demonstrated that harsher penalties have no meaningful impact in terms of discouraging potential offenders.<sup>42</sup> The goal of general deterrence cannot, therefore, be used to justify harsher penalties. Further, harsh terms do not dissuade individual offenders from reoffending. Specific deterrence should, as a result, be abolished as a sentencing consideration.<sup>43</sup> Imprisonment should not be pursued for minor offenses because the cost of imprisonment and the suffering inflicted on those offenders outweighs the harm caused by the crime.<sup>44</sup> Ultimately, prison terms can only be justified for serious offenders, and the nature and length of sentences should be determined by the principle of proportionality – that is, the theory that hardship caused by the penalty should match the suffering caused by the offense.<sup>45</sup>

Reconfiguring the objectives of sentencing and the standard penalties for offenses would profoundly change the sentencing landscape. It would also result in a significant diminution in prison numbers.

The focus on structural aspects of the sentencing system is, however, insufficient to provide a total solution to the incarceration crisis. In any system, an integral element of its success is the manner in which it is implemented. For example, even if sentencing reform resulted in lower maximum penalties, its effectiveness would nevertheless be compromised if innocent defendants felt pressured to plead guilty or if defendants often accepted penalties more punitive than they would have received if they had insisted on a trial. The need for a fair and efficient plea bargaining system is thus cardinal to the functioning of a fair and efficient sentencing system.

Prior to setting out the parameters of a fairer plea bargaining process, we explain in more detail the reason why wide-ranging sentencing reform is urgently needed by providing an overview of the harm caused by the mass incarceration crisis.

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39. See generally Mirko Bagaric & Sandeep Gopalan, *Saving the United States from Lurching to Another Sentencing Crisis: Taking Proportionality Seriously and Implementing Fair Fixed Penalties*, 60 ST. LOUIS U. L. J. 169 (2016).

40. *Id.* at 171, 284.

41. *Id.* at 184.

42. *Id.* at 187.

43. See *id.*

44. *Id.* at 185.

45. *Id.* at 189.

### B. The Staggering Financial and Humanistic Toll of Imprisonment

There are two major forms of harm stemming from the current incarceration crisis. Both are enormous in magnitude. The first is financial. The other is humanistic. We consider them in that order.

The current incarceration crisis costs taxpayers an estimated \$80 billion per year directly<sup>46</sup> and rises to more than \$500 billion when account is taken of the additional social costs.<sup>47</sup> In most states, the budget allocated to corrections is exceeded only by Medicaid and education expenditures,<sup>48</sup> and in some it exceeds the education expenditure.<sup>49</sup> The increase in the corrections budget is to be contrasted with the slow down or contraction of expenditures on other key social services.<sup>50</sup>

Notwithstanding this dramatic increase in expenditure, the resulting increase in incarceration rates has not produced any significant community benefit. Importantly, it has not enhanced community safety.<sup>51</sup> Studies have repeatedly demonstrated that increasing incarceration plays a very limited role in

46. KEARNEY ET AL., *supra* note 21, at 13.

47. Michael McLaughlin et al., *The Economic Burden of Incarceration in the U.S.* 19 (Concordance Inst. for Advancing Justice & Research Working Paper #AJI072016, 2016), <https://joinnia.com/wp-content/uploads/2017/02/The-Economic-Burden-of-Incarceration-in-the-US-2016.pdf>.

48. THE GROWTH OF INCARCERATION IN THE UNITED STATES, *supra* note 23, at 314; *see also* KEARNEY ET AL., *supra* note 21, at 13.

49. *See* MITCHELL & LEACHMAN, *supra* note 35, at 1. Reduced investment in education is also occurring at the more junior education level:

In recent years . . . states have cut education funding, in some cases by large amounts. At least 30 states are providing less general funding per student this year for K-12 schools than in state fiscal year 2008, before the Great Recession hit, after adjusting for inflation. In 14 states, the reduction exceeds 10%. The 3 states with the deepest funding cuts since the recession hit—Alabama, Arizona, and Oklahoma—are among the ten states with the highest incarceration rates.

*Id.* (footnotes omitted); *see also* Beatrice Gitau, *The Hidden Costs of Funding Prisons Instead of Schools*, CHRISTIAN SCI. MONITOR (Oct. 3, 2015), <http://www.csmonitor.com/USA/Justice/2015/1003/The-hidden-costs-of-funding-prisons-instead-of-schools> (“[Eleven states] spend more on prisons than universities: Michigan, Oregon, Arizona, Vermont, Colorado, Pennsylvania, New Hampshire, Delaware, Rhode Island, Massachusetts, and Connecticut”); Adam Gopnik, *The Caging of America*, NEW YORKER (Jan. 30, 2012), <http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america> (observing that the rate of investment in prisons has significantly exceeded that of higher education).

50. THE GROWTH OF INCARCERATION IN THE UNITED STATES, *supra* note 23, at 314; *see also* KEARNEY ET AL., *supra* note 21, at 13.

51. KEARNEY ET AL., *supra* note 21, at 18–19.

decreasing crime.<sup>52</sup> In more than half of the states in the United States, there is evidence of a *positive* correlation between reduced rates of imprisonment and a reduction in crime.<sup>53</sup> This is most clearly demonstrated in Texas, where the incarceration rate fell by seventeen percent and the crime rate dropped by twenty-seven percent between 2007 and 2015.<sup>54</sup>

The expense of mass incarceration cannot, therefore, be justified by reference to any measurable community benefit. In addition to the fiscal burden of incarceration, there is also a less obvious but perhaps even greater humanistic toll. Incarceration exacts an extreme toll not only on prisoners but also on their family and dependents.<sup>55</sup> Mass incarceration may also violate human rights,<sup>56</sup> particularly of minorities and others from socially and economically-deprived backgrounds who are over-represented in the prison system.<sup>57</sup>

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52. See, e.g., JAMES AUSTIN ET AL., BRENNAN CTR. FOR JUST., *HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED* 5, 22 (2016), [https://www.brennan-center.org/sites/default/files/publications/Unnecessarily\\_Incarcerated\\_0.pdf](https://www.brennan-center.org/sites/default/files/publications/Unnecessarily_Incarcerated_0.pdf). See generally the studies summarized in Mirko Bagaric, *The Punishment Should Fit the Crime – Not the Prior Convictions of the Person That Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing*, 51 SAN DIEGO L. REV. 343 (2014).

53. See AUSTIN ET AL., *supra* note 52, at 5. The aim of lower incarceration numbers and less crime is readily achievable. See DANIELLE SERED, VERA INST. JUST. ACCOUNTING FOR VIOLENCE: HOW TO INCREASE SAFETY AND BREAK OUR FAILED RELIANCE ON MASS INCARCERATION 8 (2017), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/accounting-for-violence/legacy\\_downloads/accounting-for-violence.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/accounting-for-violence/legacy_downloads/accounting-for-violence.pdf).

54. Tina Rosenberg, Opinion, *Even in Texas, Mass Imprisonment Is Going Out of Style*, N.Y. TIMES (Feb. 14, 2017), [https://www.nytimes.com/2017/02/14/opinion/even-in-texas-mass-imprisonment-is-going-out-of-style.html?\\_r=0](https://www.nytimes.com/2017/02/14/opinion/even-in-texas-mass-imprisonment-is-going-out-of-style.html?_r=0); see also Matt Thompson, *Imagining the Presence of Justice*, ATLANTIC (May 3, 2017), <https://www.theatlantic.com/national/archive/2017/05/criminal-justice-across-america-reporting-project/524985/> (observing the “startling divergence between crime and punishment” in the United States).

55. McLaughlin et al., *supra* note 47, at 2.

56. See Mirko Bagaric, *Three Things That a Baseline Study Shows Don’t Cause Indigenous Over-Imprisonment; Three Things that Might but Shouldn’t and Three Reforms that Will Reduce Indigenous Over-Imprisonment*, 32 HARV. J. ON RACIAL & ETHNIC JUST. 103, 104 (2016) [hereinafter Bagaric, *Three Things*] (“Due to the extreme nature of [racial] disparities Australia has been harshly condemned by the international human rights community.”); cf. Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> (discussing racial bias the United States criminal justice system).

57. See generally Bagaric, *Three Things*, *supra* note 56; Mirko Bagaric, *Rich Offender; Poor Offender: Why It (Sometimes) Matters in Sentencing*, 33 LAW & INEQ. 1 (2015). However, it should be noted that in recent years there has been a slight reduction in the extent to which African Americans are imprisoned compared to the rest of the community, but nevertheless, their over-imprisonment rate is more than 5:1. See Keith Humphreys, *Black Incarceration Hasn’t Been this Low in a Generation*, WASH. POST (Aug. 16, 2016),

The pain of imprisonment is not restricted to the deprivation of liberty. It frequently extends to mental and physical harm. Harms take the form of sexual and physical abuse, which is inflicted on inmates at substantially higher rates than members of the general community.<sup>58</sup> Added to this is the restriction of access to goods, services,<sup>59</sup> and sexual relationships,<sup>60</sup> as well as the emotional harm associated with the lack of any meaningful family contact.<sup>61</sup> The pain extends beyond the expiration of the prison term, with former prisoners suffering reduced employment prospects,<sup>62</sup> life expectancy,<sup>63</sup> and disproportionate levels of ill health.<sup>64</sup>

The burden of incarceration also extends to families and other dependents of prisoners and is most acutely felt by children.<sup>65</sup> It is perhaps not surprising that children who have had a parent imprisoned often experience significant

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<https://www.washingtonpost.com/news/wonk/wp/2016/08/16/black-incarceration-hasnt-been-this-low-in-a-generation/>. The reasons that black Americans are imprisoned at greater levels are discussed *infra* Part V; *see also* Angwin et al., *supra* note 56.

58. *See* Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, YALE L. & POL'Y REV 195, 208–09 (1999).

59. GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* 67–68 (2007).

60. *Id.* at 70–71; *see also* Robert Johnson & Hans Toch, *Introduction to THE PAINS OF IMPRISONMENT* (Robert Johnson & Hans Toch eds., 1982).

61. SYKES, *supra* note 59, at 70–71.

62. THE GROWTH OF INCARCERATION IN THE UNITED STATES, *supra* note 23, at 247. One study estimated the earnings reduction to be as high as forty percent. Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 139 DAEDALUS 8, 13 (2010).

63. Anne C. Spaulding et al., *Prisoner Survival Inside and Outside of the Institution: Implications for Health-Care Planning*, 173 AM. J. EPIDEMIOLOGY 479, 479 (2011). A study which examined the 15.5-year survival rate of 23,510 ex-prisoners in the State of Georgia found much higher mortality rates for ex-prisoners than for the rest of the population. *Id.* There were 2,650 deaths in total, which was a forty-three percent higher mortality rate than normally expected – 799 more ex-prisoners died than expected. *Id.* The main causes for the increased mortality rates were homicide, transportation accidents, accidental poisoning – which included drug overdoses – and suicide. *See id.*; *see also* THE GROWTH OF INCARCERATION IN THE UNITED STATES, *supra* note 23, at 219–26.

64. Christopher Wildeman & Emily A. Wang, *Mass Incarceration, Public Health, and Widening Inequality in the USA*, 389 LANCET 1464, 1464 (2017).

65. *See* Mirko Bagaric & Theo Alexander, *First-Time Offender, Productive Offender, Offender with Dependents: Why the Profile of Offenders (Sometimes) Matters in Sentencing*, 78 ALB. L. REV. 397, 432 (2015). For a discussion about the meaning of flourishing, *see* Mirko Bagaric, *Injecting Content into the Mirage that is Proportionality in Sentencing*, 25 N.Z. U. L. REV. 411, 434 (2013) [hereinafter Bagaric, *Injecting Content into the Mirage that is Proportionality in Sentencing*].

emotional problems and negative health outcomes,<sup>66</sup> tend to attend and participate less in school, suffer from reduced parental oversight,<sup>67</sup> and, as a result, have an increased risk of offending themselves.<sup>68</sup>

### C. Widespread Support for Sentencing Reform

The reforms proposed in this Article are admittedly wide-ranging and extensive. However, this is not necessarily a compelling reason for not advocating such changes. In fact, the sentencing landscape is currently more receptive to change than at any time in recent history. Recognition of the need for sentencing reform is reflected in the increased attention devoted to the subject by journalists,<sup>69</sup> politicians from both sides of the aisle,<sup>70</sup> and the broader community,<sup>71</sup> including the academic and legal communities. Police officials, prose-

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66. Wildeman & Wang, *supra* note 64, at 1469.

67. DAVID MURPHEY & P. MAE COOPER, PARENTS BEHIND BARS: WHAT HAPPENS TO THEIR CHILDREN? 2 (2015), <https://childtrends-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2015/10/2015-42ParentsBehindBars.pdf>.

68. E. Mosely, *Incarcerated – Children of Parents in Prison Impacted*, TEX. DEP'T CRIM. JUST. (July 2008), [http://www.tdcj.state.tx.us/gokids/gokids\\_articles\\_children\\_impacted.html](http://www.tdcj.state.tx.us/gokids/gokids_articles_children_impacted.html). This study found that children of parents who have been imprisoned are five times more likely than other children to commit offenses.

69. *See, e.g.*, Eduardo Porter, *In the U.S., Punishment Comes Before the Crimes*, N.Y. TIMES (Apr. 29, 2014), <http://www.nytimes.com/2014/04/30/business/economy/in-the-us-punishment-comes-before-the-crimes.html>; Matt Ferner, *New Report Reveals Devastating Effects of Mass Incarceration on the U.S.*, HUFFINGTON POST (Mar. 5, 2016), [http://www.huffingtonpost.com.au/entry/effects-mass-incarceration\\_us\\_5727b6abe4b0b49df6ac0e00](http://www.huffingtonpost.com.au/entry/effects-mass-incarceration_us_5727b6abe4b0b49df6ac0e00). *The New York Times* has published multiple editorials endorsing sentencing reform. *See, e.g.*, Opinion, *Cut Prison Sentences, and Costs*, N.Y. TIMES (Dec. 24, 2016), <http://www.nytimes.com/2016/12/24/opinion/sunday/cutting-prison-sentences-and-costs.html>; Opinion, *Cut Sentences for Low-Level Drug Crimes*, N.Y. TIMES (Nov. 23, 2015), <http://www.nytimes.com/2015/11/23/opinion/cut-sentences-for-low-level-drug-crimes.html>; Opinion, *Toward Saner, More Effective Prison Sentences*, N.Y. TIMES (Oct. 3, 2015), <http://www.nytimes.com/2015/10/04/opinion/sunday/toward-saner-more-effective-prison-sentences.html>; Rosenberg, *supra* note 54.

70. Clare Foran, *What Can the U.S. Do About Mass Incarceration?*, ATLANTIC (Apr. 28, 2016), <http://www.theatlantic.com/politics/archive/2016/04/ending-mass-incarceration/475563/>.

71. Several prominent reports also continue to emphasize the urgent need for sentencing reform to reduce levels of incarceration. *See, e.g.*, SERED, *supra* note 53, at 8; *see also* Holly Harris & Andrew Howard, *Ryan's Victory Trumps Justice Reform Opponents*, HILL (Aug. 15, 2006), <http://thehill.com/blogs/pundits-blog/crime/291500-ryans-victory-trumps-justice-reform-opponents>. Harris and Howard refer to polling data showing “overwhelming support across the political and ideological spectrum for criminal justice reform.” *Id.* *But see* Justin McCarthy, *Americans' Views Shift on Toughness of Justice System*, GALLUP (Oct. 20, 2016), <http://www.gallup.com/poll/196568/americans-views-shift-toughness-justice-system.aspx>.

cutors, and attorneys general have also pleaded for reductions in rates of incarceration, most notably through the Law Enforcement Leaders to Reduce Crime and Incarceration initiative.<sup>72</sup> Even more telling, however, is the fact that many victims of crime – including violent crime – have called for less spending on prison and a greater focus on rehabilitation.<sup>73</sup>

Recognizing the broad support for sentencing reform and the desirability of reducing the rate of mass incarceration, the Obama Administration, in 2014, amended the Federal Sentencing Guidelines to significantly reduce the penalty for many non-violent drug trafficking offenses.<sup>74</sup> The change operated retroactively,<sup>75</sup> resulting in a penalty reduction of approximately two years for 13,000 federal prisoners and saving around one billion dollars.<sup>76</sup>

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72. Press Release, Law Enforcement Leaders, Law Enforcement Leaders Urge President to Back Sentencing Reform, Spurn More Incarceration as Part of Anti-Crime Agenda (Feb. 13, 2017), <http://lawenforcementleaders.org/wp-content/uploads/2017/02/LEL-Report-Release.pdf>. In 2017, this body, comprised of nearly 200 police chiefs and prosecutors, issued a press release urging the Trump Administration to implement policies designed to reduce incarceration by targeting resources to preventing violent crime instead of “over-resourcing efforts to fight lower-level drug crimes and non-violent crimes.” *Id.*; see also Douglas A. Berman, *Notable New Group Advocating for Sentencing Reforms: Law Enforcement Leaders to Reduce Crime and Incarceration*, SENTENCING L. & POL’Y (Oct. 21, 2015), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2015/10/notable-new-group-advocating-for-sentencing-reforms-law-enforcement-leaders-to-reduce-crime-and-inca.html](http://sentencing.typepad.com/sentencing_law_and_policy/2015/10/notable-new-group-advocating-for-sentencing-reforms-law-enforcement-leaders-to-reduce-crime-and-inca.html).

73. Christopher Ingraham, *Even Violent Crime Victims Say Our Prisons Are Making Crime Worse*, WASH. POST (Aug 5, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/08/05/even-violent-crime-victims-say-our-prisons-are-making-crime-worse/>; see also Timothy Williams, *Trump Wants to Get Tough on Crime. Victims Don’t Agree.*, N.Y. TIMES (Aug. 11, 2017), <https://www.nytimes.com/2017/08/11/us/crime-victims-poll-trump-agenda.html>.

74. See U.S. SENTENCING COMM’N, U.S. SENTENCING COMMISSION 2014 DRUG GUIDELINES AMENDMENT RETROACTIVITY DATA REPORT (2016), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20161025-Drug-Retro-Analysis.pdf>.

75. *Id.*

76. Douglas A. Berman, *US Sentencing Commission Releases New Data on Retroactive Application of “Drugs -2” Guideline Amendment*, SENTENCING L. & POL’Y (Aug. 17, 2016), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2015/08/us-sentencing-commission-releases-new-data-on-retroactive-application-of-drugs-2-guideline-amendment.html](http://sentencing.typepad.com/sentencing_law_and_policy/2015/08/us-sentencing-commission-releases-new-data-on-retroactive-application-of-drugs-2-guideline-amendment.html).

This trend at the federal level does not, however, appear likely to continue,<sup>77</sup> with both President Trump<sup>78</sup> and former Attorney-General Jeff Sessions<sup>79</sup> appearing to embrace a ‘tough on crime’ approach to law enforcement and sentencing. This is the case notwithstanding the fact that some Republicans have recommended reform to reduce prison numbers because they recognize the increasing unpopularity of a “tough on crime” approach and, in particular, the fact that many large conservative states have been leading the reform agenda.<sup>80</sup> In addition, in December 2018, the Trump Administration passed

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77. This is the case notwithstanding the establishment of a “Task Force on Crime Reduction and Public Safety” in February 2017, designed, in part, to identify “deficiencies in existing laws that have made them less effective in reducing crime and propose new legislation that could be enacted to improve public safety and reduce crime.” Exec. Order No. 13,776, 82 Fed. Reg. 10,699 (Feb. 9, 2017). For an overview of the Trump Administration’s activity in this area in his first 100 days, see AMES GRAWERT & NATASHA CAMHI, BRENNAN CTR. FOR JUST., *CRIMINAL JUSTICE IN PRESIDENT TRUMP’S FIRST 100 DAYS* (2017), [https://www.brennancenter.org/sites/default/files/analysis/Criminal\\_Justice\\_in\\_President\\_Trumps\\_First\\_100\\_Days.pdf](https://www.brennancenter.org/sites/default/files/analysis/Criminal_Justice_in_President_Trumps_First_100_Days.pdf).

78. President Trump has long been an advocate of “tough on crime” policies. For example, he devotes a chapter of his book, *The America We Deserve*, to advocating tough on crime policies. Donald Trump, *The Safe Streets We Deserve*, in *THE AMERICA WE DESERVE* ch. 3 (St. Martin’s Press, 2000). This rhetoric continued through the primaries and into his first few months in office. See generally German Lopez, *Trump’s First 100 Days Have Been a Criminal Justice Callback to the 1980s and ‘90s*, VOX (Apr. 28, 2017), <https://www.vox.com/policy-and-politics/2017/4/28/15457902/trump-criminal-justice-100-days>; Jenna Goff & Joan Greve, *Trump vs. Clinton: Criminal Justice Reform*, PBS (Sept. 19, 2016), <http://www.pbs.org/weta/washingtonweek/blog-post/trump-vs-clinton-criminal-justice-reform>; Michelle Mark, *Here’s What Hillary Clinton and Donald Trump Think About Criminal Justice*, BUS. INSIDER AUSTRAL. (Sept. 27, 2016), <http://www.businessinsider.com.au/trump-and-clinton-on-issues-mass-incarceration-and-criminal-justice-2016-9>.

79. President Trump appointed Attorney General Jeff Sessions, who also supported a “tough on crime” approach, evidenced in part by the release of a recent memorandum requiring federal prosecutors to “charge and pursue the most serious, readily provable offense.” Memorandum from Jeff Sessions, Attorney General to All Federal Prosecutors 1 (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download>. The impact of this in terms of increasing incarceration numbers in one jurisdiction was discussed in Aaron Cantú, *Two Steps Back: How Jeff Sessions’ Memo on Federal Prosecutions Could Take New Mexico Back to a Harsher Era*, SANTA FE REP. (May 16, 2017), <http://www.sfreporter.com/santafe/article-13419-two-steps-back.html>. However, Sessions was fired in November of 2018, and Trump “named Matthew Whitaker to serve as interim attorney general.” Kevin Johnson, *Trump Fires Jeff Sessions, Names Matthew Whitaker as Interim Attorney General*, USA TODAY (Nov. 7, 2018), <https://www.usatoday.com/story/news/politics/2018/11/07/jeff-sessions-resigns-attorney-general-trump/51260001/>.

80. See, e.g., Harris & Howard, *supra* note 71. Harris and Howard have observed, for example, that “Speaker Ryan’s home state of Wisconsin show[s] support for reform issues ranging from the 60s to high 80s. The smart political play is to embrace these



the First Step Act, which aims to reduced federal prison numbers by implementing a number of reforms, including reducing penalties for certain drug offenses and facilitating for the earlier release of some prisoners.<sup>81</sup>

Notwithstanding the fact that it appears unlikely that, in the short term, positive sentencing reform will occur at the federal level, there is still the prospect that significant change can be made at the state level. With seven out of eight prisoners held in state prisons,<sup>82</sup> it is the states that can do the most to reduce current levels of mass incarceration, and many have already embarked on efforts to do so. During 2014 and 2015, for example, forty-six states passed laws directed at reducing prison populations through sentencing reform,<sup>83</sup> including, in some states, reducing terms of prison sentences for property and

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reforms. Doing otherwise could backfire.” *Id.*; see also Evan Halper, *Clinton’s Call for Easing Harsh Sentencing Laws Is Echoed by Republican Rivals*, L.A. TIMES (Apr. 29, 2015), <http://www.latimes.com/nation/politics/la-pn-clinton-prison-reform-20150429-story.html>; Peter Baker, *2016 Candidates Are United in Call to Alter Justice System*, N.Y. TIMES (Apr. 27, 2015), <http://www.nytimes.com/2015/04/28/us/politics/being-less-tough-on-crime-is-2016-consensus.html>. Perhaps more notably, a recent poll suggests a majority of people who support President Trump believe judges should have more freedom to impose sanctions other than imprisonment. Vikrant Reddy, *The Conservative Base Wants Criminal-Justice Reform*, NAT’L REV. (May 8, 2017), <http://www.nationalreview.com/article/447398/criminal-justice-reform-donald-trump-supporters-conservative-base-want-fresh>. There was some optimism that President Trump would support legislation aimed at reducing federal prison numbers, but this momentum seems to have dissipated. See Stef W. Kight & Jonathan Swan, *Trump Won’t Endorse Criminal Justice Bill Before Midterms*, AXIOS (Aug. 24, 2018), <https://www.axios.com/trump-criminal-justice-reform-bill-2018-midterms--7898f16f-0fcb-4ad0-ae44-f0131e406b22.html>.

81. For an overview of this legislation see Brandon Sample, *First Step Act: A Comprehensive Analysis*, SENTENCING.NET (Dec. 19, 2018), <https://sentencing.net/legislation/first-step-act>.

82. Rosenberg, *supra* note 54.

83. REBECCA SILBER, RAM SUBRAMANIAN & MAIA SPOTTS, VERA INST. JUST., JUSTICE IN REVIEW: NEW TRENDS IN STATE SENTENCING AND CORRECTIONS 2014–2015, at 3, 6–7 (2016),

[https://storage.googleapis.com/vera-web-assets/downloads/Publications/justice-in-review-new-trends-in-state-sentencing-and-corrections-2014-2015/legacy\\_downloads/state-sentencing-and-corrections-trends-2014-2015-updated.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/justice-in-review-new-trends-in-state-sentencing-and-corrections-2014-2015/legacy_downloads/state-sentencing-and-corrections-trends-2014-2015-updated.pdf). Wide-ranging reforms are occurring in Ohio and Michigan. See U.S. JUSTICE ACTION NETWORK, REFORMING THE NATION’S CRIMINAL JUSTICE SYSTEM: THE IMPACT OF 2015 AND PROSPECTS FOR 2016, at 9–10 (2015). Texas is also undertaking sweeping criminal justice reforms. See Adam Bradon et al., *Congress Should Follow the Red States’ Lead on Criminal-Justice Reform*, NAT’L REV. (May 2, 2016), <http://www.nationalreview.com/article/434783/criminal-justice-reform-conservatives-have-led-way>. For a summary of recent changes in some states to lower penalties for property, drunk driving, and other low-level offenders, see Sarah Breitenbach, *Prisons, Policing at Forefront of State Criminal Justice Action*, PEW CHARITABLE TR. (June 27, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/06/27/prisons-policing-at-forefront-of-state-criminal-justice-action>; Brandon L. Garrett, *Conservatives Are Leading the Way as States Enact Criminal Justice Reform*, SLATE (Mar.

drug offenses<sup>84</sup> and re-classifying certain non-violent offenses as misdemeanors.<sup>85</sup> Reforms adopted by Texas have reduced prisoner numbers by more than

31, 2017),

[http://www.slate.com/articles/news\\_and\\_politics/trials\\_and\\_error/2017/03/conservatives\\_could\\_help\\_derail\\_trump\\_s\\_tough\\_on\\_crime\\_policies.html](http://www.slate.com/articles/news_and_politics/trials_and_error/2017/03/conservatives_could_help_derail_trump_s_tough_on_crime_policies.html); Richard A. Oppel Jr., *States Trim Penalties and Prison Rolls, Even as Sessions Gets Tough*, N.Y. TIMES (May 18, 2017), <https://www.nytimes.com/2017/05/18/us/states-prisons-crime-sentences-jeff-sessions.html>; James Foreman Jr., Opinion, *Justice Springs Eternal*, N.Y. TIMES (Mar. 25, 2017), <https://www.nytimes.com/2017/03/25/opinion/sunday/justice-springs-eternal.html>.

84. SILBER, SUBRAMANIAN & SPOTTS, *supra* note 83, at 3, 19–20; *see also* Bill Keller, *Nine Lessons About Criminal Justice Reform*, MARSHALL PROJECT (July 19, 2017), <https://www.themarshallproject.org/2017/07/19/nine-lessons-about-criminal-justice-reform#.LWnzhH89W>.

85. One such measure was California Proposition 47. This law brings about the following key changes: it “requires misdemeanor sentence instead of felony for certain drug possession offenses” and “for the following crimes when amount involved is \$950 or less: petty theft, receiving stolen property, and forging/writing bad checks”; it “[a]llows felony sentence for these offenses if person has previous conviction for crimes such as rape, murder, or child molestation or is registered sex offender;” and it “requires resentencing for persons serving felony sentences for these offenses unless court finds unreasonable public safety risk.” CAL. ATTORNEY GENERAL, PROPOSITION 47: CRIMINAL SENTENCES. MISDEMEANOR PENALTIES. INITIATIVE STATUTE. 1 (2014), <http://vig.cdn.sos.ca.gov/2014/general/pdf/proposition-47-title-summary-analysis.pdf>. The law was passed with a majority of fifty-nine percent of voters in favor. Kristina Davis, *Calif Cuts Penalties for Small Drug Crimes*, SAN DIEGO UNION-TRIB. (Nov. 4, 2014),

<http://www.sandiegouniontribune.com/news/elections/sdut-prop-47-misdemeanor-law-vote-election-drug-2014nov04-story.html>; *see also San Francisco Called a Model for Ending Mass Incarceration*, CRIME REP. (Dec. 1, 2015), <http://www.thecrimereport.org/news/articles/2015-12-san-francisco-called-a-model-for-ending-mass-incarcerate>. For an overview of the impact of the reform, see Rob Kuznia, *An Unprecedented Experiment in Mass Forgiveness*, WASH. POST (Feb. 8, 2016), [https://www.washingtonpost.com/national/an-unprecedented-experiment-in-mass-forgiveness/2016/02/08/45899f9c-a059-11e5-a3c5-c77f2cc5a43c\\_story.html](https://www.washingtonpost.com/national/an-unprecedented-experiment-in-mass-forgiveness/2016/02/08/45899f9c-a059-11e5-a3c5-c77f2cc5a43c_story.html). This was followed by Proposition 57 in November 2016, which allows prisoners to be released earlier and which is likely to result in the release of 9,500 prisoners in four years and a seven percent reduction in the prison population in California. *California Plans to Free 9,500 Inmates over Next 4 Years*, L.A. TIMES (Mar. 24, 2017), <http://www.latimes.com/local/california/la-me-california-inmates-20170324-story.html>. Louisiana is also undertaking considerable criminal justice reform. *See* Julia O’Donoghue, *Louisiana to Review 16,000 Prison Sentences as Criminal Justice Reform Takes Effect*, TIMES-PICAYUNE (Aug. 16, 2017), [http://www.nola.com/politics/index.ssf/2017/08/louisiana\\_sentence\\_changes.html](http://www.nola.com/politics/index.ssf/2017/08/louisiana_sentence_changes.html); Julia O’Donoghue, *Louisiana May be Poised to Pass ‘Historic’ Criminal Justice Reform, Reduce Prison Population*, TIMES-PICAYUNE (May 16, 2017), [http://www.nola.com/politics/index.ssf/2017/05/louisiana\\_looks\\_poised\\_to\\_pass.html](http://www.nola.com/politics/index.ssf/2017/05/louisiana_looks_poised_to_pass.html). One state – North Dakota – is even going so far as to experiment with the structure of prisons and adopting the Norwegian model of humanistic prisons in a bid to ascertain whether this will correlate with less recidivism.

10,000 since 2011 and have resulted in an unprecedented plan to close four prisons in 2017.<sup>86</sup>

Nevertheless, these changes and proposals, while commendable, are piecemeal and have had only a minor impact on incarceration levels. A fundamental overhaul of sentencing is needed to ensure that the system operates fairly and efficiently. The system must, while maintaining community safety as an important goal, ensure offenders are punished in proportion to the seriousness of their offenses and eliminate gratuitous punishment. Such an approach would reduce the burden on the public purse and limit the harm often needlessly suffered by offenders and their families.<sup>87</sup>

There is, as we have shown, considerable support for sentencing reform.<sup>88</sup> In light of that support, and the harm – fiscal and humanistic – associated with the current system, we now examine the role of prosecutorial conduct in the sentencing system and make suggestions for reforming the sentencing and, in particular, plea bargaining process.

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Dashka Slater, *North Dakota's Norway Experiment: Can Humane Prisons Work in America? A Red State Aims to Find Out*, MOTHER JONES (July/Aug. 2017), <http://www.motherjones.com/crime-justice/2017/07/north-dakota-norway-prisons-experiment/>.

86. Brandy Grissom, *With Crime, Incarceration Rates Falling, Texas Closes Record Number of Prisons*, DALL. MORNING NEWS (July 5, 2017), <https://www.dallasnews.com/news/texas-legislature/2017/07/05/crime-incarceration-rates-falling-texas-closes-record-number-lock-ups>. As a result of a variety of measures, including investing in diversion programs, initiatives to assist those suffering mental illness, and a reduction in some penalties, the prison population in Texas has dropped by around 10,000 prisoners. *Id.*

87. *See* Thompson, *supra* note 54. As noted recently,

Despite dawning awareness of the deep social and economic costs of mass incarceration, no one-size-fits-all solution exists to change this picture. Rolling back mass incarceration while protecting public safety will require a legion of efforts in thousands of prosecutors' offices, police departments, parole boards, and legislative chambers. "What we have is not a system at all," as Fordham University's John Pfaff told *The Atlantic's* Matt Ford, "but a patchwork of competing bureaucracies with different constituencies, different incentives, who oftentimes might have similar political ideologies, but very different goals and very different pressures on them."

*Id.*

88. *See supra* notes 71–73, 80 and accompanying text. It should be noted that not all of the momentum is towards less incarceration. Senator Cotton has recently stated that the United States is suffering from "under-incarceration." *See* Nick Gass, *Sen. Tom Cotton: U.S. Has 'Under-Incarceration Problem'*, POLITICO (May 19, 2016), <http://www.politico.com/story/2016/05/tom-cotton-under-incarceration-223371>.

## II. THE CURRENT PLEA BARGAINING PROCESS

### A. Overview and Advantages of the Plea Bargaining Process

Plea bargaining is the process by which defendants give up their right to trial and instead plead guilty in exchange for concessions from the prosecution, generally in the form of withdrawal of charges or lighter sentences.<sup>89</sup> Plea bargaining is a multifaceted process that usually involves discussions and negotiation between the criminal defendant, his attorney, and the prosecutor. All negotiations take place directly between the parties without the involvement of a neutral – the judge assigned to the case is (typically) completely barred from participating in plea negotiations.<sup>90</sup>

Discussions in the bargaining process can focus on any aspect of the case, including what charges the State will elect to bring, what facts will be included in the agreement, and what proposed sentence will be submitted to the judge.<sup>91</sup> Lawyers, not judges, play the primary role in plea negotiations.<sup>92</sup> Defense and

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89. Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61, 66 (2015). The history of the process has been described as follows:

Plea bargains were almost unheard of prior to the Civil War. Only in its aftermath, as waves of displaced Americans and immigrants rolled into cities and crime rates climbed, did appellate courts start documenting exchanges that resemble the modern practice. The plea became a release valve for mounting caseloads. Appellate courts “all condemned it as shocking and terrible” at the time, said Albert Alschuler, a retired law professor who has studied plea bargains for five decades. The courts raised a range of objections to these early encounters, from the secretiveness of the process to the likeliness of coercing innocent defendants. Pleas, wrote the Wisconsin Supreme Court in 1877, are “hardly, if at all, distinguishable in principle from a direct sale of justice.” The practice nonetheless continued, and, by the turn of the century, a minor economy had settled in its orbit. “Fixers” could be hired to arrange for alternatives to a prison sentence. Police regularly toured jails to “negotiate” with the inmates. One New York City defense attorney and friend to local magistrates loitered in front of night court hawking [ten] days in jail for \$300, 20 days for \$200, and 30 days for \$150. By the 1920s, as violations of the federal liquor prohibition flooded court dockets, 88% percent of cases in New York City and 85% percent in Chicago were settled through pleas. When the Supreme Court in 1969 finally heard a case concerning the legality of the issue, it unanimously ruled that pleas are constitutionally acceptable. They are ‘inherent in the criminal law and its administration,’ the Court declared.

Walsh, *supra* note 8.

90. Brook et al., *supra* note 5, at 1164. The limited, if not entirely non-existent, role of the trial judge in the plea bargaining process is consistent between the federal and state jurisdictions. 2 Criminal Law Advocacy § 37.04 (2017). For the most part, it appears that the widespread bar on judicial involvement in the plea bargaining process is a product of judicial practice, not constitutional prohibition. *See id.*

91. Brook et al., *supra* note 5, at 1164–67.

92. *Id.* at 1182.

prosecution lawyers may meet outside the presence of the defendant, with the defense attorney relaying the substance of the discussions back to his or her client.<sup>93</sup> Alternatively, the negotiations may take the form of proffer sessions with the lawyers, clients, and law enforcement agents all present.<sup>94</sup>

One tack that the prosecution may take in the negotiation process is the use of charge bargaining. Broadly, charge bargaining is the process whereby the prosecution agrees to drop certain charges in exchange for the defendant's guilty plea on other charges.<sup>95</sup> In rare cases, the prosecution and the defendant will come to an agreement under which all pending charges against the defendant are dropped or no charges are brought at all.<sup>96</sup> Further, in some instances the prosecution will withdraw certain charges against the defendant where the defendant would face mandatory consequences in subsequent collateral proceedings if found guilty of the to-be-dismissed charges.<sup>97</sup> However, in the more typical case, the prosecution will agree to reduce the number of charges brought, charge less serious offenses, or dismiss certain charges against the defendant in exchange for the defendant's guilty plea.<sup>98</sup>

Alternatively (and often in conjunction with charge bargaining), the prosecution may employ sentence bargaining to encourage the defendant to enter a guilty plea. Sentence bargaining is the process whereby the prosecution and defendant agree, and the prosecution recommends to the court, that the defendant will receive a specified sentence or a sentence within a specified range, which is less onerous than the sentence that the defendant would have otherwise received had he or she been found guilty following a trial.<sup>99</sup> With sentence bargaining, the prosecution has a wide array of tools at its disposal. The prosecution can agree to recommend a particular sentence or particular sentence range (in federal cases or states with analogous sentencing guidelines), to suggest that a sentence be reduced by a fixed percentage, or to refrain from opposing a particular sentence requested by the defendant.<sup>100</sup> Finally, the prosecution may offer the defendant the possibility of using a particular section of

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93. *Id.*

94. *Id.*

95. *In re Ellis*, 356 F.3d 1198, 1213–14 (9th Cir. 2004).

96. Brook et al., *supra* note 5, at 1165.

97. *Id.* at 1165–66 (noting that dismissal of charges relating to crimes that would count as crimes of “moral turpitude” in immigration courts may be used by the prosecution to incentivize defendants to plead guilty).

98. *Id.* at 1165.

99. John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains*, 36 HOFSTRA L. REV. 639, 639 (2008). Ultimately, the court retains authority over whether to accept the plea on the terms proposed and impose the prosecution-suggested sentence. *Id.*

100. Brook et al., *supra* note 5, at 1166.

a sentencing guideline which, unlike the bulk of other plea agreements,<sup>101</sup> is binding on the sentencing court once it accepts the bargained plea.<sup>102</sup>

In the process of negotiating the plea, United States Attorneys (and other prosecuting authorities for that matter) “have wide discretion in negotiating guilty pleas . . . .”<sup>103</sup> One manner in which this discretion could be exercised is by withdrawing more serious charges in exchange for a guilty plea even if the prosecution’s case against the defendant on the dropped charge is strong.<sup>104</sup> However, at least in the federal jurisdiction, this typically does not occur.<sup>105</sup> In federal criminal trials, prevailing practice dictates that United States Attorneys pursue negotiations that will produce a guilty plea to the most serious charge provable by the prosecution. The United States Attorney General set forth this principle in a 2010 memorandum as follows:

Plea agreements should reflect the totality of a defendant’s conduct. These agreements are governed by the same fundamental principle as charging decisions: prosecutors should seek a plea to the most serious offense that is consistent with the nature of defendant’s conduct and likely to result in a sustainable conviction, informed by an individualized assessment of the specific facts and circumstances of each particular case. Charges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned to arrive at a plea bargain that does not reflect the seriousness of the defendant’s conduct.<sup>106</sup>

As alluded to above, the presiding trial judge, for the most part, plays no role in the actual process of negotiating the plea. The Federal Rules of Criminal Procedure mandate that “the court must not participate in [plea bargaining discussions].”<sup>107</sup> As such, the judge, at least in the federal system, is almost completely absent from the actual process of determining (in negotiations) which charges a defendant will plead guilty to, which charges the prosecution will drop, and what sentence is appropriate.<sup>108</sup> However, the judges retain the role of manager of cases before the court and decide how much time to give

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101. In most plea bargains, the court may impose a sentence other than what it recommended, even after accepting the agreement. *See id.*; *see also* 2 Criminal Law Advocacy § 37.04 (2017) (“If the judge does not accept the proposed agreement, the judge must allow the defendant to withdraw the plea. If the defendant persists in his or her guilty pleas, the judge may exceed the terms of the recommendation.”).

102. Brook et al., *supra* note 5, at 1166.

103. *Id.* at 1177.

104. *In re Ellis*, 356 F.3d 1198, 1213–14 (9th Cir. 2004).

105. Brook et al., *supra* note 5, at 1165.

106. Memorandum from Eric H. Holder, Jr., Attorney General, to All Federal Prosecutors 2 (May 19, 2010), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf>.

107. FED. R. CRIM. P. 11(c)(1).

108. Brook et al., *supra* note 5, at 1181–82.

the parties to negotiate.<sup>109</sup> Most importantly, the judge retains ultimate control over whether to accept or reject the plea ultimately produced as a result of the negotiations.<sup>110</sup> As to the requirements that the judge must adhere to when accepting or rejecting a plea agreement, the Federal Rules of Criminal Procedure provide comprehensive guidelines, and the federal guidelines are illustrative of what judges must do in both the federal and state systems alike.<sup>111</sup>

Rule 11 mandates that the court “address the defendant personally in open court” to make sure that the defendant understands the consequences of pleading guilty.<sup>112</sup> Perhaps most significantly, the court must relay to the defendant the important constitutional rights he or she is waiving by pleading guilty: his or her right not to plead guilty (or to persist in that plea if he or she has already so pleaded);<sup>113</sup> his or her right to a trial by jury;<sup>114</sup> his or her right to be represented by counsel;<sup>115</sup> his or her right at trial to confront and cross-examine adverse witnesses; his or her right to be protected from compelled self-incrimination; his or her right to testify and present evidence; and his or her right to compel the attendance of witnesses.<sup>116</sup>

In addition, the court must inform the defendant of the nature of each charge he or she is pleading guilty to, the maximum possible penalty for each charge, and the minimum possible penalty for each charge.<sup>117</sup> Further, the court must also determine whether the plea is voluntary or whether it was induced by force, threats, or promises other than those contained in the plea agreement.<sup>118</sup> Finally, the court must ensure that there is sufficient factual basis for the plea.<sup>119</sup> Although this final requirement is generally satisfied by asking the prosecution to read aloud the factual basis set forth in the plea agreement and then asking the defendant to confirm whether he or she agrees with the facts as written, some courts require that defendants state in open court precisely what acts they performed.<sup>120</sup>

Courts may reject a defendant’s proposed guilty plea for a number of reasons. For instance, the court may conclude that the defendant cannot execute a valid waiver of their constitutional rights, the factual basis is inadequate, or the prosecution made promises to the defendant other than those contained in the plea agreement itself. While there appears to be numerous bases for rejection of a plea, the reality is that nearly all plea agreements are in fact accepted

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109. *Id.*

110. *Id.* at 1182–83.

111. *Id.* at 1184–85; *see id.* at 1182–83.

112. FED. R. CRIM. P. 11(b)(1).

113. *Id.* 11(b)(1)(B).

114. *Id.* 11(b)(1)(C).

115. *Id.* 11(b)(1)(D).

116. *Id.* 11(b)(1)(E).

117. *Id.* 11(b)(1)(G)–(I).

118. *Id.* 11(b)(2).

119. *Id.* 11(b)(3).

120. Brook et al., *supra* note 5, at 1176.

by the courts.<sup>121</sup> This is an almost inevitable by-product of the fact that bargaining occurs outside the presence of the court; courts know very little about the case, and there are considerable time pressures to process criminal matters.<sup>122</sup> In the rare instances that the court does reject guilty pleas, the court must, on the record and in open court, tell the parties that the plea is rejected, advise the defendant that the court is not obligated to follow the plea agreement, provide the defendant with an opportunity to withdraw the plea, and inform the defendant that if the plea is not withdrawn, the defendant may be treated less favorably than under the plea agreement.<sup>123</sup>

In terms of its degree of utilization and ability to reach an agreed outcome, the plea bargaining process is an outstanding success. The overwhelming majority of criminal offenses are resolved pursuant to a plea bargain. The figure is estimated to be between ninety and ninety-five percent.<sup>124</sup> In the end, plea bargaining results in concluded agreements because both parties are incentivized to resolve criminal matters without proceeding to trial. From the State's perspective, the advantages are savings in court time and resources, sparing witnesses the time and anxiety of attending court, and providing a degree of certainty in the outcome of cases.<sup>125</sup> From the defendant's perspective, the key advantage of plea bargaining is that it provides a means of risk mitigation. Defendants are able to secure an outcome that is better than the sentence they would have received if they were found guilty after going to trial.

### *B. Problems with the Plea Bargaining Process*

Although the plea bargaining process normally produces an agreement, there are profound problems associated with the process. In short, while the plea bargaining process is, at least in abstract terms, portrayed as a negotiating process, the reality is otherwise. A negotiation requires at least an approximate matching in bargaining power. This is not the situation with a plea bargain. The defendant's position is considerably compromised by the fact that he or she is personally and profoundly invested in the outcome. Criminal sanctions involve the deliberate infliction of pain and hardship on offenders; therefore, defendants have much at stake in the process. Defendants are heavily motivated to reduce the level of suffering that can be inflicted on them by the criminal justice process. Prosecutors face no such risk. In addition to this, there is typically an imbalance in resources. Approximately eighty percent of criminal defendants cannot afford to hire an attorney.<sup>126</sup> As such, most defendants are

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121. *Id.*

122. *Id.* at 1176–77.

123. FED. R. CRIM. P. 11(c)(5)(A)–(C).

124. LINDSEY DEVERS, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>.

125. See generally Thea Johnson, *Measuring the Creative Plea Bargain*, 92 IND. L. J. 901 (2017).

126. Jaeah Lee, Hannah Levintova & Brett Brownell, *Charts: Why You're in Deep Trouble If You Can't Afford a Lawyer*, MOTHER JONES (May 6, 2013),



represented by one of America's innumerable over-burdened and under-staffed public defender's offices.<sup>127</sup> In contrast, prosecution offices are better funded and resourced.<sup>128</sup> We now elaborate on the problems associated with the plea bargaining process.

The key failing of the system is the negotiating power differential between the defendant and the prosecution. Dylan Walsh, a freelance writer undertaking research as part of the project "The Presence of Justice" sets out the inordinate leverage available to prosecutors in the following terms:

Indeed, the only bargaining restriction placed on prosecutors is that they cannot use illegal threats to secure a plea. "So if a prosecutor says, 'I'll shoot you if you don't plead guilty,' then the plea is invalid," Alschuler[, a law professor who has studied plea bargaining for five decades,] explained. "But if he threatens to charge someone with a crime punishable by death at trial and the defendant pleads guilty, then the plea is lawful." Assuming they have probable cause, prosecutors can even threaten to bring charges against a defendant's family in order to extract a plea. For instance, if a defendant's spouse or sibling is complicit in drug trafficking – perhaps they took a call related to the case – a prosecutor can offer to reduce or dismiss charges against the family member if the defendant pleads guilty. This dynamic, combined with national trends over the last 30 years favoring lengthy mandatory sentences, gives prosecutors inordinate leverage.<sup>129</sup>

The imbalance of power in the plea bargaining process is so profound that it has been asserted that it is rational for defendants to plead guilty.<sup>130</sup> The realities of prison and the bail system, and the nearly unfettered power reposed in prosecutors, often apply considerable persuasive force to those defendants who do not have the resources to get out of jail on bail or take their cases to trial. According to the Prison Policy Initiative, roughly 630,000 Americans are in jail on any given day, and of these 630,000, approximately seventy percent

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<http://www.motherjones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts/>.

127. See generally CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES (2000), <https://www.bjs.gov/content/pub/pdf/dccc.pdf> (reporting that sixty-six percent of federal felony defendants and eighty-two percent of felony defendants in state court were represented by the public defender's office).

128. See John Pfaff, *A Mockery of Justice for the Poor*, N.Y. TIMES (Apr. 29, 2016), <https://www.nytimes.com/2016/04/30/opinion/a-mockery-of-justice-for-the-poor.html>.

129. Walsh, *supra* note 8.

130. Yoffee, *supra* note 12 (referencing Maddy deLone, Executive Director of the Innocence Project).

of them (443,000) have not yet been convicted of a crime.<sup>131</sup> Of these 443,000, many face charges that would not require further incarceration.<sup>132</sup> However, these defendants often do not have enough money to get out of jail on bail and, because each passing day in pre-trial detention often carries severe consequences (such as the loss of wages from working or the loss of a job for missing work days), defendants may feel forced to plead guilty, even if they are innocent of the crime charged.<sup>133</sup> Further, prosecutors can use the threat of going to trial to prevail upon a defendant to plead guilty.<sup>134</sup> With the so called ‘trial penalty,’ defendants are informed that the prosecutor will levy more serious charges if they elect to go to trial and press for stiffer sentences if they are subsequently convicted.<sup>135</sup> While this threat lacks force for those defendants who have the money and the wherewithal to put on a vigorous defense, all too many defendants are simply incapable of doing so. Roughly eighty percent of defendants are eligible for court-appointed attorneys, and many of these court-appointed attorneys are sourced from overworked and underfunded public defender’s offices.<sup>136</sup> For defendants with no option other than a public defender, their defense is often limited to a cursory investigation of the facts followed by quick plea negotiations.<sup>137</sup> Taken together, it is the rational choice for a defendant to plead guilty.<sup>138</sup> Many defendants cannot afford to remain in jail indefinitely, and court-appointed attorneys often lack the resources to investigate defendants’ claims of innocence by seeking out all necessary witnesses and compiling crucial evidence. Rather than languishing in jail awaiting the uncertain outcome of a trial, defendants, many of whom are not guilty, presently dangerous, or afflicted by mental illness or addiction, cannot be faulted for making a considered choice to plead guilty.<sup>139</sup>

In a similar vein, it has been noted that

[t]he glut of plea bargaining and the pandemic waiver of [trial] rights have rendered trial by jury an inconvenient artifact. And . . . [b]ecause there is no judicial check on the enhanced mandatory minimums pros-

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131. Yoffee, *supra* note 12; see also Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2017*, PRISON POL’Y INITIATIVE (Mar. 14, 2017), <https://www.prisonpolicy.org/reports/pie2017.html>.

132. Yoffee, *supra* note 12.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* This style of defense has been bitterly described as “meet ‘em and greet ‘em and plead ‘em.” *Id.*

138. *Id.*

139. *Id.*

ecutors can inject into a case, they can put enormous pressure on defendants to plead guilty. In many cases, only a daring risk-taker can withstand that pressure. Most people buckle under it.<sup>140</sup>

The pressure on defendants to plead guilty due to the imbalanced nature of the plea bargain is an increasingly common criticism of the plea bargaining system. The pressure is so intense that it sometimes results in even innocent people pleading guilty.<sup>141</sup> It is, of course, very difficult to ascertain the portion of innocent defendants who plead guilty (given that even guilty defendants have an interest in maintaining their innocence), but some measure can be gleaned from the fact that hundreds of people that have been exonerated initially pleaded guilty. Dylan Walsh has observed that

[i]f a defendant considers going to trial, a prosecutor might hang overhead some charge that carries a mandatory life sentence. A plea of guilty might instead get eight years, or 10 years, “or pick a number,” said Matt Sotorosen, a senior trial attorney at the Office of the San Francisco Public Defender. “Even if you have an innocent client, most don’t want to take that chance. They’ll just take eight years. What if things go south at trial?” The results of this lopsided calculus are evident in data from the National Registry of Exonerations: Of 2,006 recorded exonerations since the project started keeping track in 1989, 362 of those, or 18% percent, were based on guilty pleas.<sup>142</sup>

Evidence shows that the plea bargaining process operates especially harshly against defendants from deprived socio-economic backgrounds.<sup>143</sup> In a recent study, Professor Carlos Berdejo of the Loyola Law School, Los Angeles has found that there are significant racial disparities in the plea bargaining

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140. Brook et al., *supra* note 5, at 1194 (footnotes omitted) (citations omitted).

Critics on the left and the right are coming to agree that our criminal-justice system, now so reliant on plea bargaining, is broken. Among them is Jed S. Rakoff, a United States district judge for the Southern District of New York, who wrote about the abuses of plea bargains in 2014, in *The New York Review of Books*. “A criminal justice system that is secret and government-dictated,” he wrote, “ultimately invites abuse and even tyranny.” Some critics even argue that the practice should be abolished. That’s what Tim Lynch, the former director of the Project on Criminal Justice at the libertarian Cato Institute, believes. The Framers adopted trials for a reason, he has argued, and replacing them with plea bargains – for convenience, no less – is unconstitutional.

Yoffee, *supra* note 12.

141. Yoffee, *supra* note 12.

142. Walsh, *supra* note 8.

143. Christi Metcalfe & Ted Chiricos, *Race, Plea, and Charge Reduction: An Assessment of Racial Disparities in the Plea Process*, 35 JUST. Q. 223 (2018).

process.<sup>144</sup> African Americans are twenty-five percent less likely to have their principal charge dropped than white defendants.<sup>145</sup> Accordingly, white defendants who are initially charged with a felony are less likely to be convicted of a felony than African Americans.<sup>146</sup> An earlier study by the Vera Institute focusing on plea bargains in more than 200,000 cases in New York City during 2010 and 2011 found that African American defendants were nineteen percent more likely to be offered plea deals that involved prison or jail time than white defendants.<sup>147</sup> Further, African Americans were more than fourteen percent more likely to be imprisoned for felony drug offenses and fifteen percent more likely to be incarcerated for misdemeanor drug offenses and drug offenses against the person.<sup>148</sup>

There is a growing chorus of critics who have launched scathing attacks on the plea bargaining process. As noted by editor Emily Yoffee, a district court judge has stated that the plea bargaining process “is secret and government-dictated” and “ultimately invites abuse and even tyranny.”<sup>149</sup> An editorial in the *Wall Street Journal* noted that “this relentless growth in plea bargaining has sparked a backlash among lawyers, legal scholars[,] and judges – evidenced by recent federal court decisions, including two from the [United States] Supreme Court. Weighing on many critics is the possibility . . . that the innocent could feel pressured into pleading guilty.”<sup>150</sup>

Despite the manifest problems associated with plea bargaining, it is not tenable to abolish it because it is a clear case of economic pragmatism prevailing over principle:

In theory, abolishing the use of plea bargains wouldn’t take much: Prosecutors would simply stop offering deals. That would be that, though the massive influx of trials would jam courts. (Michelle Alexander, author of *The New Jim Crow*, discussed defendants’ deliberately going to trial and “crashing the courts” as a form of resistance to mass incarceration.) But both sides of the debate agree the odds of this happening are infinitesimal. Even Alschuler, who throughout his career remained one of the staunchest critics of plea bargaining, admitted in 2013 that

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144. Carlos Berdejo, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187 (2018).

145. *Id.* at 1191.

146. *See id.*

147. Gene Demby, *Study Reveals Worse Outcomes for Black and Latino Defendants*, NPR (July 17, 2014), <http://www.npr.org/sections/codeswitch/2014/07/17/332075947/study-reveals-worse-outcomes-for-black-and-latino-defendants>.

148. *Id.*

149. Yoffee, *supra* note 12.

150. Brook et al., *supra* note 5, at 1190 (quoting Gary Fields & John R. Emshwiller, *Federal Guilty Pleas Soar as Bargains Trump Trials*, WALL STREET J. (Sept. 23, 2012), <https://www.wsj.com/articles/SB10000872396390443589304577637610097206808>).

“the time for a crusade” had passed. Instead, he suggested people work to make the criminal-justice system “less awful.”<sup>151</sup>

Thus, plea bargaining is a highly-flawed system. Nevertheless, it is an essential component of the criminal justice system. Given these realities, it is imperative to improve the system in a manner that does not meaningfully undermine the advantages of the system, namely the cost and time savings to the court and the community. We now advance a proposal which will achieve these objectives.

### III. REFORM PROPOSAL

#### *A. The Thirty Percent Guilty Plea Discount – Utilizing the Australian Model*

The key proposal in this Article is that the plea bargaining process should be fundamentally reformed. The fulcrum upon which this reform should be based is a designated sentencing discount of up to thirty percent for defendants that plead guilty. This should be supplemented by a higher discount (of up to seventy-five percent) for defendants who plead guilty in circumstances where the prosecution’s case against them is weak. The first proposal (the thirty percent discount) is based upon an existing system that operates in Australia. We now discuss this first proposal in greater detail in the context of explaining the Australian plea bargaining process. In the course of this discussion, we set out the advantages of the proposal and how it would operate in the United States. In doing so, we emphasize that the framework of the guilty plea discount is that the court would determine the exact size of the discount and that generally the discount would be the highest when the guilty plea is entered at a very early stage of the criminal process.

As noted above, there are several different forms of negotiations that can potentially occur relating to sentence.<sup>152</sup> The first is charge bargaining, whereby the prosecutor and defendant agree for charges to be withdrawn or changed in exchange for a guilty plea. This happens regularly in Australia. However, sentence bargaining, which involves the prosecution and defense agreeing that a specific sentence should be imposed, is not permissible in Australia.<sup>153</sup>

The Australian courts have maintained a high degree of judicial oversight and authority over sentencing decisions. The High Court of Australia, in *Barbaro v The Queen*, held that it was impermissible for the prosecution, at the plea bargaining stage, to even make a submission to the court regarding the

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151. Walsh, *supra* note 8.

152. See text accompanying notes 95–102.

153. *R v Marshall* [1981] VR 725 (Austl.); see also *LJW v Western Australia* [No 2], [2007] WASCA 275 (Austl.).

appropriate sentence or even the range of sentences that was appropriate.<sup>154</sup> The Court gave several reasons for this prohibition. The first is that the prosecution's view of the bounds of the appropriate sentence is supposedly a "statement of opinion,"<sup>155</sup> not a submission. Secondly, the Court stated that a prosecutor's statement about the acceptable sentencing range is inappropriate because it could be erroneous.<sup>156</sup> The prosecution's view is supposedly not "dispassionate" and is often based on assumed rather than actual facts.<sup>157</sup> Third, the Court stated that if a judge imposes a sentence within the prosecution's range, it may suggest that "the sentencing judge has been swayed by the prosecution's view of what punishment should be imposed."<sup>158</sup>

It has been argued that these rationales for disallowing prosecution submissions of sentencing ranges are flawed.<sup>159</sup> In short, most legal submissions constitute an opinion regarding counsel's interpretation of the law or relevant facts, and the main purpose of such submissions is precisely to influence the outcome of the case.<sup>160</sup> Despite these criticisms, the courts in Australia continue to have a high degree of control over all aspects of the sentencing process.<sup>161</sup> For the purposes of this Article, the main point to take from the prosecution and defense sentencing interaction is that the only negotiating that occurs between these parties concerns the offenses to which an accused will plead guilty. Once a guilty plea is entered, it is then for the judge to determine the penalty.

Although Australian prosecutors have no direct input into the exact sentence that a defendant will receive, defendants are nevertheless encouraged to plead guilty because this will result in a penalty discount. Pleading guilty is a mitigating factor in all Australian jurisdictions.<sup>162</sup>

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154. [2014] HCA 2, 65 (Austl.).

155. *Id.* ¶ 7.

156. *Id.* ¶ 33.

157. *Id.* ¶ 32.

158. *Id.* ¶ 33.

159. See generally Mirko Bagaric, *Sentencing: From Vagueness to Arbitrariness: The Need to Abolish the Stain that Is the Instinctive Synthesis*, 38 U.N.S.W. L. J. 76, 78 (2015).

160. *Id.* at 97–98.

161. *Id.* at 112.

162. In New South Wales, and Queensland, the Court must indicate if it does not award a sentencing discount in recognition of a guilty plea. *Crimes (Sentencing Procedure) Act 1999* (NSW) § 22(2) (Austl.); *Penalties and Sentences Act 1992* (Qld) s 13(3) (Austl.). In South Australia, Western Australia, and New South Wales, the courts often specify the size of the discount given. In Victoria, section 6AAA of the *Sentencing Act 1991* states that when courts provide a discount for a plea of guilty, they must specify the sentence that would have been given in the absence of that discount. *Sentencing Act 1991* (Vic) s 6AAA (Austl.). The rationale and size of the typical discount in Victoria is discussed in *Phillips v The Queen* [2012] VSCA 140 (Austl.). There has been some judicial comment as to the artificiality of section 6AAA, given the instinctive synthesis that produces the actual sentence. See *Scerri v The Queen* [2010] VSCA 287; *R v Flaherty* (No 2) [2008] VSC 270 (Austl.). In Western Australia, section

The importance of the guilty plea discount is illustrated by the scope of its operation.<sup>163</sup> Offenders receive a discount for pleading guilty, irrespective of the reasons for the plea, largely on account of the utilitarian benefits associated with the plea.<sup>164</sup> The motivation for the plea of guilty is irrelevant. If there is evidence that the guilty plea is motivated by remorse, this will result in a larger reduction not because this relates to the guilty plea discount but because remorse is an independent mitigating factor.<sup>165</sup> Further, the availability and magnitude of the discount does not depend on the strength of the prosecution's case, and hence the full discount is available even when the evidence against the defendant is compelling.<sup>166</sup>

The guilty plea discount is regarded as such an important aspect of the Australian sentencing system that it is one of only two sentencing considerations that attract a mathematical numerical discount.<sup>167</sup> While in some Australian jurisdictions this occurs as a matter of practice, in Victoria and Western

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9AA of the *Sentencing Act 1995* permits a court to reduce a sentence by up to twenty-five percent for a plea entered into at the first reasonable opportunity. *Sentencing Act 1995* (WA) s 9AA (Austl.). In South Australia, recent legislative changes allow for a guilty plea reduction of up to forty percent for an early guilty plea. *Criminal Law (Sentencing) Act 1988* (SA), s 10C (Austl.). For a further discussion, see Elizabeth Wren & Lorana Bartels, 'Guilty, Your Honour': *Recent Legislative Developments on the Guilty Plea Discount and an Australian Capital Territory Case Study on its Operation*, 35 ADEL. L. REV. 361 (2014).

163. For a discussion of the guilty plea discount, see ARIE FREIBERG, FOX & FREIBERG'S SENTENCING: STATE AND FEDERAL LAW IN VICTORIA 375–84 (3rd ed. 2014); GERALDINE MACKENZIE, PRINCIPLES OF SENTENCING 91–94 (2010); STEPHEN ODGERS, SENTENCE 325–36 (3rd ed. 2015).

164. The only exception to this is the federal jurisdiction, where section 16A(2) of the *Crimes Act 1914* states that in sentencing a court must take into account "if the person has pleaded guilty to the charge in respect of the offence - that fact." (Cth) s 16A(2)(g). This has been interpreted to justify a discount only to the extent that the plea evinces a desire by the offender to "facilitate the course of justice." *Cameron v The Queen* [2002] HCA 6 (Austl.). Thus, a plea purely for expedient reasons does not attract the discount. A relevant consideration in ascertaining the accused's motive is the strength of the prosecution's case. A guilty plea in the context of a strong case can attract no discount because it could be regarded as "a recognition of the inevitable." *Tyler v Regina* [2007] NSWCCA 247 [114] (Austl.).

165. See *Phillips v The Queen* [2012] VSCA 140 (Austl.); *Morton v The Queen* [2014] NSWCCA 8 (Austl.); *Fusimalohi v The Queen* [2012] ACTCA 49 (Austl.); *CD v The Queen* [2013] VSCA 95 (Austl.); *Barbaro v The Queen* [2012] VSCA 288 (Austl.).

166. See *Phillips v The Queen* [2012] VSCA 140 (Redlich JA and Curtin AJA) (summarizing the key principles relating to the guilty plea discount). An extensive summary of essentially the same principle is also set out in *Morton v The Queen* [2014] NSWCCA 8. However, a greater discount may be provided if the plea confers considerable cost or other community savings. *Id.*

167. See generally MIRKO BAGARIC & RICHARD EDNEY, AUSTRALIAN SENTENCING: PRINCIPLES AND PRACTICE (4th ed. 2017). The other is assisting authorities. *Id.*

Australia, it is a statutory requirement that the discount be quantified.<sup>168</sup> The quantitative discount for pleading guilty can be provided in two ways. First, the court can set out the discount in percentage terms. Second, the judge can set out the penalty that would have been imposed had the plea not been provided or promised. In the second instance, the percentage discount can be readily ascertained simply by comparing the prospective sentence with the actual sentence.<sup>169</sup>

While there is no precise or uniform discount for pleading guilty, the discount is normally considerable. The New South Wales Court of Criminal Appeal in *R v Thomson* issued a guideline judgment stating that a guilty plea will generally be reflected in a ten to twenty-five percent reduction of a sentence.<sup>170</sup> Since that time, several jurisdictions have enacted statutory provisions to designate the appropriate range of guilty plea sentence discounts. Generally, the range is similar to that stipulated in *Thomson*, but the penalty reduction for pleading guilty can be up to thirty percent and even up to forty percent in South Australia.<sup>171</sup> This discount does not incorporate the penalty reduction that is accorded for disclosing one's own offenses or those of others to authorities.<sup>172</sup> The most important variable regarding the size of the discount is the time of plea; early pleas attract the greatest penalty reduction.<sup>173</sup> This is because they confer the greatest benefit in terms of the amount of court time and resources saved.

In reality, there is a degree of approximation in the courts' application of guilty plea discounts. This is for two main reasons. First, the impact of the discount sometimes reduces the penalty from a prison term to a lesser sanction, such as a fine or community-based order. Yet, there is no accepted methodology or even an approximate formula for substituting criminal sanctions.<sup>174</sup> Thus, when a court reduces a term of imprisonment to another type of sanction as a result of a guilty plea, it is not feasible to ascertain the weight that has been

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168. *Sentencing Act 1991* (Vic) s 6AA(1) (Austl.); *Sentencing Act 1995* (WA) s 9AA(5) (Austl.). The New South Wales Law Reform Commission has recommended a transparent approach to the size of the guilty plea discount. NEW S. WALES L. REFORM COMMISSION, REPORT 139, at 117 (2013), <http://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-139.pdf>.

169. Unless a different sanction is imposed (e.g., a prison term is reduced to a fine).

170. [2000] NSWCCA 309 (Austl.).

171. *Criminal Law (Sentencing) Act 1988* (SA) s 10C (Austl.).

172. *Morton v The Queen* [2014] NSWCCA 8, [41] (Austl.).

173. See *R v Thomson* (2000) 49 NSWLR 383, [155]; *R v Cahyadi* [2007] NSWCCA 79; *Phillips v The Queen* (2012) 222 A Crim R 149; *Morton v The Queen* [2014] NSWCCA 8; see also *Penalties and Sentences Act 1992* (Qld) s 13(2) (Austl.); *Sentencing Act 1995* (NT) s 5(2)(j) (Austl.); *Sentencing Act 1991* (Vic) s 5(2)(e) (Austl.); *Sentencing Act 1995* (WA) s 8(2) (Austl.).

174. For discussion regarding the interchangeability of sanctions, see Andrew von Hirsch et al., *Punishments in the Community and the Principles of Desert*, 20 RUTGERS L. J. 595 (1989); Michael Tonry, *Interchangeability, Desert Limits and Equivalence of Function*, in PRINCIPLED SENTENCING 291 (Andrew von Hirsch & Andrew Ashworth eds., 1998).



accorded to this consideration. Further, sentencing law is an imprecise process. In Australia, there are over 200 considerations that can aggravate or mitigate a sentence<sup>175</sup> and there is no singularly correct penalty for an offense. Hence, there is an inescapable degree of artificiality associated with injecting exactness into a process that is inherently approximate in nature.

Despite this, an analysis of how courts incorporate a guilty plea into their sentencing determinations indicates a significant correlation between the theory and practice. A 2015 report by the Victorian Sentencing Advisory Council examined 9,618 cases and noted that in 7,073 of these cases, it was possible to discern the impact of a guilty plea on sentence<sup>176</sup> and that in about one-third (33.5%) of these cases, the type of sanction that was imposed changed as a result of the plea (e.g., from a prison term to a community corrections order).<sup>177</sup> In cases where a term of imprisonment was imposed, the average discount for pleading guilty varied considerably. For sentences of imprisonment of two years or less, the average reduction was thirty-nine percent, whereas for sentences of more than ten years, the average reduction was less than half this amount – eighteen percent.<sup>178</sup> It is unclear why more serious matters would attract lower penalty reductions, but, as a matter of speculation, it may be that in relation to these matters, community protection was the cardinal sentencing consideration. In any event, it is clear that as a matter of practice, offenders who plead guilty in Australia generally receive a considerable sentencing discount.

### *B. Arguments For and Against the Guilty Plea Discount*

There are a number of well-established reasons that underpin the guilty plea discount. These are similar to those advanced to justify the plea bargaining process in the United States and are summarized by Justices Mary Gaudron, William Gummow, and Ian Callinan in *Cameron v The Queen*, who stated:

Australian courts have indicated that they will regard a plea of guilty as a mitigating factor even when no remorse or contrition is present. They have taken the pragmatic view that giving sentence “discounts” to those who plead guilty at the earliest available opportunity encourages pleas of guilty, reduces the expense of the criminal justice system, reduces court delays, avoids inconvenience to witnesses[,] and prevents the misuse of legal aid funds by the guilty.<sup>179</sup>

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175. BAGARIC & EDNEY, *supra* note 167, at 109.

176. VICTORIA SENT’G ADVISORY COUNCIL, GUILTY PLEAS IN THE HIGHER COURTS: RATES, TIMING AND DISCOUNTS xv, xix (2015), [https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Guilty%20Pleas%20in%20the%20Higher%20Courts\\_2.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Guilty%20Pleas%20in%20the%20Higher%20Courts_2.pdf).

177. *Id.* at 59, 64.

178. *Id.* at 68.

179. [2002] HCA 6, [39].

The most persuasive consideration in favor of the discount is financial cost saving. Criminal trials typically take several weeks, and courts are expensive community institutions to fund. The guilty plea discount provides offenders a pragmatic incentive to plead guilty and thereby eliminate, or at least reduce, these costs.<sup>180</sup> The time and cost savings stemming from guilty pleas provide powerful arguments in favor of maintaining the discount. If all persons charged with a criminal offense pleaded not guilty, the criminal justice system would literally grind to a halt – the delay between charge and trial would widen to many years.<sup>181</sup> This point has also been noted by Justice Peter McClellan, who, writing extra-judicially, stated:

Having an identifiable and easily understood parameter for guilty plea discounts has had enormous benefit for the administration of criminal justice. One only has to compare the state of the criminal lists in countries where a plea brings no discount to understand the benefits of a structured sentencing approach . . . . Quantified discounts make the reasoning of sentencing judges more comprehensible to offenders, victims, the public, and the appellate courts.<sup>182</sup>

Apart from time and cost savings (and the consequential reduction in court delays), the main reason advanced for according the discount is that it avoids inconvenience to witnesses.<sup>183</sup> In *Thomson*, the Court noted:

A plea permits the healing process to commence. A victim does not have to endure the uncertainty of not knowing whether he or she will be believed, nor the skepticism sometimes displayed by friends and even family prior to a conviction. A victim will also be spared the personal rumination of the events . . . . Like the element of remorse, this consideration depends on the specific circumstances of the [offense]

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180. In *R v Thomson* [2000] NSWCCA 309, the Court noted that the “public interest served by encouraging pleas of guilty for their utilitarian value is a distinct interest,” *id.* at [122], and that utilitarian benefits “require acknowledgment of some character by way of an incentive, so that the benefits [of ‘the efficiency and effectiveness of the criminal justice system as a whole’] will in fact be derived by the system,” *id.* at [115].

181. In most jurisdictions, about two-thirds of the matters are finalized by guilty plea in the Higher Courts. K. Mack & S. Anleu, *Reform of Pre-Trial Criminal Procedure: Guilty Pleas*, 22 CRIM. L. J. 263, 264 (1998). The figure is higher in the Magistrates’ Court. *Id.*

182. PETER MCCLELLAN, SENTENCING IN THE 21ST CENTURY 17–18 (2012), <http://www.austlii.edu.au/au/journals/NSWJSchol/2012/20.pdf>.

183. See, e.g., *R v Osmond* (1987) 1 Qd R 429; *Schumacher* (1981) 3 A Crim R 441; *R v Fisher* (1989) 40 A Crim R 442; *R v Thomson* [2000] NSWCCA 309 [3] (“[In] sexual assault cases, crimes involving children and, often, elderly victims – there is a particular value in avoiding the need to call witnesses, especially victims, to give evidence.”).

and overlaps to a substantial extent with other aspects of the specific case [that] are relevant to the sentencing task.<sup>184</sup>

The guilty plea discount is not without its critics. The most forceful of these is that the guilty plea discount penalizes offenders who elect to contest a charge and exercise their right to a fair trial.<sup>185</sup> The High Court of Australia has attempted to circumvent this claim by stating that the guilty plea discount does not penalize those who elect to go to trial but simply punishes those who plead guilty less. Yet, the plausibility of this distinction is debatable. In *Cameron v The Queen*, Justices Gaudron, Gummow, and Callinan were unable to account for the distinction other than to state that “[t]he distinction *between allowing a reduction for a plea of guilty and not [penalizing] a convicted person for not pleading guilty is not without its subtleties, but it is, nonetheless, a real distinction . . .*”<sup>186</sup>

Further, the position that the guilty plea discount does not penalize defendants who proceed to trial contrasts sharply with that taken by Justice Michael McHugh in *Cameron v The Queen*, who correctly stated that the *effect* of the discount is to more severely penalize those who plead not guilty.<sup>187</sup> Further, it has been noted that “it is a paradox [that] courts are diligent to prevent . . . pressure or inducement . . . to bring about an admission, . . . and yet with . . . the plea of guilty such inducements have become institutionalized.”<sup>188</sup> This observation gets to the crux of the main argument against the discount, which is that it may cross the threshold between providing an *incentive* to plead guilty and *coercing* accused persons to forego their right to a hearing.

There is no firm evidence regarding whether the discount is so significant that it influences defendants to forego their right to trial. In any event, from the perspective of achieving substantive justice, this would only be a concern if defendants that were innocent felt so troubled at the prospect of losing the discount if the verdict went against them that they pleaded guilty. To this end, it has been postulated that, in fact, some innocent defendants would invariably plead guilty in order to attract the discount and avoid the uncertainties of the outcome of a trial.<sup>189</sup> The fact that some people feel compelled to plead guilty

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184. *R v Thomson* [2000] NSWCCA 309, [120] – [121].

185. *See Cameron v The Queen* [2002] HCA 6, [12]. It has also been suggested that it discriminates against offenders who plead not guilty. *Id.* at [44]. The guilty plea does not discriminate against non-guilty pleaders because there is an obvious relevant difference between them and guilty pleaders: only the latter conducted their affairs in a manner which saved the community considerable resources.

186. *Id.* [41] (emphasis added).

187. *Id.* at [39].

188. MARK FINDLAY, STEPHEN ODGERS & STANLEY YEO, AUSTRALIAN CRIMINAL JUSTICE 114–15 (1994); *see also* Albert W. Alschuler, *The Changing Plea Bargaining Debate.*, 69 CAL. L. REV. 652, 688–90 (1981).

189. In the United Kingdom, the Royal Commission on Criminal Justice has noted that the risk of innocent people being pressured into pleading guilty “cannot be avoided

is unsatisfactory. However, there is a means of overcoming this problem or at least reducing the harm flowing from decisions of this nature. It is to this means that we now turn.

### *C. Higher Discount When the Prosecution's Case Is Weak*

As noted above, we propose that defendants should receive a substantive discount for pleading guilty. This should be in the order of one-third, with the maximum discount being accorded when the plea is entered early. In addition to this, there is also a need to deal with the issue of incentivized pleas for defendants against whom the prosecution's case is weak. A greater discount should be available in these circumstances.

This could be approached in two ways. First, the defendant could plead guilty and, in the course of the plea, submit that the prosecution's case is weak. If the court accepts that submission, the defendant should be eligible for a greater discount because, in effect, he or she gave up more than most other defendants. He or she, in fact, passed up a tenable chance of acquittal and, in doing so, realistically saved precious community resources by not proceeding to trial. This is in fact a considerable sacrifice by defendants and one that should be acknowledged by way of a considerable penalty discount. This approach will then have the further benefit of encouraging other defendants who have weak cases against them to also plead guilty. In such circumstances, the maximum discount should be seventy-five percent. The actual discount should be determined by reference to two main considerations: (1) the weakness of the prosecution's case and (2) the timeliness of the plea. The highest discount should be reserved for cases when the plea is entered at the first available opportunity and the prosecution's case is demonstrably weak.

This proposal strikes a balance between the competing interests of the state and those of defendants. It ensures that the utilitarian benefits of preserving the discount are retained while giving appropriate acknowledgment to the fact that (1) waiving the right to trial is a considerable forfeiture, especially when the defendant has a significant chance of acquittal, and (2) the discount places pressure on defendants to plead guilty.

It could be contended that the same position could be reached if defendants were permitted to submit that they were in fact innocent but pleaded guilty to attract the sentencing discount and to avoid the risk of an adverse trial outcome. The advantage of this option is that it reflects the reality that some innocent people do plead guilty. Further, there is support at the philosophical level for the position that, in some circumstances, it is acceptable to punish the innocent. This is so whether one adopts a utilitarian or retributive theory of

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and although there can be no certainty as to the numbers . . . it would be naive to suppose" that it does not happen. ROYAL COMMISSION ON CRIMINAL JUSTICE, REPORT 110 (1993),

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/271971/2263.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271971/2263.pdf).

punishment.<sup>190</sup> This was an observation made by Professor George Schedler from the Southern Illinois University nearly forty years ago:

Retributivists who advocate punishment are relevantly like utilitarians who will sacrifice the welfare of innocents for the greater good, since retributivists are willing to trade the welfare of the innocent who are punished by mistake for the greater good of the punishment of the guilty. While never intending to punish the innocent, they nevertheless do not choose to withdraw their support for arrangements that have this result.<sup>191</sup>

In theory, defendants who are innocent should be permitted to maintain their innocence and yet indicate that they plead guilty only in order to attract the discount and not risk an adverse trial outcome. This would reflect the actual position in which some defendants find themselves and the decision-making calculus that they have pursued.<sup>192</sup> However, the feasibility of this approach would be unworkable for a number of reasons. First, there is a strong tension between punishing people while at the same time acknowledging their innocence. This tension is probably irreconcilable, given the strong community and jurisprudential aversion to punishing people known to be innocent. Further, at the pragmatic level, as is discussed below, most current sentencing schemes require the sentencing judge to consider the factual basis of the defendant's guilty plea before agreeing to accept the plea. An assertion of innocence would

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190. A common retributive response to the problem of punishing the innocent is that offered by R. A. Duff, who denies that punishing the innocent is a concern for the retributivist because, unlike the utilitarian situation, punishment of the innocent is *not intended* and occurs despite the aims of a retributive system of punishment. *See generally* R. A. DUFF, TRIALS AND PUNISHMENTS (1985). The same point is made by Michael S. Moore, *Justifying Retributivism*, 27 *ISR. L. REV.* 15, 20 (1993). The credibility of this response turns on the persuasiveness of the doctrine of double effect. It has been argued that this doctrine is unsound. *See* Mirko Bagaric & Kumar Amarasekera, *The Errors of Retributivism*, 24 *MELBOURNE U. L. REV.* 125 (2000). *But see* R. A. Duff, *In Defence of One Type of Retributivism: A Reply to Bagaric and Amarasekera*, 24 *MELBOURNE U. L. REV.* 411 (2000).

191. George Schedler, *Can Retributivists Support Legal Punishment?*, 63 *MONIST* 185, 189 (1980). For this reason, he concluded that retributivists simply cannot support the institution of punishment. However, it must be noted that there are a large number of different retributive theories. For an overview of many of the theories, see C. L. TEN, CRIME, GUILT AND PUNISHMENT 38–65 (1987); TED HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 211 (1984); MIRKO BAGARIC, PUNISHMENT AND SENTENCING: A RATIONAL APPROACH (2001); John Cottingham, *Varieties of Retributivism*, 29 *PHIL. Q.* 238 (1979) (identifying nine different theories of punishment that have been classified as retributive).

192. In fact, this was a position that two of the authors previously endorsed in the context of the Australian sentencing system. *See generally* Mirko Bagaric & Julie Brebner, *The Solution to the Dilemma Presented by the Guilty Plea Discount: The Qualified Guilty Plea – I'm Pleading Guilty Only Because of the Discount . . .*, 30 *INT'L J. SOC. L.* 51 (2002).

almost certainly preclude the capacity and willingness of courts to proceed to sentencing defendants.

Thus, in order for defendants to attract a discount up to seventy-five percent, they would need to plead guilty, acknowledge their guilt, and demonstrate that the prosecution's case was especially weak. In the more typical scenario, where the prosecution's case was at least satisfactory, the maximum discount would be approximately fifty percent. We recognize that discounts of this nature are considerable. However, they are not so large as to undermine the efficacy and integrity of the criminal justice process. In Australia, defendants who plead guilty and cooperate with authorities by giving evidence against their co-accused are eligible for a discount in excess of fifty percent,<sup>193</sup> and there is a high degree of acceptance of this approach. There is no reason, in principle, that a considerable discount for a guilty plea in the face of a weak prosecution case should be approached differently.

This is true especially in light of the fact that the discount would be introduced in response to and in the context of wide-ranging acceptance that the current plea bargaining process is manifestly and seriously flawed. As we have seen, it utterly disempowers defendants and facilitates the imposition of prosecutorial coercion on them to plead – even in situations where there is a tenable claim that they are innocent. The proposed reform deals with these shortcomings in a transparent, principled, and systematic manner that meaningfully restores the negotiating balance between the prosecution and defense by conferring more power to judges.

#### IV. RESPONSES TO LIKELY CRITICISM OF REFORM PROPOSAL

There are likely to be several criticisms of the above proposal. It is to these that we now turn. Three main criticisms are likely to be made of the proposed reform. The first is theoretical, the second is pragmatic, and the last is legal. We deal with the theoretical critique first.

##### *A. Punishing the Innocent*

As noted above, a sentencing discount in the order of seventy-five percent is large. The difference between, for example, a one-year prison term and a four-year prison term is considerable. Four years removed from society, totally disconnected from one's relatives and friends and deprived of social and economic developments, can have a defining negative impact on an individual's well-being; twelve months is much more a temporary blip than a meaningful exile.<sup>194</sup> Such disparities are likely to strongly encourage many defendants to

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193. Mirko Bagaric, *Abolishing the Curious Sentencing Anomaly Between the Voluntary Disclosure of One's Own Offending and Assisting Authorities with the Offending of Others*, 43 MONASH U. L. REV. 299, 314 (2017).

194. This is demonstrated by the notion of a "gap year," which is commonplace and does not result in social fracturing.

plead guilty. This will apply to all defendants and especially to those who have a fair chance of an acquittal because their potential discount is the largest. Paradoxically, the effect of our proposal is that defendants with the strongest defense will be most strongly encouraged to plead guilty. It is almost certain that this will result in a portion of innocent defendants pleading guilty.

This is, on its face, a significant shortcoming of our proposal. At the jurisprudential level, it is repugnant to inflict punishment on people who are innocent. In abstract terms, of course, the criminal justice system should only punish the guilty, but a claim that actual guilt is a precondition to punishment is so unrealistic to be farcical. It is well-established that the system of trial and proof is far from perfect, that many innocent people are convicted,<sup>195</sup> and that some are even executed.<sup>196</sup> Further, it is clear that the current plea bargaining process results in some innocent people pleading guilty.

In evaluating the desirability of legal reform, the reference point is not abstract purity but the status quo. As we have seen, it is clear that the current plea bargaining process results in many innocent people pleading guilty. This is an unfortunate reality. While our proposal will have the same effect, it has a demonstrable advantage over the current system. The transparency of the reform means that defendants will know precisely the maximum discount that is available to them if they relinquish their right to trial. This means that they can make fully-informed, autonomous decisions regarding their criminal justice outcomes and have a basis for confidence that their prospect of acquittal, if they had elected to exercise their right to trial, will be reflected in a significantly lower sentence. This is in contrast to the current situation where the discount accorded to defendants in the plea bargaining process is, to some extent, driven by the opaqueness and fickleness of the respective negotiation skills of counsel for the prosecution and defense.

### *B. Increased Court Time Required to Establish a Weak Prosecution Case*

A potential pragmatic difficulty with the reform proposal is that the amount of court time involved in ascertaining the merits of the prosecution's case might be so extensive as to undermine the efficiency justification for the guilty plea discount. However, for several reasons, this potential problem can be surmounted. First, as noted above, before judges can accept a plea bargain proposal, they must already inquire into the merits of the proposal to ensure that the arrangement is supported by evidence.<sup>197</sup> Thus, courts are already accustomed to undertaking an, albeit perfunctory, examination of the merits of the prosecution's case against the defendant.

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195. See *supra* Part II.

196. See *supra* Part II; see also see John L. Kane, *Plea Bargaining and the Innocent*, MARSHALL PROJECT (Dec. 26, 2014), <https://www.themarshallproject.org/2014/12/26/plea-bargaining-and-the-innocent>.

197. For example, character witnesses are often called on behalf of the defendant.

Given that our proposal involves the courts having a greater degree of sentencing discretion and power, it is understandable and expected that the prosecution and defense counsel will desire to make more extensive submissions regarding the merits of their respective cases. This problem could be circumvented by placing a ceiling on the length of time available to defense counsel to outline the weaknesses of the prosecution's case. In determining this ceiling, it is necessary to keep in mind that an extensive hearing into the exact strength of the defendant's case would be wasteful and unnecessary. The purpose of the inquiry is not to determine guilt or innocence – this has already been resolved by the plea of guilty. The aim is simply to determine if the accused has a sufficiently strong defense. A useful reference point for setting limits is the practice of the United States Supreme Court. In this context, parties are typically provided thirty minutes in oral argument.<sup>198</sup> The cases before the United States Supreme Court generally involve complex and important legal issues. There is no basis for suggesting that sentencing matters should require any greater duration. In fact, given that guilt and innocence is not in question, thirty minutes is too generous a time allocation. Courts should allocate no more than thirty minutes in total to hear submissions from the prosecution and defense regarding the strength of the prosecution's case in circumstances where the parties do not agree on this issue. Thus, our proposal would not result in a significant time burden on the courts. The current cost efficiencies of the present plea bargaining system would hence not be undercut.

### C. Potential Constitutional Problems

A potentially more significant problem with the proposal is that it may run afoul of constitutional limitations. There are potential difficulties that arise in relation to statutory schemes that expressly (or by necessary implication) incentivize defendants to enter pleas of guilty. At issue here are a criminal defendant's rights under the Fifth Amendment not to plead guilty<sup>199</sup> and under the Sixth Amendment to demand a jury trial.<sup>200</sup> Under United States Supreme Court precedent, statutes that implicitly give a defendant a discount in sentencing in exchange for a guilty or nolo contendere plea are unconstitutional if the statute needlessly encourages such pleas or places an impermissible burden on a defendant's right to plead not guilty or to be tried by a jury.<sup>201</sup>

In *United States v. Jackson*, the Court found unconstitutional a provision of the Federal Kidnapping Act that required the trial court to impose the death penalty if the jury recommended it but also provided for a lesser maximum

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198. *The Court and Its Procedures*, U.S. SUP. CT., <https://www.supremecourt.gov/about/procedures.aspx> (last visited Mar. 5, 2019).

199. U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”).

200. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .”).

201. *United States v. Jackson*, 390 U.S. 570 (1968).



penalty if the defendant was convicted following a bench trial or following a guilty plea.<sup>202</sup> In putting to a defendant the choice of pleading guilty, opting for a bench trial (thereby removing the possibility of the death penalty and restricting the maximum punishment to life imprisonment), or choosing instead to proceed to a jury trial (where the jury could recommend a capital sentence), the statute unconstitutionally burdened the defendant's right not to plead guilty and to be tried by a jury in exchange for the sentencing "discount."<sup>203</sup> While *Jackson* limited the ability of legislatures to enact criminal sentencing schemes that incentivized a defendant to plead guilty in exchange for a "discount," subsequent decisions of the Court have made clear that legislatures have some leeway in crafting such regimes.

In *Corbitt v. New Jersey*, the Court remarked that "there is no per se rule against encouraging guilty pleas" and that "a [s]tate may encourage a guilty plea by offering substantial benefits in return for [a guilty] plea."<sup>204</sup> Such substantial benefits may include even "the possibility or certainty [not only of] a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty . . . but also of a lesser penalty than that required to be imposed after a guilty verdict by a jury."<sup>205</sup> While limiting the scope of *Jackson*, the *Corbitt* Court was careful to note that it "[did] not suggest that every conceivable statutory sentencing structure, plea bargaining system, or particular plea bargain would be constitutional."<sup>206</sup>

While it is clear that legislatures may constitutionally offer criminal defendants the possibility of lesser or reduced sentences in exchange for nolo contendere or guilty pleas, it is equally clear that legislatures are not given free rein in doing so. Absent further guidance from the Court, it is unclear whether the holdings in *Jackson* and *Corbitt* extend beyond circumstances in which the defendant faces the possibility of a death sentence or whether these principles are of more universal application. Some courts have taken the latter tack, holding that the rationales of *Jackson* and *Corbitt* apply regardless of the maximum potential penalty.<sup>207</sup> For example, a Tennessee statute that allowed defendants to plead guilty by mail instead of appearing for trial (reducing the maximum penalty from a \$500 fine and six months' imprisonment to a fixed-sum fine of less than \$100) was found to impermissibly burden the exercise of the right to a trial by jury since it "create[d] an unchecked danger of inaccurate [guilty or nolo contendere] pleas."<sup>208</sup>

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202. *Id.* at 591.

203. *Id.* at 583.

204. 439 U.S. 212, 218–19 (1978) (italics omitted).

205. *Id.* at 219 (first alteration in original) (citation omitted).

206. *Id.* at 225 n.15.

207. *See, e.g.,* Scharf v. United States, 606 F. Supp. 379 (E.D. Va. 1985); United States v. Porter, 513 F. Supp. 245 (M.D. Tenn. 1981); State v. Frampton, 627 P.2d 922 (Wash. 1981).

208. *Porter*, 513 F. Supp. at 248. The court concluded that the huge difference between the penalty faced by a defendant who pleaded guilty and the potential penalty faced by a defendant who chose to invoke his constitutional right to trial by jury was

Despite this, Congress and the states have enacted criminal sentencing schemes that incentivize defendants, either expressly or implicitly, to plead guilty to a charged offense. Apart from statutes that provide a “discount” by their terms (e.g., sentence of death upon recommendation of a jury), the Federal Sentencing Guidelines themselves encourage defendants to enter guilty pleas. Under the heading of “acceptance of responsibility,” if a defendant “clearly demonstrates acceptance of responsibility for his offense,” the defendant’s offense level (i.e., the level from which the range of possible sentences is drawn) is to be decreased by two levels.<sup>209</sup> For some defendants, the resulting reduction in the range of incarceration is substantial incentive for entering a guilty plea.<sup>210</sup>

While it is evident that states can, at least to some extent, constitutionally incentivize defendants to plead guilty, most states do not express significant sentence discounts or reductions within their substantive and procedural criminal laws for defendants who plead guilty. A survey of the five largest states (California, Texas, New York, Florida, and Illinois) shows that most typically classify the results of the plea bargaining as a mitigating factor that judges and juries should (or must) take into account when recommending or imposing sentences that constitute a downward departure from the lowest penalty permitted under statute. Thus, while a defendant may be enticed to plead guilty in the hope that his or her plea will serve as a mitigating factor justifying a downward departure from a more severe penalty – one he or she would have faced had he or she proceeded to trial and been convicted by a jury – his or her plea is not the quid pro quo for a guaranteed sentence reduction.

Under California’s determinate sentencing scheme, trial courts may consider a defendant’s guilty plea as a factor in mitigation of the imposition of a more severe sentence. “When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term

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likely to result in a deluge of inaccurate pleas as defendants who were, in fact, innocent would take the “discount” option instead of exercising their rights. *Id.* at 249.

209. Federal Sentencing Guidelines § 3E1.1(a). If a defendant qualifies for a decrease, the offense level prior to the decrease is level sixteen or greater, and

upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, the offense level is further reduced by one level.

*Id.* § 3E1.1(b).

210. See *An Offer You Can’t Refuse*, HUMAN RTS. WATCH (Dec. 5, 2013), <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead> (illustrating that a defendant with an offense level of thirty and a criminal history category of III can reduce his potential sentencing range from 121-151 months to 84-108 months with a timely guilty plea).

shall rest within the sound discretion of the court.”<sup>211</sup> To aid trial courts in selecting between one of the three possible terms, “either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation.”<sup>212</sup> Circumstances in mitigation include factors relating specifically to the defendant as well as factors relating to the crime.<sup>213</sup> “Factors relating to the defendant include that . . . [t]he defendant voluntarily acknowledged wrongdoing before arrest or at an early stage of the criminal process.”<sup>214</sup> Thus, a guilty plea entered at an early stage of the criminal process can serve as a voluntary acknowledgement of wrongdoing that a trial court can consider in mitigation.<sup>215</sup> However, while an early guilty plea can, in general, be considered as a mitigating factor, some courts refuse to consider a guilty plea induced by the plea bargaining process as a mitigating factor because, through the plea bargain, the defendant received the full benefit of the admission.<sup>216</sup> Furthermore, a guilty plea entered at or near trial may not be considered as a mitigating factor because by entering the guilty plea near the end of the criminal proceedings, the plea does not constitute an acknowledgement of wrongdoing at an early stage of the criminal process.<sup>217</sup>

In Texas, some defendants’ decision to plead guilty or no contest affects whether they qualify for a favorable program known as deferred adjudication community supervision.

[I]f in the judge’s opinion the best interest of society and the defendant will be served, the judge may, *after receiving a plea of guilty or nolo contendere*, hearing the evidence, and finding that it substantiates the defendant’s guilt, defer further proceedings without entering an adjudication of guilt and place the defendant on deferred adjudication community supervision.<sup>218</sup>

Under deferred adjudication community supervision, “the defendant is placed on community supervision without a finding of guilt and without being

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211. CAL. PENAL CODE § 1170(b) (West 2019).

212. *Id.*

213. Cal. R. 4.423.

214. Cal. R. 4.423(b)(3).

215. *See, e.g.*, *People v. Holguin*, 262 Cal. Rptr. 331, 336 (Cal. Ct. App. 1989); *People v. Nelson*, No. A105925, 2005 WL 407797, at \* 3 (Cal. Ct. App. 2005).

216. *See, e.g.*, *People v. Burg*, 120 Cal. App. 3d 304 (Cal. Ct. App. 1981) (“The Judicial Council did not have a plea bargain in mind when it proposed as a circumstance in mitigation a defendant’s early admission of guilt.”); *People v. Close*, No. D041522, 2004 WL 723131, at \* 3 (Cal. Ct. App. 2004) (“However, some courts consider a guilty plea entered in a plea bargain not to be a factor in mitigation.”).

217. *See, e.g.*, *People v. Sears*, No. E034679, 2004 WL 1283170, at \* 4 (Cal. Ct. App. 2004).

218. TEX. CODE CRIM. PROC. ANN. § 42A.101(a) (West 2019) (emphasis added). Importantly, only certain defendants are eligible for deferred adjudication community supervision. *See* TEX. CODE CRIM. PROC. ANN. § 42A.101(b) (West 2019).

convicted of any offense.”<sup>219</sup> If the defendant completes the term of deferred adjudication community supervision without requiring the judge to proceed to an adjudication of guilt, “the proceedings are dismissed, the defendant is discharged, and the defendant is deemed not to have a conviction for many purposes.”<sup>220</sup> Thus, for eligible defendants, the potential benefits of deferred adjudication community supervision serve as a substantial incentive to forgo trial and plead guilty or no contest. Texas’ decision to offer deferred adjudication community supervision only to those defendants who plead guilty or no contest has been challenged on constitutional grounds.<sup>221</sup> In *Reed v. State*,<sup>222</sup> the defendant argued that the deferred adjudication community supervision scheme “has no other purpose or effect than to penalize assertion of the right not to plead guilty.” In rejecting the defendant’s argument, the court noted that “[t]he purpose of the statute is to allow the trial court the flexibility to defer adjudication for deserving defendants” and that limiting the availability of deferred adjudication community supervision to defendants who plead guilty or no contest “reflects both a desire to conserve scarce judicial and prosecutorial resources and the practical knowledge that [deferred adjudication community supervision] will very often be utilized as part of a plea-bargain arrangement.”<sup>223</sup> Ultimately, the court concluded that deferred adjudication community supervision is constitutional under the Fifth or Fourteenth Amendments to the United States Constitution even though the program may occasionally have the effect of encouraging defendants to relinquish the right to trial and plead guilty.<sup>224</sup>

In Florida, for example, a downward departure from the lowest permissible sentence is prohibited unless there are circumstances or factors that reasonably justify the downward departure.<sup>225</sup> Departure from the lowest permissible sentence is reasonably justified when “[t]he departure results from a legitimate, uncoerced plea bargain.”<sup>226</sup> Notably, the mitigating effect of a guilty plea applies to any felony offense other than capital felonies;<sup>227</sup> a defendant’s entry of a guilty or nolo contendere plea does not serve as a mitigating factor weighing

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219. 43A TEX. PRAC. § 47:30 (3d Ed. 2017). “‘Community supervision’ means the placement of a defendant by a court under a continuum of programs and sanctions, with conditions imposed by the court for a specified period during which . . . criminal proceedings are deferred without an adjudication of guilt.” TEX. CODE CRIM. PROC. ANN. § 42A.001(1)(A) (West 2019).

220. *Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004).

221. *See, e.g., Moses v. State*, No. 05-06-00338-CR, 2007 WL 1098436, at \*2–3 (Tex. Crim. App. 2007).

222. 644 S.W.2d 479, 482 (Tex. Crim. App. 1983), *superseded by* TEX. R. EVID. 702.

223. *Id.* at 483.

224. *Id.* at 483–84; *see Moses*, 2007 WL 1098436, at \*3 (“The deferred adjudication statute does not put an unconstitutional burden on a defendant’s right to a jury trial.”).

225. FLA. STAT. ANN. § 921.0026(1) (West 2019).

226. *Id.* § 921.0026(2)(a).

227. *Id.* § 921.0026.

against the imposition of the death penalty, and a defendant can be sentenced to death notwithstanding his plea of guilty.<sup>228</sup>

In Illinois, there are no incentives structured into statutes to encourage defendants to plead guilty.<sup>229</sup> Illinois, like all of the five largest U.S. jurisdictions, encourages plea bargaining.<sup>230</sup> However, the benefits that a defendant may gain from plea bargaining do not appear to extend beyond the consideration of a guilty plea as a mitigating factor in sentencing for certain crimes.<sup>231</sup> Moreover, the mitigating effect of plea bargaining is not statutory in nature; it exists by way of judicial fiat.<sup>232</sup> In any event, however, the parties to a plea agreement cannot bargain for a sentence that the court is not authorized by statute to impose.<sup>233</sup> Thus, while entering a guilty plea may operate to reduce a sentence, it cannot operate to justify a downward departure from the minimum permissible statutory sentence.

New York once had a death penalty sentencing scheme under which a defendant could only be sentenced to death by recommendation of a convicting jury.<sup>234</sup> The scheme was invalidated under the authority of *Jackson*.<sup>235</sup> Apart from this now defunct statute, New York law does not afford any express statutory incentive for pleading guilty.<sup>236</sup>

Thus, in the United States it is not conventional for a designated discount to be accorded for a guilty plea. The key reason for this, in our view, is because most matters are disposed by way of a plea bargain and this negotiation generally incorporates a sentencing reduction, the fulcrum around which is the guilty plea. Given that well over ninety percent of matters are finalized pursuant to a plea bargain, there is no imperative for a guilty plea discount to be formalized in a statutory form.

We acknowledge that there is prospect of our proposal being subjected to constitutional challenge. However, the reasoning in *Jackson* and *Corbitt* is unlikely to undermine the legality of a formal guilty plea sentencing discount. The proposal in this Article places a far lesser burden on a defendant's right to plead not guilty than the current plea bargaining process, whereby nearly all of the negotiating power rests with the prosecution and there are no defined sen-

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228. *See id.* § 921.141.

229. *See* 725 ILL. COMP. STAT. 5/115-2 (2018).

230. *See* *People v. Hart*, 828 N.E.2d 260, 266 (Ill. 2005); ILL. SUP. CT. R. 402(f).

231. *People v. Hernandez*, 562 N.E.2d 219, 226 (Ill. 1990) (noting that a guilty plea, while not a statutorily enumerated mitigating factor, may be considered by the court in levying a more lenient sentence).

232. *Id.*

233. *People v. Hare*, 734 N.E.2d 515, 518 (Ill. Ct. App. 2000).

234. *See Hynes v. Tomei*, 706 N.E.2d 1201, 1205 (N.Y. 1998).

235. *Id.* at 1209.

236. *See* N.Y. CRIM. PROC. LAW § 220.30 (McKinney 2018), *invalidated by* *Parker v. Phillips*, 717 F. Supp. 2d 310 (W.D.N.Y. 2010).

tencing reduction parameters that defendants can utilize to assist with their negotiations.<sup>237</sup> Moreover, in *Corbitt*, the Court expressly acknowledged that it is permissible to encourage a guilty plea by offering a substantial discount.<sup>238</sup> Our proposal does just that and does so in a manner whereby defendants are less incentivized to plead guilty because greater transparency and judicial oversight will be injected in the sentencing process.<sup>239</sup>

### CONCLUSION

The fates of millions of Americans who are charged with criminal offenses each year are not determined in court. They are determined following a negotiation with a prosecutor. In this negotiation, prosecutors have considerably more bargaining power than defendants. Prosecutors are normally better resourced and do not have important personal interests at stake. Defendants often face the risk of considerable prison time if a trial outcome is adverse to their interests. No such risk confronts prosecutors. Thus, there is considerable pressure on defendants not to proceed to trial. The pressure is so significant that it has been noted that it is rational for defendants to plead guilty. This places the prosecution at an enormous advantage in the plea bargaining process. This strategic advantage manifests in prosecutors often insisting on severe penalties. The one-sided plea bargaining process is a principal reason for the mass incarceration crisis that exists in America today.

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237. *People v. Collins*, a Supreme Court of California case, illustrates how certain offers of benefits in exchange for a defendant's waiver of trial rights can run afoul of the Constitution and how the proposed sentencing reform avoids these pitfalls. 27 P.3d 726 (Cal. 2001). In *Collins*, the trial court advised the defendant that he would receive "some benefit" in exchange for waiving his right to a jury trial. *Id.* at 728. However, the court did not specify the nature of the benefit. *Id.* On review, the Supreme Court of California concluded that because the defendant did not understand the full extent of what he was getting in exchange for his waiver, the defendant did not knowingly, intelligently, and voluntarily waive his rights and, as such, he was deprived of due process. *Id.* at 731–34. Additionally, the court took issue with the fact that the trial court itself actively participated in obtaining the defendant's waiver, thus rendering it incapable of impartially determining whether the defendant validly waived his rights and injecting a "substantial danger of unintentional coercion" into the process. *Id.* at 734 (quoting *People v. Orin*, 533 P.2d 193, 197 (Cal. 1975)). Our proposal avoids both of these potential problems. First, because the sentencing discount would be clearly defined at the outset of the process, the defendant would know exactly what he is gaining in exchange for forfeiting his right to not plead guilty and his right to a jury trial. Second, the judge, while assuming a greater role in the guilty plea negotiation process, would not be a "party" to the process in the manner condemned in *Collins*. The judge would not be making the discount offer. Instead, the judge would simply apply the law to the facts to determine what discount the defendant would be entitled to – a function very much in accordance with a judge's ordinary duties.

238. *Corbitt v. New Jersey*, 439 U.S. 212, 218–20 (1978).

239. *See supra* Part III.

Despite the manifest shortcomings of the plea bargaining process, it is untenable to abolish a system that results in most defendants pleading guilty. More than ninety-five percent of all criminal matters are resolved in this manner, and the justice system simply does not have the capacity to undertake a significantly large number of trials. A solution to the problems with the plea bargaining process must be found within the structural confines of the current system. This Article offers one such solution. The solution is based on three key pillars. First, the system should be more transparent. Second, prosecution officials should have less influence in the outcome of the bargain. Finally, the reform should not involve an extensive increase in the court time required to finalize a matter.

These three objectives can be met by reforming the sentencing system such that a sentencing discount of up to thirty percent applies for defendants who plead guilty. The discount should be the highest in circumstances when a plea is entered early in the proceedings. In addition to this, a discount of up to seventy-five percent should be available when defendants plead guilty in light of a weak prosecution case.

The existence of these discounts would introduce a high level of transparency into the sentencing system and shift considerable power from prosecutors to judges, thereby leading to fairer and more impartial decisions. Absent a reform of this nature, the sentencing system will continue to be distorted by the fundamental mismatch in the negotiating positions of defendants and prosecutors, thereby continuing to seriously undermine the integrity of criminal justice in America.