Plea Bargaining: A History of Unbalanced Power

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INTRODUCTION

"We now live in a world of guilty pleas, not trials"[1]

The act of plea bargaining has not always held the position within the American justice system that it holds today.[2] What began as a humble technique to address specific charges has expanded into a method for dispatching justice to over 90% of defendants receiving punishment in the United States.[3] With such a vast reach it is not surprising that plea bargaining has both been hailed by staunch supporters, and ridiculed by persistent critics. What both sides can agree on is that the presence of plea bargaining has changed the landscape of jurisprudence in a monumental way.[4]

This paper is intended to review the practice of plea bargaining and examine a perceived imbalance in the power shared by interested parties engaged in the bargaining process. Section I will first look back to the origins of plea bargaining in America. This will begin with the early conception of plea bargaining in seventeenth century criminal cases in America. The modern expansion of plea bargaining is next reviewed in the light of increased academic and social commentary. The section then concludes with a discussion of the impact of modern sentence

[1] Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in A World of Guilty Pleas*, 110 Yale L.J. 1097, 1100 (2001)
[2] Raymond Moley, *The Vanishing Jury* 2 So Calif L Rev 96, 107 (1928)
[3] Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 Ohio St. J. Crim. L. 37, 42 (2006) ("Today jury involvement in the criminal justice system is the exception rather than the rule. Roughly 95% of adjudicated cases result in guilty pleas, which subvert the jury's opportunity to check prosecutors and judges."), See also George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* 49 (2003); Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 Am. J. Comp. L. 717 (2006)
[4] Robert L. Segar, *Plea Bargaining Techniques* 25 Am. Jur. Trials 69 (Originally published in 1978)

guidelines on plea bargains. Section II will introduce the analysis of two schools of thought, economic game theory and cognitive decision making theory; these two views will be used as lenses though which to examine plea bargains. [5] Among the game theory topics discussed will be such concepts as; equilibrium theories (specifically Nash's equilibrium theory), cooperative models, asymmetrical models, and game models including normal and extensive forms.[6] While introducing cognitive decision theories the focus will be on the impact of bias, framing, anchoring, risk avoidance, and overconfidence on plea bargaining outcomes. Section III will then examine the imbalance of powers between interested parties involved in the plea, specifically that of the prosecutors, defendants and judges. Section IV will conclude the paper with a discussion of the use of state constitutional protections to rebalance the scales of a plea bargain.

I. THE HISTORY OF PLEA BARGAINING

Plea bargaining may have become the mechanism vastly preferred for handing down justice in America today, but its origins are of a much more humble nature.[7] Plea bargaining began in the 19th century, primarily for the same reason that many hold today as the reason for its popularity, to help ease the crushing weight caused by the ever growing workload on prosecutors.[8] The act of plea bargaining in the form of *charge bargaining* encountered resistance from opponents, but managed to emerge by the end of the nineteenth century and into the twentieth century as a dominant method for resolving criminal cases.[9] In addition to the

[5] Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining* 217-220, 91 Marq. L. Rev. 213 (2007)
[6] Eric B. Rasmusen, Games and Information 56-60 (1989)
[7] Mary E. Vogel, The Social Origins of Plea Bargaining: Conflict and the Law in the Process of State Formation, 1830-1860, 33 Law & Soc'y Rev. 161, 162 (1999)
[8] George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* 13 (2003)
[9] Albert W. Alschuler, *Plea Bargaining and Its History*, 79 Colum. L. Rev. 1, 6 (1979)

power of charge bargaining, in the nineteenth century judges in American courts saw the benefit of *sentence bargaining* to aid them in the handling of an ever increasing docket.[10] With judges and prosecutors joined in their endorsement of the plea bargain instrument, plea bargaining took on a power of its own and entrenched itself into the American justice system.[11] The balancing of power between prosecutors and judges to control plea bargains held each party in check until the emergence of sentencing guidelines, which threatened to remove the judicial power to set the sentence in cases that had been plea bargained.[12] This removal of judicial involvement tipped the balance of power and the way plea bargaining was leveraged.

A. The early conception of plea bargaining in America.

Society would like to believe that powerful institutions that control the dispensing of justice in America come from noble and honorable roots that extend into our heritage and history much the way trials by jury or the right to confront a witness do.[13] However when it comes to plea bargaining there is no such lineage, for plea bargaining seems to have taken root in response to whisky and murder.[14]

There is clear evidence that plea bargaining existed in varied forms and in varied stages of sophistication prior to 1904, however it is the very nature and character of these more

[10] George Fisher, Plea Bargaining's Triumph, 109 Yale L.J. 857, 864 (2000)
[11] George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* 132 (2003)
[12] Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 Cal. L. Rev. 1471, 1475 (1993) ("Historically, the prosecutor's extraordinary bargaining power over defendants was constrained by independent judicial sentencing.")("The prosecutor's new power to shape the outcomes of criminal trials radically alters the nature of plea bargaining. Rather than being constrained to shape bargains according to judge-determined sentencing parameters, the prosecutor now determines with little inhibition the sentencing parameters.")
[13] Michael McConville & Chester L. Mirsky, Jury Trials and Plea Bargaining: A True History 1-3 (2005)
[14] Stanford Law School professor George Fisher painstakingly unearthed the origins of plea bargains in Middlesex County Massachusetts in his 2003 book titled Plea Bargaining's Triumph. Professor Fisher's account of the use of early plea bargaining, in the form of charge bargaining, dates back to 1804.

sophisticated versions of plea bargaining found during this period of history that is most helpful in gaining an understanding of modern plea bargaining.[15]

In Massachusetts in 1804 the laws associated with liquor were quite different than those of most other offenses of the time.[16] The legislature, in an attempt to control the spread of alcohol established several provisions of sentencing.[17] First, and perhaps most critical, the legislature created a mandatory non fluctuating fine of 20 pounds (at the time this equaled about $67) which was quite substantial for anyone convicted of the crime of being a "Common Seller". [18] Second, the legislature imposed a more flexible fine for other licensing law violations of between two and six pounds, which would be determined by the judge presiding in the case.[19] Third, and perhaps the wild card in this situation, the prosecutors were responsible for setting the charge for the costs of prosecuting the case, which was often several times the cost of the fines.[20]

What began to unfold was a more sophisticated version of pleading guilty, one where the prosecutor could adjust the charge, and through this control the related penalty in exchange for a plea of guilty or no contest.[21] The reason this worked was because of the convergence of the three factors mentioned above. 1) The charged offense had to be one of substantial penalty, with little or no room for the defendant to feel he could go to the judge and get a better deal (charge of common seller with a 20 pound mandatory fine). 2) The prosecutor had to have a fall back charge that was of a known lesser penalty (lesser licensing charge with a penalty range of 2-6 pounds). 3) To strike a sufficiently stable penalty the prosecutor needed to be able to guarantee

[15] George Fisher, *Plea Bargaining's Triumph*, 109 Yale L.J. 857, 871 (2000)
[16] See Act of Feb. 28, 1787, ch. 68, 1786 Mass. Acts 206, 207
[17] Id.
[18] George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* 23-24 (2003)
[19] Id. At 24
[20] Id.
[21] Id.

the defendant a set fine amount (by adjusting the prosecution charges to offset any variation in the judge's sentence in the 2-6 range).[22]

This scenario is demonstrated by prosecutor Samuel Dana in an 1804 liquor law violation case against Josiah Stevens. Stevens was charged with four counts, one for being a "common seller" of alcohol, two counts of making particular unlicensed sales, and a final count of selling alcohol and permitting the buyer to drink on Stevens' premises. The County Clerk's record is as follows.[23]

> [T]he said Josiah [Stevens] says he will not contend with the Commonwealth. And Samuel Dana Esquire Atty. for the Commonwealth in this behalf says that in consequence of the defts. plea aforesaid he will not prosecute the first third and fourth counts against him any further.[24]

Here, even without knowing Dana's motives, it can be seen how the greater charge of "common seller" was dropped, as were two other of the lesser offenses, in exchange for a no contest plea on the remaining count. Without the ability to demonstrate a specific, unalterable penalty for the greater offense it is likely Dana would not have been able to easily secure the plea. It is also likely that Stevens would have been more tempted to take his chances before a judge had Dana not been able to offset any variation in the judges sentencing by adjusting the cost of prosecution. It was this combination of factors that gave the prosecutor the power needed to encourage the plea bargaining process.[25]

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[22] Id.
[23] Id. At 21-23, *Commonwealth v. Josiah Stevens*, Middlesex Ct. C.P. R. Book 803 (Dec. 1808),
[24] Id.
[25] See George Fisher, Plea Bargaining's Triumph, 109 Yale L.J. 857, 872 (2000)

As time went on and caseloads increased, even more resourceful tactics to deal with liquor law violations were.[26] In 1834 Middlesex County more than doubled the number of cases it prosecuted from just five years before in 1829.[27] Asahel Huntington, the prosecutor during this time period, saw the answer to his overburdened workload in the plea bargain process.[28] In 1834 Huntington began creating, and using a pre-printed, multi-count liquor indictment form.[29] This form was used to list multiple indictments of varying severity.[30] Huntington would then often remove counts from the form in exchange for no contest pleas on the remaining counts. [31] The use of the plea form does not change the structure of the plea bargain from that used in the Stevens case, what it does show is the routine nature by which plea bargaining in these cases had reached in 30 years. The use of the multi-count form, whether contemplated by Huntington or not, may have been more persuasive given what decision making theorist today believe about the impact of that framing, and anchoring has on decision makers.[32]

While Huntington's multi-count plea form may have helped him to handle the increased workload, it did not garner him friends in the legislature, who by 1844 had noticed his new practice of plea bargaining. Huntington was summoned to appear before the House investigation committee to answer to charges of "mal-administration…[I]n taking less than might have been required on the discharge of indictments found and not tried".[33] Huntington admitted to the charge and went on to defend his actions as "right under the law".[34] He further explained that

[26] Id. At 883
[27] Id.
[28] Id.
[29] Id.
[30] Id.
[31] Id.
[32] Id.
[33] George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* 30 (2003)
[34] Id.

this procedure was needed to handle the ever growing workload of the prosecutor's office.[35] The committee was won over by Huntington's defense of plea bargaining and stated that "it was applied, to attain the just end of all punishment, the prevention of the offence, the reformation of the offender."[36]

Liquor law violations were not the only charges that plea bargaining was beginning to be used in.[37] In the same part of the country that prosecutors Dana and Huntington had used plea bargains to dispense with liquor law violations, others were seeing the opportunity to apply similar procedures to take on murder cases.[38] While murder cases and liquor violations seem to be very different in impact, and in penalty, their procedural positioning is very similar.[39] Murder in Massachusetts carried a mandatory sentence of death, while the lesser offense of manslaughter carried a sentence of between 0 – 20 years in prison.[40] The mandatory sentence acted as much the same point of leverage as common seller did under liquor laws.[41] The mandatory severe penalty allowed the prosecutors to have a guaranteed outcome of sentence which the defendant could not hope to receive a lesser penalty from the judge. By being the sole controlling agent of the charging, the prosecutor could decide to charge with murder, or agree to charge with the lesser offense (manslaughter) in exchange for a guilty or no contest plea. Although the prosecutor is lacking the ability to adjust any variation in the judges sentencing range, an option he had in liquor prosecution through the discretion of prosecution charges (prosecutors rarely

[35] Id. At 31
[36] Id.
[37] George Fisher, Plea Bargaining's Triumph, 109 Yale L.J. 857, 885 (2000)
[38] Id. At 886
[39] George Fisher, Plea Bargaining's Triumph: A History of Plea Bargaining in America 39 (2003) ("Despite the gulf that would seem to divide a liquor law violation that carried a mandatory hundred dollar fine from a murder charge that carried mandatory death, these two crimes share a common subplot in the story of plea bargaining's rise. In each case, the legislature's assignment of a mandatory minimum penalty…gave prosecutors the power to charge bargain.")
[40] George Fisher, Plea Bargaining's Triumph, 109 Yale L.J. 857, 886 (2000)
[41] Id. At 893

could charge fees if a defendant was incarcerated), the severe nature of a mandatory death penalty was sufficient to offset the unknown nature of the sentencing range of 0-20 years.[42]

Professor Fisher gives us an example of just such an interaction.[43] In 1848 Barney Goulding was charged with murdering his wife. Prosecutor Charles Train employed similar techniques as Dana and Huntington had. The clerk's record captures the result.[44]

> And afterward in this same term the said Barney Goulding, otherwise called Barnett Goulding, retracts his [not guilty] plea above pleaded, and says he is guilty of manslaughter. And Charles R. Train, Esquire, attorney for the Commonwealth in this behalf, says, he will no further prosecute this indictment as to the malice aforethought, and the charge of murder. On his manslaughter conviction, the court sentenced Goulding to two years in the house of correction.

B. The modern expansion of plea bargaining.

Not every jurisdiction enjoyed the accumulation of these factors that allowed plea bargaining to flourish in nineteenth century Massachusetts.[45] Other areas of the country were slower to embrace plea bargaining in the numbers seen in Middlesex County.[46] This is primarily due to the structure of the laws and sentencing guidelines. However by the early twentieth century plea bargaining was on the rise in America, and legal scholars were beginning to take note.

Just as the birth of sophisticated plea bargaining could be said to be the product of whisky and murder, the birth of the recognition of the impact it could have on defendants' rights was the

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[42] Id. At 893
[43] Id. At 885-886
[44] Id.
[45] Id. At 161-162
[46] Id. ("Lawrence Friedman and Robert Percival's study of Alameda County in California for the late 19th century and the early 18th century shows the proportion of guilty pleas of all sorts was growing steady over the years. 22% - 1880 and 1889, 25% - 1890, to 36% in 1900. These numbers were considerably lower than the same time period in Middlesex County. A reason for this would probably be the California legislatures ban on the prosecutor's use of the nol pros, and thus eliminating the prosecutor's power to charge bargain.")

product of Dean Justin Miller of the University of Southern California Law School. Dean Miller wasted no time during his tenure to take on the issue of plea bargaining, dedicating the first page of the first issue of the Southern California Law Review to the topic.[47] Dean Miller was quick to state his views on the swelling of plea bargains. He declared that "The contrast between the law in the books and the law in action is nowhere more plainly to be seen than in the administration of criminal justice."[48] He continued by saying that " So careful is the law to guard against such practices (bargaining) that there has been created a special crime, called compounding crime, which denounces the acceptance of anything of value in consideration of a promise not to prosecute one guilty of crime."[49] Dean Miller then made the pronouncement that "[I]n theory there should be no compromises of criminal cases" but in reality, "the condonation and compromise of criminal cases is frequent and the methods of evading the clear purpose of the written law are varied."[50]

Miller was joined by other legal scholars such as Raymond Moley, who in 1928 wrote *The Vanishing Jury*,[51] which examined the New York State judicial system from 1839 – 1927. Moley condemned the invisible nature in which prosecutors were able to indulge in plea bargains out of the sight of the public.[52] Moley looked deeper into the motives and interests of prosecutors to engage in plea bargaining and concluded that the invisible nature of plea bargaining allowed prosecutors to claim high conviction rates without revealing how many of those convictions came from compromises gained in plea bargaining.[53] He also was one of the

[47] Justin Miller, The Compromise of Criminal Cases 1, 1 S. Cal. L. Rev. 1 (1927-1928)
[48] Id.
[49] Id. At 1
[50] Id. At 1-2 (1927)
[51] Raymond Moley, *The Vanishing Jury*, 2 S. CAL. REV. 97 (1928)
[52] Id. At 126, George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* 7 (2003), Albert W. Alschuler, *Plea Bargaining and Its History*, 79 Colum. L. Rev. 1, 10 (1979)
[53] Raymond Moley, *The Vanishing Jury* 103-104, 2 S. CAL. REV. 97 (1928)

first theorists to recognize the growing acceptance of plea bargaining among judges for the safety that it provided their reputations and ambitions. Moley pointed out that judges could eliminate the fear of reversal on appeal, or condemnation, by allowing plea bargains to determine the outcome of a charge.[54]

Moley's observation that something more than just caseload pressure was powering the rise of plea bargains was further expanded by legal scholars such as Milton Heumann, whose book *Plea Bargaining: The Experience of Prosecutors, Judges, and Defense Attorneys*,[55] described many of the incentives and potential penalties that lead interested parties to choose plea bargaining as their preferred method of navigating the criminal justice system.[56] Historian Lawrence Friedman, along with his student collaborator Robert Percival, explored the court records of Alameda County California.[57] Their examination spanned the years 1870 – 1910, and led to their book *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870 – 1910*.[58] For the first time, the rise in technology and police investigation techniques were being explored to see what impact they had on the rise of plea bargains.[59] Police science, such as blood tests and fingerprinting were now playing major roles in allowing the prosecutor and police departments to apply heavy leverage based on science and thus encourage plea bargains.[60]

What began to emerge in the twentieth century, with the explosion of research on plea bargaining, was a view of plea bargaining as a much more complicated mechanism than just a

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[54] Id., see also George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* 8-9, 180 (2003)
[55] Milton Heumann, *Plea Bargaining: The Experiences of Prosecutors, Judges and Defense Attorneys* (1978)
[56] Id.
[57] Robert J. Cottrol, Lawrence Friedman: *The Legal Historian and the Social Organization of Criminal Justice*, 40 Tulsa L. Rev. 627, 630 (2005)
[58] Lawrence M. Friedman & Robert V. Percival, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870-1910*, (UNC Press 1981)
[59] Id.
[60] Id.

tool to handle caseload pressures. What was highly visible was the rate at which it had taken control of the vast majority of cases in America and the legitimacy that seemed to follow by association with these vast numbers.[61] With percentages of criminal cases being resolved by plea bargains reaching and exceeding 90% many Americans by the 1970's had accepted plea bargaining as a necessary element of justice.[62]

C. Plea bargaining in the post sentencing guidelines system.

From humble beginnings as a tool to ease the burden of whisky and murder cases, to the dominant means of addressing criminal charges, plea bargains expanded over the years in America. Many influences have been associated with this growth and expansion up to the twentieth century, some well accepted, and others debated. What is much less debated is the impact that sentencing guidelines have had on plea bargaining.[63] Since the implementation of federal sentencing guidelines and the varied adoption by the states of such guidelines, plea bargaining has taken on significant presence. Once the servant of both judges and prosecutors, the sentencing guidelines have eliminated the prosecutors need, in many cases, to balance their charging power with the sentencing discretion of the judges.[64] The result in most cases has left prosecutors solely in the seat of control of what has become the most powerful tool in addressing criminal cases.[65]

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[61] Douglas A. Berman & Stephanos Bibas, Making Sentencing Sensible, 4 Ohio St. J. Crim. L. 37, 42 (2006)
[62] Id. ("Today jury involvement in the criminal justice system is the exception rather than the rule. Roughly 95% of adjudicated cases result in guilty pleas, which subvert the jury's opportunity to check prosecutors and judges."), See also George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* 49 (2003); Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 Am. J. Comp. L. 717 (2006)
[63] Jeffrey Standen, Plea Bargaining in the *Shadow of the Guidelines*, 81 Cal. L. Rev. 1471, 1475 (1993)
[64] Id. At 1472
[65] Id ("As the sole "purchasers" of criminal defendants' convictions and incriminating information, prosecutors act as agents of a monopsonist. As monopsonists, they possess substantial power to overwhelm criminal defendants in the plea bargaining process. Historically, such power has been constrained by independent judicial sentencing. The United States Sentencing Guidelines have substantially eliminated the discretion of federal judges to determine final

When looking back to the early cases of plea bargaining of liquor cases, three elements were identified that made the use of plea bargaining by prosecutors effective. First, and perhaps most critical, the legislature created a mandatory sentence. [66] Second, the prosecutor had a less severe alternative. [67] Third, the prosecutors had the ability to offset any variations in the sentence of the lesser penalty.[68] The key to the success was to place all the power in the charging phase and remove the power from the penalty setting phase. By doing this the prosecutor, who is the sole agent of charging, would have all the cards necessary to negotiate a deal with little interference from the court. Absent this level of control the prosecutor would be forced to negotiate without full authority to make a deal with a defendant that was specific enough in many cases to entice them to deal rather than go to trial. Sentencing guidelines and mandatory minimums gave the prosecutors all the options they needed to be able to strategically charge defendants in ways to maximize their ability to negotiate a plea.[69] Some of the provisions of sentencing guidelines not only removed the judges from the equation, it also removed other agents such as parole boards, probation officers, and prison officials from influencing negotiated plea decisions as well.[70]

In 1984 the sentencing reform act created the United States Sentencing Commission which in turn created the Federal Sentencing Guidelines.[71] The guidelines were created to provide determinate sentencing in an attempt to remove any disparities that existed in different courts or

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sentences, curtailing judges' ability to constrain prosecutors. Because sentencing under the guidelines is largely "charge-offense based," prosecutors have more control over the sentencing outcomes, since they determine the charges")

[66] George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* 23-24 (2003)

[67] Id. At 24

[68] Id.

[69] Daniel Donovan & John Rhodes, *The Prisoner's Dilemma Becomes the Lawyer's Dilemma to Be A Zealous Advocate or A Judas Goat?*, Mont. Law., December 2009/January 2010, at 8, 9 ("Criminal law is different. Its primary role is not to define obligations, but to create a menu of options for prosecutors. If the menu is long enough--and it usually is--prosecutors can dictate the terms of plea bargains.")

[70] George Fisher, Plea Bargaining's Triumph, 109 Yale L.J. 857, 860 (2000)

[71] Marc L. Miller, *Domination & Dissatisfaction: Prosecutors As Sentencers*, 56 Stan. L. Rev. 1211, 1212 (2004)

under different judges, as well as other policy considerations.[72] What is of great interest is the impact that the guidelines have had on plea bargaining, and the balance of power held by interested parties. To continue the practice of using illustrations to demonstrate specific points, let us run through just one area of the sentencing guidelines and mandatory minimums and show how the plea bargaining process is impacted. Rather than focus on the federal guidelines alone this illustration will move one step deeper and look at a State's adoption of the federal guidelines.

In 1995, for example, Tennessee adopted legislation for the Tennessee Drug Free School Zone Act (DFSZA) modeled after the Federal guideline.[73] Tennessee Code Annotated § 39-17-432 states that: (a) It is the intent of this section to create drug-free zones for the purpose of providing vulnerable persons in this state an environment in which they can learn, play and enjoy themselves without the distractions and dangers that are incident to the occurrence of illegal drug activities. The enhanced and mandatory minimum sentences required by this section for drug offenses occurring in a drug-free zone are necessary to serve as a deterrent to such unacceptable conduct.[74] (b)(1) A violation of § 39-17-417, or a conspiracy to violate the section, that occurs on the grounds or facilities of any school or within one thousand feet (1,000′) of the real property that comprises a public or private elementary school, middle school, secondary school, preschool, child care agency, or public library, recreational center or park shall be punished one (1) classification higher than is provided in § 39-17-417(b)-(i) for such violation.[75]

[72] Id. At 1211, 1217
[73] Tenn. Code Ann. § 39-17-432 (West)
[74] Tenn. Code Ann. § 39-17-432 (West)
[75] Id.

In addition Tenn. Code Ann. § 39-17-432 provides that a day for day serving of at least the minimum sentence must be served and that, "Any sentence reduction credits the defendant may be eligible for or earn shall not operate to permit or allow the release of the defendant prior to full service of the minimum sentence." [76] The legislation clears up any loop holes by further adding that other provisions which dictate the release and parole of prisoners would not apply to DFSZA day for day serving of at least the minimum sentence. The DFSZA also levies a heavy fine for each offense ranging from up to $10,000 for a Class E felony to $100,000 for a Class A felony.[77]

In summary the DFSZA requires a jump in offense classification (for example a Class C felony becomes a Class B felony), a heavy fine, and a requirement for a day for day serving of at least the minimum sentence. To see how this plays out a typical charge for a defendant can be examined.

This scenario will use the statistics of Tennessee's application of DFSZA to create a likely scenario. A 35 year old male defendant is arrested for selling narcotics to a confidential informant, later he is arrested and charged with possession with intent to sell. Let's assume the amount he was caught with is 0.75 grams of methamphetamines (a Class B felony). Under Tennessee sentencing guidelines if the defendant is a standard range offender (0-1 priors) he would be facing a sentence of 8-12 years with a release eligibility date (RED) of as early as 2.4

[76] Id.
[77] Id.

years (30%).[78] A maximum fine of up to $25,000 is also available as a sentence.[79] Other options would be available if this defendant was a first time offender, such as a deferred sentence.

Now let's take the exact same scenario and change one factor this time the confidential informant has been advised to ask the defendant to meet at a gas station to make the drug sale. The gas station is within 1,000 feet of a school. The effect of this one change is to increase the charge from a Class B felony to a Class A felony, the resulting sentence range goes from 8-12 years to 15-25 years.[80] The RED goes from as low as 2.4 years to 15 years. The maximum fine increases 4 fold to $100,000.[81] In addition all other options available to a first offender would not be available.[82]

Samuel Dana from Middlesex County, Massachusetts would likely have recognized this situation. It is remarkably like the liquor law cases of 1804,[83] with an additional leverage point. The DFSZA empowers the prosecutors further by allowing them to remove any hope the defendant would have to be released early or qualify for deferral. In the scenario above, the prosecutor holds both reins of the plea bargaining process, and defendants are severely disadvantaged to risk taking their charge to trial with a Tenn. Code Ann. § 39-17-432 charge added to their indictment. What makes the enhancement charge even more powerful in the hands of a prosecutor is the relative ease at which it can be added or detracted from an indictment.[84] Police agencies have learned to coordinate drug sales by confidential informants to

[78] District attorney's office, Tennessee sentencing guidelines, available at http://da.nashville.gov/portal/page/portal/da/officeNews/sentencingGuidelines (last visited Nov. 25, 2012)
[79] Id.
[80] Id.
[81] Id.
[82] Tenn. Code Ann. § 39-17-432 (West)
[83] See Act of Feb. 28, 1787, ch. 68, 1786 Mass. Acts 206, 207
[84] Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 Cal. L. Rev. 1471, 1506-08 (1993) (Discussing the prosecutors ability to control sentencing outcomes charge bargaining); see also Nancy J. King,

take place within the Drug Free Zones. This task is made even easier in urban areas where you would be hard pressed to find many areas on a map that do not fall within a Drug Free zone.[85] By offering to remove the enhanced penalty the prosecutor can add a larger fulcrum to the leverage he/she already possessed. Evidence of this can be gleaned from Tennessee statistics which show that 80% of defendants initially charged with DFSZA violation have these charges removed at a later time. [86] Another statistic that stands out with the application of DFSZA charges is that 93% of all defendants charged were determined to be legally indigent.[87] The impact of this high level of indigence can be seen both in the quality and amount of retained legal counsel as well as the ability of a defendant to make bail and thus make decisions without the framing bias associated with incarceration.[88] The psychological effect of pretrial detention is quite powerful as it can be much more difficult for defendants to accept a plea and come to jail from home, than it is for a defendant who is already locked up to accept the same deal.[89] The perception that a guilty plea is a gain and trial a loss is virtually overwhelming to a defendant who is incarcerated already.[90]

It is remarkable to note the resilient nature of the plea bargaining process over the last 110 years.[91] Serving both as a mechanism for handling ever growing caseloads and to enhance

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Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment, 58 Stan. L. Rev. 294 (2005) ("Both in bargaining over statutory ranges and in bargaining over sentences within statutory ranges, parties have easily escaped from the constraints of the Guidelines.")

[85] Jordan T. Smith, *Equal Protection Under the Law? Examining Tennessee's Drug Free School Zone Act (TNDFSZA)* 14-15 University of Tennessee Honors Thesis Project (2012)

[86] Id. At 24

[87] Id. At 23

[88] See Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 Marq. L. Rev. 213, 239 (2007) ("Substantial numbers of felony defendants are detained prior to trial. Indeed, in state courts approximately one-third of all felony defendants on average are detained pretrial, and in many jurisdictions, two-thirds or more of felony arrestees typically cannot make bail or are not given the option.")

[89] Id. At 240

[90] Id.

[91] See Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 Am. J. Comp. L. 717 (2006)

conviction rates it has become the trusted friend to prosecutors in America.[92] Judges have had a more "on again, off again" love of the plea bargain, but have been relegated to the sidelines by legislature's attempt to both increase punishment and control fluctuations. The evolutionary adaption of plea bargaining process shows signs that the process, itself once dependent on the acceptance of interested parties such as judges and prosecutors, has now engrained itself so deeply in the system that it appears to be able to sustain itself.[93] Let us now look into is the current state of power in the plea bargaining process, and what that may mean to defendants and the justice system overall. To analyze this it is important to first understand two schools of analysis that will be used as the lenses through which to view plea bargaining through.

II. TWO SCHOOLS OF THOUGHT TO ASSIST IN EVALUATING PLEA BARGAINS

When it comes to understanding the decision making mechanics of plea bargaining experts are divided into separate schools of thought. On one side experts utilizing economic theory and rational decision making based upon persons perceived objectives. [94] On the other side are experts schooled in the psychological analysis of cognitive decision making and the multitude of variables influencing a person's decisions. Both schools of thought offer valuable information to understanding the complex nature of plea bargaining.

A. Economic analysis

[92] Id.
[93] George Fisher, Plea Bargaining's Triumph, 109 Yale L.J. 857, 860 (2000)
[94] Rebecca B. Morton, *Methods and Models: A Guide to the Empirical Analysis of Formal Models in Political Science* 75 (1999)

Since the days of Adam Smith, economic theory has been used to explain and predict the behavior of individuals in a multitude of situations.[95] The primary basis of this theory rested on the idea that a person's behavior is a direct response to incentives.[96] This concept was advanced further by the works of Alfred Marshall, who added the concept of supply and demand curves to that of incentives.[97] The economic focus on incentives and price, paid very low dividends in the area of law due to such complications as asymmetric information, and the fact that the interested parties in a legal dispute do not often take the "price" as a given factor. [98]

One of the most important contributions, by law and economic scholars to the study of law, is the use of a coherent theory of human decision-making ("rational choice theory") to attempt to predict how people are likely to decide issue in reference to legal rules.[99] Scholars used this theory in their analyses of legal decision making and actions. Rational choice theory in brief, states how people would behave if they followed a series of logical axioms, and posits that people make outcome-maximizing decisions.[100] Although there is no single, widely accepted definition of rational choice theory, the use of the assumption that actors behave rationally is pervasive among scholars, the assumption is most often implicit.

Economic theorist interested in creating a model to be applied in the legal arena also turned to another form of analysis, that of game theory and formal models.[101] The advent of game theory is often considered to have begun with the publication of *The Theory of Games and*

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[95] Eric B. Rasmusen, *Game Theory and the Law* ix (2007)
[96] Id.
[97] Id.
[98] Id.
[99] Russell B. Korobkind & Thomas S. Ulen, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 Cal. L. Rev. 1051, 1058 (2000).
[100] Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 Nw. U. L. Rev. 1115 (2003).
[101] Douglas Baird, Robert Gertner, & Randall Picker, Game Theory and the Law 268-271 (1994)

Economic Behavior by von Neumann and Morgenstern in 1944.[102] In the early 1950's game theory was aided by the thoughts of John Nash, who in a series of papers wrote on the existence of equilibrium which laid a foundation of knowledge that then advanced the modern theories of noncooperative game theory.[103] However the use of game theory to analyze, explain and predict actions in legal situations did not begin its steady rise until the early 1970's.[104] Game theory, as used in law, is very similar to how it is used in economic analysis, to reduce and simplify a situation significantly enough that the key forces at work will be revealed in a way that can studied and understood. [105] This reduction is done by isolating one or two issues and applying simple assumptions until a framework can be applied, then later expanding on these assumptions within this framework by adding various complications that might present themselves.[106] By stripping a situation down, as just described, legal theorists can then view the interactions between players, analyze their actions, and measure their payoffs.[107] The concept is to hone our intuitions and understanding of a given and specific situation by highlighting these most basic forces that might otherwise be hidden in the complexity of the situation when it is viewed as a whole.[108] Among the advantages gained by viewing legal situations through a game theory lens is the addition of a mathematical language and mode for describing strategic interactions between interested parties involved.[109] This addition of a strategic component is of primary

[102] Franklin M Fisher, *Games Economists Play: a Noncooperative View* , 20 RAND Journal of Economics 1, 113, (1989), see also Eric B. Rasmusen, *Games and Information* 13 (1989), Rebecca B. Morton, Methods and Models: A Guide to the Empirical Analysis of Formal Models in Political Science 84 (1999)
[103] Id.
[104] Gordon Arsenoff, *Ignorance is Strength: Evolution of Optimism Bias in a Plea Bargaining Game*, http://taguchi.wustl.edu/wordpress/arsenoff/files/2012/08/120827-prosecution.pdf (last visited Nov. 23, 2012)
[105] Eric B. Rasmusen, *Game Theory and the Law* ix (2007)
[106] A. Mitchell Polinsky, *An Introduction to Law and Economics* 3-4 (1983)
[107] Eric B. Rasmusen, *Game Theory and the Law* x (2007)
[108] Douglas Baird, Robert Gertner, & Randall Picker, *Game Theory and the Law* 7 (1994)
[109] Rebecca B. Morton, *Methods and Models: A Guide to the Empirical Analysis of Formal Models in Political Science* 82 (1999)

importance to allowing policy makers, interested parties, and practitioners to understand and often predict expected outcomes of a legal scenario.[110]

Although a thorough review and discussion on game theory and formal modeling is well beyond the scope of this paper, a few basic definitions and concepts will allow the reader to better see the interactions between interested parties in a plea bargain. The following definitions will act as an aid for the limited discussion presented.

Normal Form Game: A normal form game is a frame work to analyze a basic situation in which two players interact, and each must determine what to do without knowledge of what the other player is doing.[111] The actions are assumed to occur simultaneously. A normal form game requires three components: [112]

1) *Players*
2) *Strategies* available to the players
3) *Payoff* each player would receive for all possible combinations of chosen strategies

Extensive Form Game:[113] An extensive form game is a framework to analyze a more complicated series of interactions, incorporating the elements of a normal form game as well as the additional information concerning sequence of actions, as well as the information each player possesses and when they possess it.[114] An extensive form game requires five components:[115]

[110] Id.
[111] Douglas Baird, Robert Gertner, & Randall Picker, *Game Theory and the Law* 7 (1994)
[112] Id. At 8
[113] The extensive form game and its included subgames are the primary elements of modern game theory. The analysis of subgame perfection and equilibrium are introduced well in *A Course in Microeconomic Theory* by David M. Kreps (1990)
[114] Douglas Baird, Robert Gertner, & Randall Picker, *Game Theory and the Law* 50 (1994)
[115] Id. At 51, See also Eric B. Rasmusen, *Games and Information* 22-25 (1989)

1) *Players*

2) *Sequence* of action and when players take action

3) *Choices* available to each player when that player can act

4) *Information* known to each player at different sequences of action

5) *Payoffs* each player would receive for all possible combinations of chosen strategies

Strategic Decision Making: When players make choices knowing that these choices will have an impact (known or unknown) on the other players, in an effort to accomplish their own goal.[116]

Dominant Pure Strategy: a strategy in a game that is the best option for a player for every possible choice that could be made by the opposing player.[117]

Nash Equilibrium: John Nash is credited with creating this central solution concept of modern game theory.[118] A Nash equilibrium is in existence when each player's strategy, in combination with the other player's strategy, cannot be improved upon resulting in neither player having an incentive to deviate from their strategy.[119] Put mathematically, if player 1 chooses strategy x, and player 2 chooses strategy y, a Nash equilibrium would exist if it is proved that player 1 could do no better than choosing x if player 2 chooses y, and conversely that player 2 could do no better than choosing y if player 1 chooses x. [120] Each player could not switch strategy without reducing payoff, thus a Nash equilibrium is in existence.[121] If the players are

[116] Rebecca B. Morton, *Methods and Models: A Guide to the Empirical Analysis of Formal Models in Political Science* 82 (1999)
[117] Douglas Baird, Robert Gertner, & Randall Picker, *Game Theory and the Law* 306, 313 (1994)
[118] Id. At 310
[119] Id.
[120] Id.
[121] Eric B. Rasmusen, Games and Information 33 (1989)

rational, and the solution is not a Nash equilibrium, then one or both players would have an incentive to switch to a new strategy.[122]

Asymmetric information: A situation in which one side of a decision making scenario has information that the other side does not have, but would benefit from knowing.[123] Asymmetric information can lead to such unwanted outcomes as adverse selection, moral hazard,[124] and market failure.[125]

With these definitions in mind, perhaps the best place to begin applying game theory techniques to understand legal situations is with the prisoner's dilemma game model. In the prisoners dilemma game scenario it is imagined that a prosecutor suspects two people of a Class B felony crime (aggravated robbery). The prosecutor however, only has enough evidence to prove their involvement in a misdemeanor crime (possession of a firearm without registration). The prosecutor offers each prisoner the same inducement to confess to the felony:[126]

1) "If you are the only one to confess, I will reward you by dropping all charges" (0) "And I will use your testimony to convict your partner, giving the maximum sentence for this crime which is 12 years." (-12).[127]
2) "However, if your partner confesses and you are the only one not to confess, I will use your partner's testimony to convict you of the felony and obtain for you the maximum 12 years in prison" (-12) " and let the partner go free" (0).[128]

[122] Douglas Baird, Robert Gertner, & Randall Picker, Game Theory and the Law 306, 310 (1994)
[123] Nolan McCarty & Adam Meirowitz, *Political Game Theory* 204, 215 (2007)
[124] Eric B. Rasmusen, Games and Information 133 (1989)
[125] David Aboody & Baruch Lev, *Information Asymmetry, R&D, and Insider Gains* 2747 -2766 Journal of Finance 55 (2000)
[126] Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. Cal. L. Rev. 209, 215-16 (2009)
[127] Id.
[128] Id.

3) "If neither of you confesses, you each will get one year for the misdemeanor weapons violation" (-1)[129]
4) "If you both confess, I will convict you both of the felony, but give you the minimum sentence of 6 years" (-6).[130]

In this example, to select the strategy of not confessing is to "Stay Quiet" and to select the strategy of confessing is to "Talk."[131]

With these payoffs, if Player 2 stays quiet, Player 1 is better off talking (receiving a payoff of 0) than staying quiet (-1). If Player 2 talks, Player 1 is better off talking (-6) than staying quiet (-12).[132] Therefore, Player 1 has a dominant pure strategy of talking; it is player 1's best move, regardless of what Player 2 does. These payoffs are symmetric so Player 2 has the same dominant pure strategy.[133] Thus, the only equilibrium is Talk/Talk. This game is referred to as a "dilemma" because this equilibrium is worse for all players than another possible outcome, Stay Quiet/Stay Quiet.[134]

[129] Id.
[130] Id.
[131] Id.
[132] Id.
[133] Id.
[134] Id.

	(Player 2) Stay Quiet	(Player 2) Talk
(Player1) Stay Quiet	Each get player gets 1 year for misdemeanor **(-1,-1)**	Player 1 gets 5 years, player 2 gets no time **(-12,0)**
(Player 1) Talk	Player 1 gets no time, player 2 gets 5 years **(0,-12)**	Each player gets 3 years for felony with a reduced sentence **(-6,-6)**

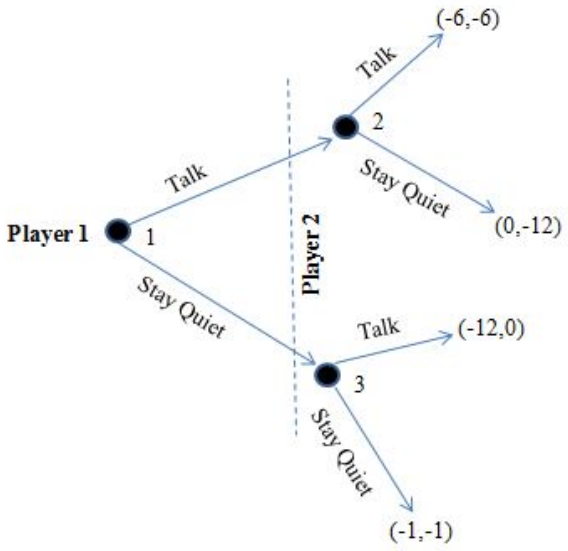
This is an example of a situational game that has a solution that is a dominant pure strategy leading to Nash equilibrium.[135] Further, this game is a valuable tool to demonstrate how an individual's strategy can be one that leads to individual interests that are neither the player's best choice, nor the choice that is best for the group as a whole.[136] A less descriptive, more efficient way of expressing this game is demonstrated below.

	(P2) Stay Quiet	Talk
(P1) Stay Quiet	**(-1,-1)**	**(-12,0)**
Talk	**(0,-12)**	**(-6,-6)**

To advance beyond the constraints of this helpful but limited scenario game, it is beneficial to begin to move away from static simultaneous normal form games such as the prisoner's dilemma and move toward the dynamic interaction of extensive form games.[137] With the

[135] Douglas Baird, Robert Gertner, & Randall Picker, *Game Theory and the Law* 313 (1994)
[136] Id.
[137] Id. At 50

addition of sequencing and information disparity, extensive games change the form of the model into an inverted tree diagram with each possible point in the game being represented by a node.[138] The dashed line in the model represents a sequence in time for either a player to make a decision or in which to gain information. The model below would be the extensive form game of the prisoner's dilemma just discussed.[139] In this scenario, the assumption would be that player 2 is unaware of the decision of player one, so player two does not know if they are in node 2 or 3 prior to making their decision.[140] These nodes are referred to as being in the same information set,[141] since the information the player has is the same regardless of the actual node which they are at.[142]



After examining the prisoner's dilemma game in extrinsic form, the importance of sequencing and information becomes clearer. The strategy of player 2 would be different if

[138] Id. At 51
[139] Id.
[140] Id. At 53
[141] Nolan McCarty & Adam Meirowitz, *Political Game Theory* 209 (2007), Eric B. Rasmusen, Games and Information 48 (1989)
[142] Douglas Baird, Robert Gertner, & Randall Picker, Game Theory and the Law 53 (1994)

they were allowed to update their information on the style of strategy that player 1 was using. However if player 1 knew that player 2 was acting second, and thus gaining an advantage in information, player 1 would be even more inclined to choose to talk so as to avoid the almost certain worst case scenario of 12 years in prison.[143] Through this illustration of the extensive form game model, the strategies and equilibriums become more visible than they are in the normal form game model.[144]

With the ability now to add the elements of decision making sequence, information sequence, and asymmetrical information, the tools now exist to build a game model to examine a basic plea bargain.[145] This allows us to, at a basic level, assign value to a specific expected outcome and understand the strategy to choose an expected value that is of a higher level. First, an assumption must be made that the defendant (D) will accept any plea offer where the value of the guilty plea (P) is greater than or equal to the expected sentence to be given at trial (T) factoring in the perceived chance of a guilty verdict (G). In a formula, this would be expressed as $P \geq (G * T)$.[146] An example of this formula in action would be a plea offer from a prosecutor to serve 5 years in prison is acceptable in a situation where the probability of being found guilty at trial (G) was 75% and the likely sentence after trial (T) was 15 years in prison. Thus $5 \geq (.75*15)$ or, 5 years in prison is of greater value to the

[143] Eric B. Rasmusen, Games and Information 35, 228 (1989) (First-mover advantage)
[144] Peter C. Ordeshook, *A Political Theory Primer* 15-17 (1992)
[145] Eric B. Rasmusen, Games and Information 43 (1989)
[146] Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 Marq. L. Rev. 213, 247 (2007) ("The expected value of a guilty plea can be calculated Vp = (P*Et) - R, where Vp represents the value of the guilty plea, P is the probability of conviction, Et is the expected sentence upon conviction at trial, and R is the resource cost of trial.") See, e.g., Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 Am. Econ. Rev. 713, 714 (1988). "Both plea bargains and trials entail resource costs, but trials usually consume substantially more resource costs--both in terms of pretrial preparation and court time, and often, post-conviction review--than guilty pleas. Accordingly, R here represents the marginal resource costs of trial above those expended for guilty pleas."

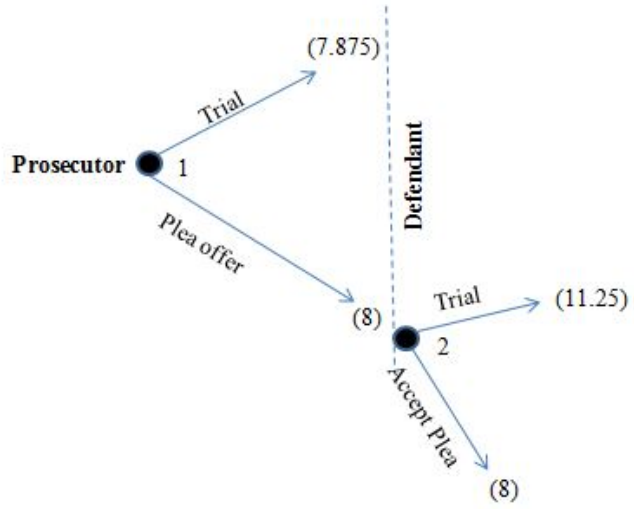
defendant than 11.25 years in prison. If the perceived likelihood of conviction is reduced, the value of the expected outcome of a trial against which the defendant considers a plea offer is changed. If the defendant now thinks his/her chances at trial are much better (G) (25% of conviction rather than 75%), then he/she would turn down the 5 year plea that was offered. $5 \leq (.25 * 15)$, or 5 year sentence is valued less than a sentence of 3.75.

In a rudimentary way, this same formula can be used by the prosecutor to come up with a plea offer. The prosecutor would often factor in the cost reduction of avoiding a trial (R).[147] The newly modified formula for the prosecutor would be represented by the following $P = (G * T) – R$. In the original scenario, if the prosecutor also assigned a 75% likely guilty verdict and assessed a cost savings of 30% based on agency savings in time and money, this would be expressed as $P = (.75 * 15) – 30\%$, or $P = 11.25 - 3.375$. This example would create a plea value of 7.875. Under this scenario, the prosecutor would likely round up the figure and make a plea offer of 8 years. This would create an incentive for the prosecutor (player 1) to choose the slightly higher value of the plea bargain. In step two of the sequence (node 2), the defendant (player 2) would now choose between going to trial and accepting the plea. An incentive exists for the defendant to take the lower jail time of 8 years and accept the plea.[148] In this scenario the prosecutor and the defendant have a dominant strategy to always offer/accept the plea if the pay offs are the same as under this scenario's formula.[149]

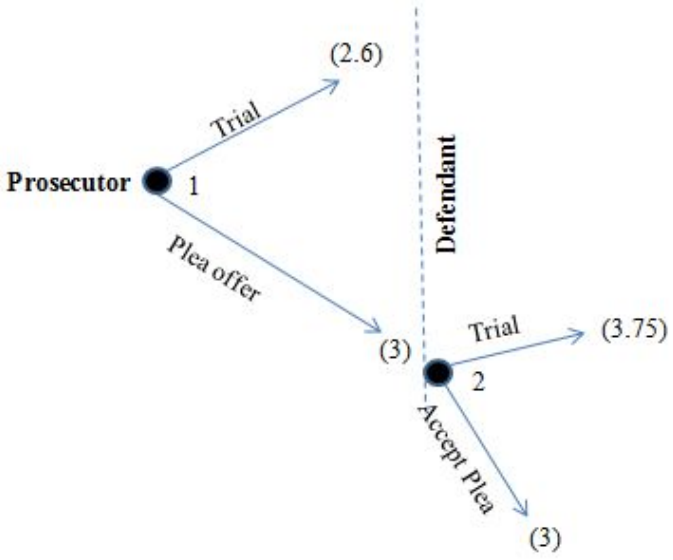
[147] Id. At 216

[148] Id.

[149] Id.



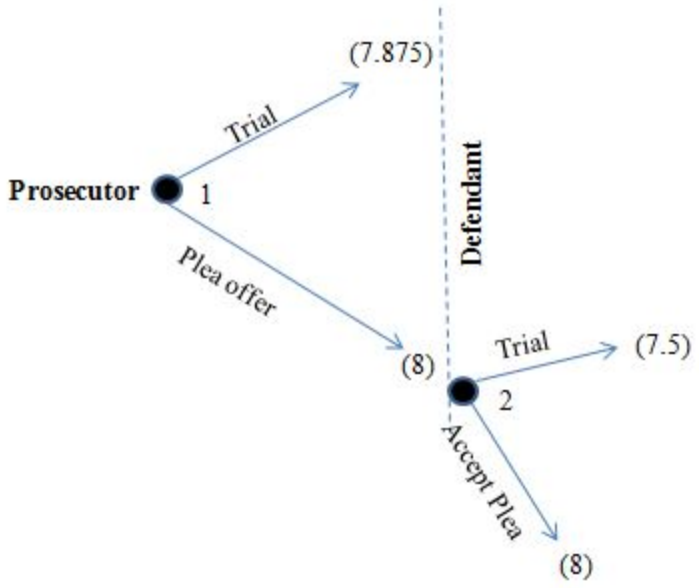
If it again is assumed that the chance of a guilty verdict at trial was reduced to 25%, the entire dynamic has again changed. The formula under this scenario would be P= (.25 * 15) – 30%, or P = 3.75 – 1.125. The plea offer would likely be rounded up by the prosecutor from 2.625 to 3 years. The defendants expected penalty would be a 3.75 year sentence, and the plea offer from the prosecutor would be 3 years.



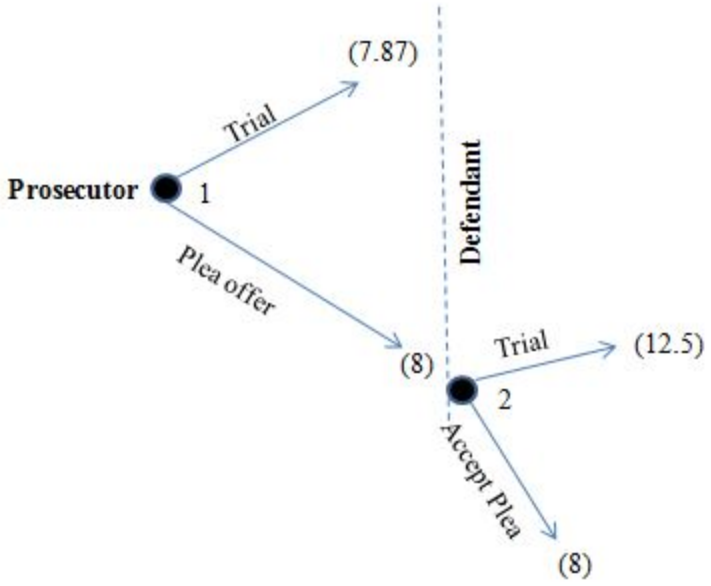
The other option for the prosecutor would be to drop the charges as the costs are too high for the results. This would be the result if the prosecutor's office were implementing a screening function.[150]

What these models of basic decision making in a plea bargain reveal is the interdependent nature of a plea bargain decision. In a scenario where the defendant and the prosecutor are assessing the probability of a guilty verdict differently, they will likely not be able to agree upon an acceptable plea. It is also often true that in a criminal case, information is not static or symmetrical. Each party comes into the negotiation with differing facts, and facts and information may change throughout the negotiation. In a scenario where the prosecutor believes the chances of guilty verdict is 75% likely (P = 11.25 – 30%), while the defendant believes their chances are a bit better and calculates the chance of a guilty verdict at 50% (P = 7.5). As the model illustrates, this is now a scenario with no equilibrium. The prosecutor has an incentive to offer a plea, and the defendant has an incentive to reject this plea and go to trial. This would seem very balanced in power and would encourage communication from both parties so that they can coordinate their expectations on the same information and thus have a greater chance of striking a mutually acceptable solution.

[150] Ronald Wright, Marc Miller, The Screening/bargaining Tradeoff, 55 Stan. L. Rev. 29, 49 (2002)



However, if the concept of charge bargaining is introduced the prosecutor can overcome any need to communicate or adjust the plea offer. All that has to be done to get the desired result is to adjust the charge and the corresponding expected sentence. If the previous scenario is expanded, but this time the prosecutor increased the charge, or added an enhancing charge so that it has an expected penalty of 25 years instead of the previous 15 years. The model would show how this would completely change the likely strategy of the defendant. By adding the prospect of the enhanced charge, the defendant's likely penalty for going to trial is much higher than without it. The perception this creates for many people is that there now exists, in the view of the defendant, a trial penalty.



Even at its basic level, game theory is an effective tool to evaluate specific events in plea bargaining and will help to explain the power dynamics at work, and aid in identifying solutions to any perceived problems. The ability of either party to, in isolation, change the variables to be considered when assigning value, would demonstrate a power imbalance that would dysfunction the concept of participants in a "fair" game. This is a basic modeling of the behavior that was observed in the charge bargaining of Samuel Dana and Asahel Huntington. The prosecutor's ability to add or detract charges allowed them to successfully unbalance the plea bargain as to greatly enhance their own chances of success. Their increased reliance on this strategy demonstrates the dominant strategy present.[151]

[151] Eric B. Rasmusen, *Games and Information* 28 (1989)

B. Cognitive decision making

Plea-bargains are struck in the shadow of expected trial outcomes.[152] Parties forecast the expected sentence after trial, discount it by the probability of acquittal, and offer some proportional discount.[153] Under this calculation, the parties are trying to mirror outcomes that they would anticipate based on the laws, court decisions, and historical outcomes.[154] This oversimplified model ignores how structural distortions skew bargaining outcomes.[155] Over the last several decades, researchers in cognitive science have identified numerous ways that actual human reasoning diverges from rational choices.[156] Individuals systematically fall prey to a host of "cognitive illusions" that lead to non-rational decisions. Rational-choice-based analyses of legal decision making has been of great value, but scholars have begun to question the wisdom of relying on them because there is "too much credible experimental evidence that individuals frequently act in ways that are incompatible with the assumptions of the theory.[157]

Persuaded by this argument, scholars have begun to apply another theory to help explain decision making during a plea bargain, this theory is called "prospect theory" [158]. Developed by Daniel Kahneman and Amos Tversky, prospect theory describes how people actually make decisions.[159] Like rational choice theory, prospect theory assumes that people try to maximize

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[152] Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 Harv. L. Rev. 2463, 2464 - 2465 (2004)
[153] Id.
[154] Id.
[155] Id.

[156] Rebecca B. Morton, *Methods and Models: A Guide to the Empirical Analysis of Formal Models in Political Science* 89 (1999), See also Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases* 18-20 (1982); Cass R. Sunstein, *Behavioral Law & Economics* (2000).
[157] Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 Nw. U. L. Rev. 1115, 1116 (2003).
[158] The "prospect theory" described and discussed in this paper is not to be confused with the prospect theory of patents developed by Edmund Kitch. See Edmund W. Kitch, The Nature and Function of the Patent System, 20 J.L. & Econ. 265, 267 (1977).
[159] Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision Under Risk, 47 Econometrica 263 (1979), Chris Guthrie, Prospect Theory, Risk Preference, and the Law, 97 Nw. U. L. Rev. 1115, 1116 (2003).

outcomes; unlike rational choice theory, however, prospect theory suggests that people often fail to do so in systematic and predictable ways.[160]

Following three years of research, Kahneman and Tversky formally introduced "prospect theory"[161] in their path-breaking article, *Prospect Theory: An Analysis of Decision Under Risk*, in a 1979 issue of Econometrica.[162]

> First, people evaluate decision options relative to some reference point, generally the status quo. When choosing between options that appear to be gains relative to that reference point, people tend to make risk-adverse choices; when choosing between options that appear to be losses, people tend to make risk-seeking choices. For example, people will generally choose a definite $1,000 prize over a 50% chance at receiving a $2,000 prize but will opt to face a 50% chance at having to pay a $2,000 fine over having to pay a definite $1,000 fine. This result is inconsistent with rational choice theory, which generally assumes either risk neutrality or risk aversion in the face of both gains and losses.
>
> Second, individuals' risk preferences tend to reverse when they are faced with low-probability gains and losses. Individuals tend to make risk-seeking choices when selecting between options that appear to be low-probability gains and risk-adverse choices when selecting between options that appear to be low-probability losses. For example, when choosing between a definite $50 prize and a 5% chance at winning a $1,000 prize, individuals tend to make the risk-seeking choice and opt for the gamble. When choosing between paying a definite $50 fine and facing a 5% chance at having to pay a $1,000 fine, individuals tend to make the risk-averse choice and opt to make the sure payment. Again, this empirical finding conflicts with rational choice theory, which generally assumes either risk neutrality or risk aversion in the face of both gains and losses (whether low-probability or not).
>
> Third, individuals tend to value losses more heavily than gains of the same magnitude. As Kahneman and Tversky stated, "The aggravation that one experiences in losing a sum of money appears to be greater than the pleasure associated with gaining the same amount." In fact, the available empirical evidence suggests that losses generally loom at least twice as large as equivalent gains. [163]Thus, a prospective $1,000 loss will have much greater effect on a decision maker than a prospective $1,000 gain.

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[160] Id.
[161] Id.
[162] Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision Under Risk, 47 Econometrica 263 (1979).
[163] Id.

> Fourth, and finally, individuals tend to overvalue certainty. People "overweight outcomes that are considered certain, relative to outcomes which are merely probable." For example, most individuals prefer a definite prize of a one-week tour of England over a 50% chance at winning a three-week tour of England, France, and Italy; yet when given a choice between a 5% chance at that three-week tour and a 10% chance at the week-long tour of England, they prefer the chance at the three-week tour.

Legal scholars have used these four components of prospect theory--framing of ordinary gains and losses, framing of low-probability gains and losses, loss aversion, and the certainty effect--to develop, or at least inform, various analyses of law and legal behavior.[164] As Russell Covey described it in his article *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining:*[165]

> Because a plea bargain is a trade of a certain loss (a conviction and punishment) for a chance of no loss (an acquittal) accompanied by a chance of a greater loss (a trial conviction and enhanced sentence), cognitive research suggests that, all else being equal, most persons would prefer to gamble on total exoneration at trial rather than accept a certain, though likely smaller, punishment by pleading guilty.[166]

In essence, prospect theory predicts that people generally make risk-averse decisions when choosing between options that appear to be gains and risk-seeking decisions when choosing between options that appear to be losses. Decision makers are "often willing to take risks to avoid losses but are unwilling to take risks to accumulate gains".[167]

Other cognitive influences can also greatly affect a defendant's ability to accurately evaluate their chances of a successful verdict at trial and thus impact their decision making ability.[168] These cognitive influences can often combine to influence defendants to take plea deals that are

[164] Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 Nw. U. L. Rev. 1115, 1118-19 (2003).
[165] Russell Covey, Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining, 91 Marq. L. Rev. 219(2007)
[166] Id.
[167] Id. At 1115, 1116 .
[168] Id. At 217.

not in their best interest, and influence prosecutors to react in ways that are not fully rational or utility enhancing.[169] Prospect theory, and cognitive decision making theory, provides a nuanced understanding of plea bargains.[170]

To better understand how these cognitive influences affect decision making within plea bargains, a basic definition of the specific cognitive influences to be discussed is necessary.

Over Confidence, Confirmation, and Self-serving biases: When it comes to how people evaluate risk, they are consistently overconfident.[171] Most people believe they are healthier, smarter, and more ethical than others; and that good things will happen to them more often and bad things less often than average.[172] A person can also be expected to evaluate information selectively, giving more attention to information that is consistent with their own pre-existing beliefs.[173] Russell Covey identified the effect this would have on a plea bargain.[174]

> The effect of these biases on plea bargaining seems fairly predictable. Overconfident criminal defendants should be expected consistently to overestimate the probability that they will prevail at trial. Prosecutors and defendants should look at the same evidence and have consistently divergent views as to its persuasiveness to a judge or jury. As a result, the parties should tend to disagree about all of the inputs to the plea-pricing formula, including the probability of conviction, the trial sentence, and the plea sentence.

Endowment effect: The endowment effect describes a phenomenon that individuals consistently place a higher valuation on goods they possess than on those they do not.[175] The endowment effect may influence plea bargains in ways such as over valuing the testimony of

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[169] Id. At 215, See also Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 Marq. L. Rev. 183, 185 (2007).
[170] Id. At 215-216.
[171] Id. At 218
[172] Id.
[173] Id.
[174] Id. At 218-219
[175] Id. At 214, 220

"your" witnesses, or "your" evidence, or "your" right to trial and the impact that they may have.[176]

Denial mechanisms: A person will often ignore, dismiss, or undervalue information that conflicts with their already established beliefs, or evaluation of a situation.[177] This can influence prosecutors and defendants alike. Once a person settles into a belief, they may very well ignore important information that contradicts that belief, and thus lack the ability to properly assign value to certain decisions and outcomes.[178]

Anchoring and Framing: The connotation and circumstances in which information is presented can often effect how the information is perceived (Framing) or allow too much weight to a piece of information that has little real weight (Anchoring).[179]

Given these cognitive influences, it would seem that most defendants would choose to go to trial.[180] That a prosecutor would have to convince an overconfident (confirmation biased, self-serving biased, endowed), denial prone, risk preferring (to avoid a loss) defendant to suffer certain adverse consequences.[181]

How then do so many cases end in a plea bargain?[182] Richard Birke proposes four potential solutions to this contradiction.[183] One of these solutions pondered by Birke was that prosecutors may simply be offering such good deals that even risk-seeking criminal defendants are inclined

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[176] Id. At 220
[177] Id. At 214
[178] Id.
[179] James N. Druckman, *The Implications of Framing Effects for Citizen Competence*, 225–256 Political Behavior 23 (2001), Amos Tversky & Daniel Kahneman, *Judgment under uncertainty: Heuristics and biases*, 1124–1130 Science, 185 (1974)
[180] Russell Covey, Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining, 91 Marq. L. Rev. 213, 223 (2007)
[181] Id.
[182] Id. At 246-247 ("Seeing the criminal justice system as an integrated plea bargaining machine that functionally works to overcome the cognitive resistance of criminal defendants to plead guilty helps place its component parts in perspective")
[183] Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 205 Utah L. Rev. 208-210. (1999).

to take them.[184] "If the utility value of the plea is much higher than that of trial," Birke explained, "the plea offer may overcome a tendency toward loss aversion."[185] If, for example, a criminal defendant can plead guilty to sexual assault with a three to five year sentence or face a 50/50 chance of a rape conviction with a fifteen to twenty-five year sentence, he might opt for the plea simply because it greatly exceeds the expected value of trial. Nonetheless, Birke concludes that this explanation is unlikely to account for the plea bargaining-prospect theory discrepancy.[186] For doctrinal, political, and practical reasons, it is unlikely that prosecutors are routinely offering such attractive deals.[187] Here Birke fails to account for the impact of charge bargaining and how this can easily multiply a perceived gain and thus make this solution an acceptable one. However, in the absence of this view Birke proposes a final explanation for the high rate of plea bargaining-- criminal defendants are induced to plead guilty due to the way prosecutors frame their offers:[188]

> Defendants plead because they are misinformed about the values of trials and pleas, and because pleas are framed as gains. Defendants are manipulated into pleading because they possess too little information to overcome framing effects inherent in the valuation of pleas and trials, and because they lack information to accurately value that which they so readily trade away--the right to trial. Naturally, defense attorneys respond to incentives of the court that encourage pleas, and these responses manifest themselves as information that distorts defendants' views of their alternatives. Trial looks worse than it really is, and so the plea looks relatively better.

Although Birke contends that each of his accounts might help resolve the apparent inconsistency between prospect theory's predictions and the rate of plea bargaining, he finds the latter explanation most compelling and argues that the criminal justice system should attempt to

[184] Id At, 219.
[185] Id.
[186] Id.
[187] Id.
[188] Id At, 247

address the way prosecutors manipulate the information that they present to criminal defendants.[189]

The answer, suggested by other scholars is similar, that a power differential exists that is powerful enough to overcome these cognitive influences and induce the defendant to plead rather than to proceed to trial.[190]

III. A SHARED FINDING OF AN IMBALANCE OF POWER IN MODERN PLEA BARGAINING

It seems that the both cognitive decision making theory and economic game theory have the potential to shed light onto the topic of plea bargaining.[191] Where game theory can strip back a complex concept to simple yet measurable functions, cognitive decision making has the ability to see the interworking's of many influences on the process at large.[192] Using these tools let us now turn back to the roles of the interested parties to identify sources of power and leverage within the plea bargain scenario.

A. Power and roles in plea bargaining

[189] Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 Nw. U. L. Rev. 1115, 1137-38 (2003)
[190] Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 Marq. L. Rev. ("Several scholars have also observed the ways that psychological and cognitive factors can influence plea bargaining. Professor Alschuler, for example, has called for an end to plea bargaining, in part because its outcomes often turn on an individual defendant's optimism about his prospects or denial about his predicament. Professors Scott and Stuntz have explored the ways that information barriers, coupled with risk aversion in innocent defendants, can cause innocent defendants to plead guilty. Perhaps no scholar has done more to call attention to the psychological factors that can drive plea bargaining than Stephanos Bibas. Professor Bibas has compellingly demonstrated how cognitive biases such as overconfidence, framing, denial, anchoring, and risk preferences can skew plea bargaining.")

[191][191] Rebecca B. Morton, *Methods and Models: A Guide to the Empirical Analysis of Formal Models in Political Science* 93 (1999)
[192] Rebecca B. Morton, Methods and Models: A Guide to the Empirical Analysis of Formal Models in Political Science 79 (1999)

To understand the impact of plea bargains, it is important that the power wielded by each interested party in a plea bargain is understood, and the motivation they have to either avoid or encourage a compromise is also examined.

1. Prosecutors

There is perhaps no better way to begin discussing the power of the prosecutor in plea bargaining than that the following colloquy recorded in 3 Lord Campbell, *The Lives of the Chief Justices of England* 59 (7th ed. 1878), which occurred when one Lacy, a friend of an accused, came to Lord Chief Justice Holt to plead for him:[193]

> Lacy: "I come to you a prophet from the Lord God, who has sent me to thee, and would have thee grant a Nolle proscqui for John Atkins, his servant, whom thou has sent to prison."
>
> Holt, C.J.: "Thou art a false prophet, and a lying knave. If the Lord God had sent thee, it would have been to the Attorney General, for He knows that it belongeth not to the Chief Justice to grant a Nolle prosequi"

What Lord Chief Justice Holt had explained in a few short lines, is the core of the prosecutor's power to plea bargain. The prosecutor is the sole determiner of charging, and thus dropping of charges.[194] It is from this vested power that all plea bargains begin. The prosecutor is often the first interested party to act and is the party that gets to determine the ground on which the negotiation will take place. In addition to this power, the prosecutor is also the holder of much of the information and evidence of a cases strength and weakness, and in many cases is not

[193] People v. Dennis, 164 Colo. 163, 166, 433 P.2d 339, 340 (1967)
[194] See William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 Harv. L. Rev. 2548, 2559 (2004) ("the prosecutor is no longer the price taker but the price setter." This proposition plainly holds true where sentencing guidelines tie sentences to charged offenses, since prosecutors always decide which offenses to charge.")

obligated by law to share or release this information prior to or during a plea negotiation.[195] It is the prosecutor who not only gets to choose which path to walk down, but also how much light to shine in front of the rest of the travelers.[196]

While the power that the prosecutor has to influence plea bargains may be self-evident at this point, the motivations and inconsistency of when they utilize it may still be shrouded in the shadows. It would seem with such a bargaining position a prosecutor would be motivated to always use the charge bargaining leverage to bring a case to conclusion.[197] So why is it that plea bargains don't account for even more case dispositions? Given the desire for prosecutors to maintain a high rate of conviction,[198] why would they defer this leverage to pursue a trial?

The answers may very well be that the motivations of prosecutors are more complex than have previously been discussed.[199] In most instances, the prosecutors are driven by more than just a high rate of convictions, and this causes them to act in ways that may sometimes contradict the maneuvers of a strategic player interested only in high convictions. Many prosecutors take up their position "not just for the thrill of litigation but because of a sincere desire to "do the right thing" and to help the victims of crime."[200] Because of this added desire to seek justice and out of a responsibility to be a "minister of justice", not just an advocate of a particular side, prosecutors will exhibit a passion that will persuade them to seek trial rather than bargain.[201] It

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[195] See Douglas Baird, Robert Gertner, & Randall Picker, Game Theory and the Law 261-264 (1994)
[196] Id. At 122-124
[197] See generally Gordon Arsenoff, *Ignorance is Strength: Evolution of Optimism Bias in a Plea Bargaining Game*, 21-22 http://taguchi.wustl.edu/wordpress/arsenoff/files/2012/08/120827-prosecution.pdf (last visited Nov. 23, 2012)
[198] Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 Marq. L. Rev. 183, 186 (2007)
[199] Id.
[200] Mary Patrice Brown, Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 Am. Crim. L. Rev. 1063, 1080 (2006)
[201] Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 Marq. L. Rev. 183, 187 (2007), See also *ABA Standards for Criminal Justice Standard* 3-1.2 cmt. (1993); Model Rules of Prof'l Conduct R. 3.8 (2004). The prosecutor's obligation to do justice imposes a dual responsibility both to punish the guilty and to

is in these situations that a prosecutor will take pride in taking on the hard case, preferring an acquittal at trial to facing a victim's family to explain a bargained sentence reduction.[202]

Another factor that may cause a prosecutor to seek trial, even when he/she has the leverage to negotiate a plea is decision making based on self-interested bias, endowment effects, and denial mechanisms. It would be quite natural for a prosecutor to allow passion for a case to affect their ability to do a cost benefit analysis. A prosecutor who has looked over a case with sufficient passion may very well inflate his/her chances of success at trial, and thus tries to force a bargain outside of the defendant's interests.[203]

What can be said about prosecutors is that, with the increased frequency and power of plea bargaining, they have attained influence in the rendering of justice unrivaled by any other interested parties.[204]

2. Defendants

"We would rather bear those ills we have, than fly to others that we know not of… thus conscience does make cowards of us all."[205]

The reason defendants continue to negotiate plea agreements may be because of the fear that they may face uncertain punishment at trial, or may face severe punishments due to enhancements. Indeed, the entire criminal justice system is geared toward encouraging guilty

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protect the innocent. *Berger v. United States*, 295 U.S. 78, 88 (1935) ("[The prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.").
[202] Id. At 183, 188 (2007)
[203] Id At 192
[204] Ronald F. Wright, Rodney L. Engen, *The Effects of Depth and Distance in A Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. Rev. 1935, 1936 (2006) ("Today's conventional wisdom about criminal justice in the United States tells us that criminal codes do not matter much. The real impact of the criminal law appears not in the statute books, but in the choices of criminal prosecutors who apply the criminal laws.")
[205] *Hamlet*, (3.1.1775)

pleas.[206] The criminal justice system systematically increases pressure on defendants to plea rather than to go to trial.[207]

The skill, motivation, and experience of the defense attorney can greatly enhance the quality of the plea deal the prosecutor offers, and agrees to. A skilled defense attorney can bring to light facts and weaknesses in the prosecutor's case and help to offset any unrealistic biases the prosecutor may have formed as to the strength of the case before a jury. The defense attorney may help to neutralize bias that the defendant has about their chances at trial, and help the defendant formulate a realistic expectation for a negotiated sentence. The defense attorney can also help the defendant reduce bail, or make other arrangements to be released from custody pending trial. Being released from custody has a great impact on the defendants framing of any offer that the prosecutor will make.

The defense attorney's role in dispelling specific bias, framing, and anchoring impediments to the plea bargain process,[208] as well as the legal advice, trial outcome expectations, and sentencing negotiation is extremely important in the plea bargaining process. The courts have recognized the importance of this function by extending the right to counsel to include plea bargain negotiations.[209] The courts have also seen the importance of the quality of this counsel

[206] TNPRAC–CRP, § 22:29. *Defense counsel's role*, 10 Tenn. Prac. Crim. Prac. & Procedure § 22:29 (2011-2012)
[207] Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 Marq. L. Rev. 213, 223 (2007) ("All things being equal, cognitive biases may well impel defendants to opt for trial, but things are far from equal. The criminal justice system contains numerous levers to induce defendants to abandon their right to trial and to accept a guilty plea, and its evolution has tended, with few exceptions, to expand and strengthen these levers")
[208] Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 Marq. L. Rev. 183, 185 (2007) ("Professor Bibas has compellingly demonstrated how cognitive biases such as overconfidence, framing, denial, anchoring, and risk preferences can skew plea bargaining.")
[209] Missouri v. Frye, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012) (defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused)

during a plea bargain by specifically outlining specific requirements for communication and guidance during a plea bargain.[210]

In addition to the right to counsel during plea bargaining of important criminal cases, the defendant also has the final authority in accepting or rejecting a plea offer from the prosecution. The defendant's right to a trial and to confront any witnesses against them, trumps any desire by the court or prosecutor to negotiate a plea. In most states, the defendant has a right to withdraw a plea up to the time of sentencing. The defendant is also protected, much the same as in other contract situations, from significant changes to the plea once it has been accepted by the judge.[211]

However powerful the defendant's right to refuse a plea and to have counsel advise them, it is not equal in power during the negotiation as those of the prosecutor. The ability to walk away from a deal is not equal to the ability to make a deal and enforce it. A defendant who walks away from a plea is often left with the possibility of a very severe sentence from a court that has no mercy for a person who chose to go to trial. In addition, prosecutors have no incentive to reduce charges after a plea has been rejected, and defendants are often left with the multiple counts that were initially charged by the prosecutor in a strategic maneuver intended to induce a plea. These charges often include the heavy weighted enhancements such as the DFSZA discussed earlier. So while the defendant is still guaranteed his right to trial, the type of trial faced would appear to most defendants as one that has been increased in severity due to the fact that they did not take the plea offer.

[210] Id.
[211] 16 A.L.R.4th 1089 (Originally published in 1982)

This concept of being punished if a defendant choses to go to trial has been upheld by many courts as being within the right of the prosecutors, who by law can charge a defendant with any and all crimes that the prosecutor feels can be proven and are justified by law.[212] However, in many situations it is this very perception that overpowers defendants, no doubt some of which who are innocent of the crimes they are charged with, to accept a plea rather than go to trial and risk an even heavier penalty. To put it another way, many risk avoiding citizens would choose a guaranteed lesser penalty rather than face the future prospect of a heavier penalty. This is even more likely when the penalty being offered does not include jail time, but is probation or financially based, a decision which places them in a precarious position for some time with risks of being drawn back into court for violations or failure to pay costs.

Defendants may well be in less control than prosecutors in a plea bargain.[213] However, it can be argued that the defendant remains better off with the presence of plea bargaining than without. Given the severity of mandated sentencing, the legislatures "get tough on crime" posture, and penalty enhancing statutes, the defendant would find most trials a hostile place in comparison to the "low price" deal making of the plea bargain.

3. Judges

The roles of the prosecutor and the defendant in plea bargaining have remained planted. The prosecutor has grown in power but has managed to keep the reins in hand and still remain master of the plea bargain. The defendant too has gained some protections and benefits from the plea bargain, namely shelter from the storm of legislative increases in criminal penalties. However,

[212] See Brady v. United States, 397 U.S. 742, 756 - 758, 90 S. Ct. 1463, 1473, 25 L. Ed. 2d 747 (1970)
[213] Jeffrey Standen, Plea Bargaining in the Shadow of the Guidelines, 81 Cal. L. Rev. 1471, 1472 (1993)

the role of judges has changed through the history of plea bargaining.[214] Judges originally disdained plea bargaining as corrupt and unethical, however with the onslaught of civil cases in addition to their criminal dockets many former opponents became supporters of the institution as a means to control caseloads.[215] With the judicial power to sentence bargain, added to the already present prosecutors power to charge bargain, plea bargaining erupted into the American Justice System. This dual wielding power of judges and prosecutors kept a form of balance within the plea bargaining arena.

However, the power sharing was not to last forever, legislatures seem more than eager to step in and criticize the use of sentence bargaining by judges.[216] Even though the prosecutorial charge bargaining power was happening in equal amounts and with equal impact, the legislature seemed much more reluctant to address this issue.[217] With a stroke of the pen, the legislature began removing the power of judges to sentence outside of specific ranges, and under mandatory minimums. Left with no power to sentence, bargaining judges quickly found themselves unable to influence plea bargaining, reluctantly handing over the mechanism of plea bargaining to the prosecutors alone.[218] Additional state legislation further removes the judges from the plea bargaining process by specifically disallowing any involvement in a plea bargain, including advisory, or information gathering.[219]

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[214] George Fisher, Plea Bargaining's Triumph, 109 Yale L.J. 857, 864 (2000)
[215] See George Fisher, Plea Bargaining's Triumph, 109 Yale L.J. 857 (2000)
[216] Ronald F. Wright, Rodney L. Engen, *The Effects of Depth and Distance in A Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. Rev. 1935, 1936 (2006) ("While state legislatures have been eager to enact laws regulating judicial discretion in sentencing, they have been reluctant to impose similar constraints on prosecutors.")
[217] George Fisher, Plea Bargaining's Triumph, 109 Yale L.J. 857, 859 (2000)
[218] Id. At 1935, 1937
[219] Id.

Today in most State Courts, the judge is forbidden to overhear plea discussions until such time as an agreement has been reached and the defendant is standing before the court ready to plea.[220] The Judge then is limited to asking the defendant about their understanding of their rights, and the potential consequences. The Judge may exercise limited power at this point by either refusing to accept the plea, and thus force a trial or further negotiation, or accept the plea as negotiated. In some instances, depending on the restriction of the sentencing guidelines the Judge may either accept the sentencing recommendation of the prosecutor, or assign a punishment within the range allowed. However, if the judge refuses to accept the prosecutors sentencing recommendation, the defendant has a right to withdraw their agreement to the plea.[221]

As can be seen, the Judge is not entirely removed from the plea bargaining process, however the role of the judge is relegated to more of a public role of sealing the deal that the prosecutor has brought before the court. If the judge were to exercise the right to refuse the plea they run the risk of forcing the defendant to go to trial and increase the courts caseload, or to force another deal that interested parties would find less acceptable than the original plea.

B. The effect of the power imbalance

The view of the modern plea bargain is not one of balanced or shared power. Plea bargaining is largely in the control and under the authority of the prosecutors who have gathered to themselves, with the help of legislation and sentencing guidelines, much of the power associated with plea bargaining.[222] What prosecutors have had since the beginning of plea bargaining is the power to set the charge against the defendant. In examples through the past 100 years it has been

[220] Id At 1935, 1941
[221] See 16 A.L.R.4th 1089 (Originally published in 1982)
[222] George Fisher, Plea Bargaining's Triumph, 109 Yale L.J. 857, 874 (2000)

demonstrated how this has given the prosecutors the ability to charge, not charge, and modify the charge according to strategic goals of striking a deal in plea bargains. The legislature, in an attempt to increase penalties on criminal acts and to remove fluctuations in the sentencing by different courts, inadvertently handed prosecutors additional power and leverage.[223] This leverage was increased even further in some criminal charges, such as drug charges and sex crimes, by the addition of enhanced penalties, which not only further tied the hands of the courts, but gave the prosecutors power to alienate other participants in the justice system such as parole boards, prison systems, and probation officers.[224]

IV. CONCLUSION: A REMEDY FROM AN UNTAPPED SOURCE: STATE POWER APPLIED TO REBALANCE THE SCALES.

Faced with the enormous power of the prosecutor in a plea bargain, defendants are left with little recourse but to accept the plea or exercise their right to a trial in the face of steep additional penalties and additional charges. For most, the increased stakes of going to trial are too much and result is that over 90% of cases are resolved through plea bargains.[225]

However, plea bargains themselves are not the evil that some make them out to be,[226] they have become a very important tool in dispensing justice in a timely manner. Neither is the power of the prosecutor, in and of itself, a plague on the justice system. What seems to be most at odds

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[223] Marc L. Miller, *Domination & Dissatisfaction: Prosecutors As Sentencers*, 56 Stan. L. Rev. 1211, 1253 (2004)
[224] George Fisher, Plea Bargaining's Triumph, 109 Yale L.J. 857, 860 (2000)
[225] Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 Ohio St. J. Crim. L. 37, 42 (2006) ("Today jury involvement in the criminal justice system is the exception rather than the rule. Roughly 95% of adjudicated cases result in guilty pleas, which subvert the jury's opportunity to check prosecutors and judges."), See also George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* 49 (2003); Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 Am. J. Comp. L. 717 (2006)
[226] Immanuel Kant, *The Metaphysics of Morals* 141 (Mary Gregor ed. and trans., 1991) (1797) ("Justice ceases to be justice if it can be bought at any price whatsoever") (Kant's declaration follows his consideration and emphatic rejection of a bargain justice proposal. Id. For further discussion of Kant's view of bargain justice, see infra notes 150-55 and accompanying text.)

with American idea of justice is that the adversarial nature of the criminal system seems to have become a rigged fight. It is no longer equally matched and informed participants battling it out, and truth being the outcome. There is a 200 pound prize fighter who has all the information he needs about his opponent stepping into the ring with an under informed, opponent with one arm tied behind his back. To take this analogy a step further, the referee has been blindfolded while the prize fighter warns the opponent not to flinch or he will get it twice as bad in the next round.[227]

This is the experience that leaves most outsiders seriously questioning the integrity of the court and of the office of the prosecutor. Citizens no longer think that pleading guilty means you did it, and this shift in the perception of what guilt means in the justice system leaves citizens cynical and offenders not fully facing the wrong of their own actions.

I propose that the answer is not in removing the mechanism of plea bargaining, as some would suggest. Nor is it letting it remain as it is at the expense of defendants. The solution that I propose is a rebalance of power that is more in alignment with our views of separation of powers, right to a trial by jury, and the right to confront a witness that are expounded on in every State Constitution in America. It is for each state to expand the protections to defendants and to rethink the effect of guidelines that affect the plea bargaining process.

A. State constitutional power

[227] See Candace McCoy, *Bargaining in the Shadow of the Hammer: The Trial Penalty in the USA, in The Jury Trial in Criminal Justice* 23, 27 (Douglas D. Koski ed., 2003) (noting statistics showing that trial penalty in most states averages 300% ("mean sentence imposed in all felony offenses: 54 months after guilty plea versus 150 months after jury verdict") and in some cases rises as high as 500%).

Defendants rely on Constitutional rights and provisions when being charged with a criminal act. However they do not solely rely on the Constitutional rights afforded them in the United States Constitution, they also rely on the rights guaranteed them in the State Constitution.[228] Many Justices have interpreted their State Constitutions to provide more extensive rights and protections than those found in the United States Constitution.[229] Not only have State Courts interpreted the ability of the State Constitution to allow the states to expand rights beyond the minimum requirements of the United States Constitution, the Supreme Court along with its individual justices has advised courts of this ability.[230] The Supreme Court endorsed such an expansion of protection by individual states. It has given clear guidance that the Supreme Court would not be insulted by such action, and demonstrated techniques of how to avoid any Federal Court interference on such matters.[231]

This "renaissance in state constitution jurisprudence" often is credited to have originated from the words of Justice William Brennan's call to state courts to rediscover and utilize their own state constitutions in the service of protecting individual rights.[232] This call was an attempt by Justice Brennan to aid issues of individual protections, which had encountered resistance in the Federal Courts.[233]

In much the same way Justice Brennan and state constitutional scholars have used the state constitution to expand rights on such issues as search warrants, confrontation clauses, and police

[228] *State v. Lund*, 573 A.2d 1376, 1385 (N.J. 1990)
[229] Robert F. Williams, *The Law of American State Constitutions* 171 (2009)
[230] Id. At 181
[231] Id. (" to make plain the State decisional ground so as to avoid unnecessary Supreme Court review")
[232]William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977), Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 Val. U. L. Rev. 421 (1996)
[233] Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 Val. U. L. Rev. 423 (1996)

seizures,[234] the state constitutions could be used to expand protections afforded defendants during the plea bargaining phase in ways that the United States Supreme court has not found itself required to do so. This seems especially proper considering it is the state's interest and authority to regulate the courts, agents, and procedures of its own justice system through the constitution.

B. Application of state constitutional power to balance plea bargaining.

For the state to rebalance the plea bargaining process, three primary changes need to occur.[235] First, balance cannot be achieved while the judges sit on the sideline. Second, the defendants should be afforded more rights during plea bargaining, specifically the right to more information prior to entering into a plea bargain. Third, the prosecutor's power to charge is far too powerful to go unchecked, unreviewed, and unscreened.

Even though the ABA Standards for Criminal Justice and the legislation of most states have placed the judges outside the plea bargaining process,[236] it is critical for efficiency and fairness that the balance be returned by having the courts involved in aspects of the plea bargaining process.[237] The judge's involvement would add another point of view on the facts of the case. The judge's view would likely be more objective, and accurate in the assessment of the strength

[234] See Robert F. Williams, *The Law of American State Constitutions* 163-165, 169 (2009)
[235] Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 Marq. L. Rev. 213, 247 (2007) ("Such a conception suggests that sporadic or isolated reform initiatives are not likely to succeed, at least not if their goal is to improve defendant decision making or systemic sorting accuracy. If these are the goals, what is needed is not piecemeal reform, but system-wide transformation.")
[236] *ABA Standards for Criminal Justice: Pleas of Guilty Standard* 14-3.3(d) (1999), See also Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 Marq. L. Rev. 183, 207 (2007)

[237] Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 Marq. L. Rev. 123(2007), See also Seung-Hee Lee, *The Scales of Justice: Balancing Neutrality and Efficiency in Plea-Bargaining Encounters*, 16 Discourse & Soc'y 33, 34 (2005)

and weakness of the case.[238] To avoid the appearance of bias, if either party contends there to be bias present, should the plea not be accepted after judicial oversight, the case could be handed to another judge for trial.[239] This review of the facts by a judge would likely aid in allowing both sides to see more clearly how the court may view the case. Also, by allowing the judge to have an expanded role in the sentencing will allow the defendant to have a second party to go to with a guilty plea should the prosecutor decide not to offer an acceptable solution.[240] This act of re-engaging the judiciary in the plea bargain could occur in the form of greater range of sentencing. While many states have interpreted the federal guideline minimums as a bottom limit there is still plenty of room for the judge to elevate sentences, or refuse to accept pleas that have been viewed to be excessive use of the charge bargaining power. This judicial power would be made effective by requiring a record of charges filed and dropped, as well as the specifics of the evidence so that the judge can make an independent determination as to the propriety of the charges brought before the bench.

Experts such as Stephanos Bibas have suggested placing fixed plea discounts as a protection of innocent defendants and those with weak evidence against them.[241]

> Conversely, if plea discounts were fixed or capped, prosecutors would be less able to bargain away weak cases. Because prosecutors would be able to offer only limited plea discounts, innocent defendants (or those facing the weakest cases) would not likely accept the offered plea bargains. Prosecutors would thus be reluctant to pursue charges in the weakest cases and would be more likely to dismiss them to avoid risking loss at trial. True, loss aversion would deter prosecutors from bringing some meritorious cases to protect their reputations and win-loss records. This prosecutorial caution, however, would be a price worth paying to deter prosecutions of the possibly innocent.[242]

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[238] Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 Marq. L. Rev. 124 (2007)
[239] Id.
[240] Id.
[241] Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 Harv. L. Rev. 2463, 2536 (2004)
[242] Id.

The state should recognize the significance of plea bargaining in a majority of criminal cases as the sole means of justice a defendant may receive. As such, increased rights should be extended to plea bargains, much the same as they are required in trials. Among these rights would be access to information about the case, including exculpatory information to which the prosecutor has access to.[243] An additional right that would assist defendants, is quicker access to bail, and a reasonable amount of time to consider any offer the prosecutor makes. The pressure and influence of a defendant sitting in jail who is given an offer with literally only minutes to consider it before it is withdrawn, impairs the defendants ability to properly and fairly consider the offer in light of the facts of the case.[244] These basic rights, along with the expanded right of effective council at this critical stage of a case,[245] would assist the defendant in properly weighing the options without giving their rights away with little or no facts or information.

The prosecutorial power to charge, not charge, or modify charges is one of the most significant grants of authority in the judicial system. The ability for this to be manipulated is compounded by the fact that it is rarely reviewed, or reversed.[246] A judge does not have the

[243] Erica Hashimoto, *Toward Ethical Plea Bargaining*, 30 Cardozo L. Rev. 949, 950 (2008) (pre-plea access to exculpatory and impeachment information is necessary to the accuracy of the plea process)
[244] Alafair S. Burke, Prosecutorial Passion, Cognitive Bias, and Plea Bargaining, 91 Marq. L. Rev. 183, 185 (2007) ("Structural factors such as limited pretrial discovery, attorney self-interest and incompetence, pretrial detention, and determinate sentencing can affect the parties' willingness and power to negotiate. Several scholars have also observed the ways that psychological and cognitive factors can influence plea bargaining.")
[245] *Missouri v. Frye*, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012) (defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused), See also *Lafler v. Cooper*, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012) (petitioner was prejudiced by counsel's deficient performance in advising petitioner to reject the plea offer and go to trial), *Williams v. Jon*, 123 Harv. L. Rev. 1795 (2010) ("At the heart of America's conception of its criminal justice system sits the right to a fair trial. Part of this right is a right to effective assistance of counsel. But the overwhelming majority of defendants never see trial; guilty pleas structure their experience of criminal adjudication. In *Hill v. Lockhart*, the Supreme Court clarified that effective assistance protects these defendants' trial rights too (Sixth Amendment - Ineffective Assistance of Counsel - Tenth Circuit Holds That A Defendant Is Prejudiced When His Lawyer's Deficient Performance Leads Him to Forego A Plea Bargain and Face A Fair Trial.")
[246] Ronald F. Wright, Rodney L. Engen, *The Effects of Depth and Distance in A Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. Rev. 1935, 1936 (2006) ("for the most part, prosecutorial discretion

authority to modify this nor does the defendant have any recourse to it. The answer though, may be far simpler than some have suggested. It could be as simple as peer review of charges and facts to determine the propriety of the charging. The ability to sanction or reprimand a prosecutor for violating a rule of ethics may be easier than having the courts rule the charging as vindictive. This sanction will go further for removing bias associated with overcharging, and would help to establish a series of precedence's that could guide prosecutors of the required facts to ethically charge, and a limit to the amount of overcharging that is acceptable to the public. Under this process, strategies such as drawing drug dealers into a school zone, a clear violation of the legislature's intent in creating DFSZA, in order to have access to charge enhancements would come to the public's attention and likely lead to a reduction in its practice by law enforcement.

Additionally the office of the prosecutors could implement a much more vigorous screening process at key points of the charging process requiring law enforcement to provide much more proof prior to charges being brought forth, and a complete screening of appropriate charges as well as a screening of any charges to be dropped.[247] Ronald Wright and Marc Miller laid out the criteria of such a screening approach.[248]

> First, the prosecutor's office must make an early and careful assessment of each case, and demand that police and investigators provide sufficient information before the initial charge is filed.

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in charging and plea bargaining is unreviewable--leading some socio-legal scholars to argue that the prosecutor may be the single most powerful actor in the criminal justice system. In addition to remaining beyond the reach of conventional sources of law, these discretionary choices are easier to hide than a judge's discretion in sentencing and remain largely outside the spotlight of academic inquiry.")

[247] S Ronald Wright, Marc Miller, *The Screening/bargaining Tradeoff*, 55 Stan. L. Rev. 29, 32 (2002) ("By prosecutorial screening we mean a far more structured and reasoned charge selection process than is typical in most prosecutors' offices in this country. The prosecutorial screening system we describe has four interrelated features, all internal to the prosecutor's office: early assessment, reasoned selection, barriers to bargains, and enforcement.")

[248] Id.

> Second, the prosecutor's office must file only appropriate charges. Which charges are "appropriate" is determined by several factors. A prosecutor should only file charges that the office would generally want to result in a criminal conviction and sanction. In addition, appropriate charges must reflect reasonably accurately what actually occurred. They are charges that the prosecutor can very likely prove in court.
>
> Third, and critically, the office must severely restrict all plea bargaining, and most especially charge bargains. Prosecutors should also recognize explicitly that the screening process is the mechanism that makes such restrictions possible.
>
> Fourth, the kind of prosecutorial screening we advocate must include sufficient training, oversight, and other internal enforcement mechanisms to ensure reasonable uniformity in charging and relatively few changes to charges after they have been filed.

These screening mechanisms could be made more available to the public as a whole, as well as state ethics boards and the judiciary.[249] By adding both a new layer of transparency and accountability the state could pull back the heavy old curtains, and allow the disinfecting sunlight to be shined upon plea bargains finally driving them out of the shadows of justice.[250]

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[249] Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 Wis. L. Rev. 896 ("Accordingly, even if a prosecutors' office does not set forth detailed policies to mandate specified plea outcomes in individual cases, it might nevertheless set forth the principles that should guide prosecutorial discretion in plea bargaining. Professors Green and Zacharias, for example, have advocated that prosecutorial supervisors articulate "factors that society wishes prosecutors to implement or ignore.")

[250] Ronald Wright, Marc Miller, *The Screening/bargaining Tradeoff*, 55 Stan. L. Rev. 29, 34 (2002) ("Jurisdictions that implement the screening/bargaining tradeoff will be more honest and more accessible. In hard screening systems, prosecutors will be less likely to "overcharge" or "undercharge." … A screening-based system should also be more accessible than a system of negotiated pleas, because the public … will receive clearer and more accurate signals about how the system adjudicates and punishes crimes. The charge is declared publicly from the outset and is easy to evaluate.")

Together these modifications could result in the equalizing of power so as to protect individual rights while maintaining plea bargains as a valuable tool within the American justice system.