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## Hard Bargaining in Plea Bargaining: When do Prosecutors Cross the Line?

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# HARD BARGAINING IN PLEA BARGAINING: WHEN DO PROSECUTORS CROSS THE LINE?

Cynthia Alkon\*

*Well over 90 percent of all criminal cases in the United States are resolved by plea bargaining and not by trial. This means that how plea bargaining works impacts nearly every criminal defendant. However, there are few restrictions to protect defendants in the negotiating process. One serious problem is that prosecutors regularly use hard bargaining tactics such as exploding offers, threats to add enhancements, take-it-or-leave-it offers, and threats to seek the death penalty. These hard bargaining tactics contribute to the often highly coercive atmosphere of plea bargaining that can lead innocent defendants to plead guilty. Pressure to plead guilty can also lead defendants to fail to litigate issues, such as search and seizure motions. Finally, the coercive atmosphere in plea bargaining can lead defendants to accept bad deals as they try to avoid potentially much higher sentences after trial.*

*This article argues that the U.S. Supreme Court should limit prosecutorial hard bargaining tactics in plea negotiations to better protect defendants' right to counsel. In 2012, the U.S. Supreme Court, in *Lafler v. Cooper* and *Missouri v. Frye*, held that there is a constitutional right to effective assistance of counsel in plea bargaining. This article argues that *Lafler* and *Frye* demand that the Court restrict prosecutorial hard bargaining behavior that interferes with defense lawyers' ability to do their jobs and thereby deprives defendants of their constitutional right to counsel. Other areas of law, notably labor law, prohibit hard bargaining. Under the National Labor Relations Act, unions and companies are required to bargain in good faith. Courts have held that some types of hard bargaining act to undermine the representation role of the union and are, therefore, a violation of the duty to bargain in good faith. This article will suggest that one way to argue the Supreme Court should limit prosecutorial hard bargaining is that allowing unrestricted prosecutorial hard bargaining undermines the representation of counsel and thereby prevents effective assistance of counsel in plea bargaining. This article also gives specific examples of what kinds of prosecutorial hard bargaining tactics*

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*should be restricted to better protect defendants' constitutional rights in the plea bargaining process.*

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#### INTRODUCTION

Imagine a case where the defendant was arrested and charged with a theft offense. He is facing a maximum of ten years in prison. The prosecutor offers him a deal of five years in prison. However, if the defendant refuses the deal, the prosecutor threatens to charge him under a habitual-offender statute which would increase the sentence to a mandatory term of life in prison due to the defendant's two prior felony convictions. In this situation, the defendant is faced with a difficult choice: fight the case and risk life in prison, or accept the plea deal of five years in prison, perhaps for something he did not do.

Prosecutors regularly threaten to add charges, to add enhancements, or to seek more time, as part of the plea-bargaining process. But, does this kind of hard

bargaining, regardless of how routine it is, cross the line and create an overly coercive plea-bargaining environment that violates defendants' constitutional rights? Since the U.S. Supreme Court first held that plea bargaining was constitutional in *Brady v. United States*, they have allowed prosecutorial hard bargaining.<sup>1</sup> In *Brady*, the Court held the fact that the prosecution was threatening the death penalty if the defendant rejected the plea deal did not invalidate the defendant's guilty plea, as the defendant pled voluntarily and with "sufficient awareness of the relevant circumstances and likely consequences."<sup>2</sup> Eight years later, in *Bordenkircher v. Hayes*, the U.S. Supreme Court held that the facts described at the beginning of this article did not constitute a violation.<sup>3</sup> The Court noted that the prosecutor simply "openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, [and therefore] did not violate the Due Process Clause of the Fourteenth Amendment."<sup>4</sup>

Plea bargaining is the predominant form of criminal-case resolution in the United States. 94 percent to 97 percent of criminal cases are resolved by guilty pleas and not through trials.<sup>5</sup> Plea bargaining is so common that there are counties that report having no criminal trials.<sup>6</sup> The few cases that tend to go to trial are more serious offenses and, even then, it is only a small percentage.<sup>7</sup> Individuals arrested and charged in the United States will most likely resolve their criminal case through plea bargaining. This means that how plea bargaining works impacts nearly every criminal defendant.

In recent years, the Court has shown an increasing interest in plea bargaining,<sup>8</sup> acknowledging the fact that "criminal justice today is for the most part a system of pleas, not a system of trials."<sup>9</sup> However, so far, the Court has focused only on questions of competent assistance of counsel in the counseling phase of

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<sup>1</sup> *Brady v. United States*, 397 U.S. 742, 751–52 (1970).

<sup>2</sup> *Id.* at 748, 751.

<sup>3</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 358–59, 365 (1978).

<sup>4</sup> *Id.* at 365.

<sup>5</sup> *See, e.g.*, *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

<sup>6</sup> Marisa Gerber, *No Criminal Trials Held in Santa Cruz Since 2010*, SANTA CRUZ VALLEY SUN (Feb. 8, 2012), [http://www.nogalesinternational.com/scv\\_sun/news/no-criminal-trials-held-in-santa-cruz-county-since/article\\_2651fbde-5269-11e1-b903-0019bb2963f4.html](http://www.nogalesinternational.com/scv_sun/news/no-criminal-trials-held-in-santa-cruz-county-since/article_2651fbde-5269-11e1-b903-0019bb2963f4.html) [<https://perma.cc/NR99-ZBVE>].

<sup>7</sup> For example, 25 percent of trials in Texas were capital murder cases and a further 21 percent were non-capital murder cases. OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY 35 (2006), <http://www.txcourts.gov/media/454891/Published-Annual-Report-2006.pdf> [<https://perma.cc/R6W5-QKJN>]. Murder convictions come from trials much more frequently than convictions for other felonies. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, STATE COURT PROCESSING STATISTICS, 1990-2002 (2006) <https://www.bjs.gov/content/pub/as/cii/vfluc.txt> [<https://perma.cc/7VVSJ-LAQX>].

<sup>8</sup> *See generally Frye*, 132 S. Ct. 1399; *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *Padilla v. Kentucky*, 559 U.S. 356 (2010).

<sup>9</sup> *Lafler*, 132 S. Ct. at 1381.

plea bargaining and has not looked at larger issues surrounding the plea-bargaining atmosphere, including prosecutorial behavior.<sup>10</sup> In cases where the Court has dealt with questions about prosecutors' actions in plea bargaining, it has, with few exceptions, not found that prosecutors engaged in unconstitutional behavior.<sup>11</sup>

Is it time for the Court to start to place more meaningful limits on prosecutorial hard bargaining behavior? Prosecutorial hard bargaining tactics contribute to what is often a coercive plea bargaining atmosphere.<sup>12</sup> The coercive atmosphere in plea bargaining can lead innocent defendants to plead guilty. Pressure to plead guilty can also lead defendants to fail to litigate issues, such as search and seizure motions. Finally, the coercive atmosphere in plea bargaining can lead to defendants accepting bad deals as they try to avoid potentially much higher sentences after trial. These problems do not exist only due to prosecutorial hard bargaining;<sup>13</sup> however, prosecutorial hard bargaining contributes to these problems.

This article argues that yes, in light of the U.S. Supreme Court's recent interest in plea bargaining, it is time to consider whether and how it might be appropriate to restrict prosecutorial hard bargaining practices. This article will begin in Part I by giving a working definition of hard bargaining and describing the types of hard bargaining practices that are both routine and highly problematic. Part II will discuss the concern that hard bargaining practices are coercive and lead innocent defendants to plead guilty, that hard bargaining inhibits litigation of issues, and that it leads defendants to accept bad deals. Part III will review the law as it currently exists in plea bargaining and the few constraints that the Court has placed on prosecutorial behavior. Part IV will examine whether hard bargaining practices in plea bargaining are a violation of the right to fundamental fairness. Part IV will conclude that it is unlikely that the Supreme Court will reverse long-standing case law which has allowed hard bargaining tactics and has not found such behavior to be a violation of fundamental fairness.

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<sup>10</sup> Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2653 (2013). For a longer discussion recommending that the Court look beyond the counseling phase to determine whether a defendant had competent assistance of counsel, see generally Cynthia Alkon, *Plea Bargain Negotiations: Defining Competence Beyond Lafler and Frye*, 53 AM. CRIM. L. REV. 377 (2016).

<sup>11</sup> See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978).

<sup>12</sup> See, e.g., Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, 242–43 (2007) (“The routine use of high-pressure bargaining tactics and exploding offers, and the ever-present threat that next time one might find himself or herself standing before an even more vindictive or unreasonable judge, places added psychological stress on criminal defendants.”); see also Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of Lafler and Frye*, 41 HASTINGS CONST. L.Q. 561, 598–601 (2014).

<sup>13</sup> For a more extensive discussion of the complexity of plea bargaining and the structural realities of the criminal justice system that make reform efforts aimed at just one part of the process unlikely to bring far-reaching change, see generally Alkon, *supra* note 12.

Since it is unlikely the Court will find that prosecutorial hard bargaining is a violation of fundamental fairness, Part V will consider whether labor law, and the prohibition of hard bargaining tactics in the labor context, might provide a useful example of an argument that is more likely to prevail to place limits on hard bargaining in plea bargaining. Under the National Labor Relations Act, unions and companies are required to bargain in good faith.<sup>14</sup> Courts have held that some types of hard bargaining, when viewed from the entirety of the bargaining behavior, have acted to undermine the representation role of the union and were, therefore, a violation of the duty to bargain in good faith. Part VI will build on this approach and suggest that one way to argue the U.S. Supreme Court should limit prosecutorial hard bargaining is that allowing unrestricted hard bargaining tactics undermines the representation of counsel and thereby prevents effective representation of counsel in plea bargaining. The Court has shown a willingness in recent years to examine more critically the defense role in plea bargaining in the cases of *Padilla v. Kentucky*,<sup>15</sup> *Lafler v. Cooper*,<sup>16</sup> and *Missouri v. Frye*.<sup>17</sup> The Court may, therefore, be ready to look more critically at the totality of circumstances that defense lawyers are operating under and to agree that certain prosecutorial hard bargaining tactics work to undermine the defense function and thereby violate the right to effective assistance of counsel. Part VII will discuss specific examples of the kinds of prosecutorial hard bargaining tactics should be restricted.

Restricting the most egregious examples of prosecutorial hard bargaining will not alone fix the problems of coercion in plea bargaining. This is due to the fact that an underlying reason for the coercive atmosphere in plea bargaining is the possibility of extreme penalties that are part of every penal code in the United States.<sup>18</sup> Preventing prosecutors from using certain hard bargaining tactics will not fix that underlying structural problem. However, it is time that the U.S. Supreme Court look more critically at prosecutorial behavior.<sup>19</sup> The Court should

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<sup>14</sup> National Labor Relations Act, 29 U.S.C. § 158(d) (2012).

<sup>15</sup> *Padilla v. Kentucky*, 559 U.S. 356 (2010).

<sup>16</sup> *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

<sup>17</sup> *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

<sup>18</sup> For a more extensive discussion of the need for criminal code reform as part of plea-bargaining reform see Cynthia Alkon, *What's Law Got to Do With It? Plea Bargaining Reform After Lafler and Frye*, 7 Y.B. ON ARB. & MEDIATION 1 (2015), [https://works.bepress.com/cynthia\\_alkon/44](https://works.bepress.com/cynthia_alkon/44) [<https://perma.cc/BSV3-N77M>]. For a critique of reform proposals from an earlier era see Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 563 (1978) (criticizing sentencing reform proposal for not limiting prosecutorial discretion in plea bargaining as "[a]ny reform of sentencing practices, whether great or small and whether taking the form of fixed sentences, presumptive sentences or sentencing guidelines, can be undercut by the practice of plea bargaining").

<sup>19</sup> This article does not intend to suggest that a Supreme Court decision is the only route to limit hard bargaining tactics and/or coercive practices in plea bargaining. For an article suggesting that judicial involvement in plea negotiations may help to minimize or limit such co-

place limits on some forms of hard bargaining to restrict at least some prosecutorial behavior to better protect defendants' constitutional rights in the plea bargaining process.

### I. HARD BARGAINING

In the negotiation literature, hard bargaining can refer to a vast array of negotiation tactics that fall broadly under the category of adversarial,<sup>20</sup> competitive,<sup>21</sup> distributive,<sup>22</sup> positional,<sup>23</sup> or zero-sum bargaining.<sup>24</sup> These terms are often used interchangeably to describe a type of negotiation behavior that is not problem-solving,<sup>25</sup> cooperative,<sup>26</sup> integrative,<sup>27</sup> or interest based.<sup>28</sup> However, this article is not using the term "hard bargaining" in this broad sense, but rather is defining hard bargaining to be specific prosecutorial tactics in plea bargaining that make further negotiation nearly impossible and leave the defendant with an immediate, or near-immediate, decision of whether to take the deal or go to trial.

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ercive practices see Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 383 (2016) (reporting interview results where defense lawyers, prosecutors, and judges reported that "judicial involvement made an already coercive situation a little less so"). For a recommendation that judges regulate prosecutors, see Samuel J. Levine, *The Potential Utility of Disciplinary Regulation as a Remedy for Abuses of Prosecutorial Discretion*, 12 DUKE J. CONST. L. & PUB. POL'Y 1 (2016) (recommending reform of prosecutorial discretion by judges who can use existing power to supervise prosecutorial charging decisions through ethical rules); see also Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143 (2016).

<sup>20</sup> See, e.g., Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 764–65 (1984) ("[I]n the pure adversarial case, each party wants as much as he can get of the thing bargained for, and the more one party receives, the less the other party receives." (footnote omitted)).

<sup>21</sup> See, e.g., GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 18–42 (1983) (categorizing negotiators as either cooperative or competitive).

<sup>22</sup> See, e.g., Menkel-Meadow, *supra* note 20, at 765 n.35.

<sup>23</sup> See, e.g., ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 40–55 (Bruce Patton ed., 2d ed. 1991) (explaining the difference between positions and interests).

<sup>24</sup> For an explanation of the origin of the term zero sum, see Menkel-Meadow, *supra* note 20, at 756 n.4.

<sup>25</sup> See, e.g., Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 171, 179–81 (2002).

<sup>26</sup> See, e.g., WILLIAMS, *supra* note 21, at 18–42.

<sup>27</sup> See, e.g., CARRIE J. MENKEL-MEADOW ET AL., NEGOTIATION: PROCESSES FOR PROBLEM SOLVING 89 (2006).

<sup>28</sup> See, e.g., FISHER & URY, *supra* note 23, at 40–55. For a more general discussion about the variety of labels describing negotiation styles see Andrea Kupfer Schneider, *Teaching a New Negotiation Skills Paradigm*, 39 WASH. U. J. L. & POL'Y 13, 16–18 (2012).

Even under this narrower definition, prosecutorial hard bargaining tactics are routine.<sup>29</sup> But, this is not to suggest that every plea negotiation or even a majority of plea negotiations include hard bargaining tactics. Young and less experienced prosecutors may use hard bargaining tactics.<sup>30</sup> Prosecutors who are difficult people or who think that all negotiations should be highly adversarial may use hard bargaining tactics. Prosecutors who have political motivations, such as wanting to show they are “tough on drunk driving” may use hard bargaining tactics.<sup>31</sup> Prosecutors who want to manage their caseloads may use hard bargaining tactics.<sup>32</sup> Prosecutors may also use hard bargaining tactics on some cases when they are, for whatever reason, reacting more emotionally to the case and want to ensure a conviction. And, in cases that bring even greater concern, prosecutors may use hard bargaining tactics to cover up for a weak case where they are concerned they might not otherwise secure a conviction or when they are worried that they will lose in an expected search and seizure motion. It is hard to know how frequently hard bargaining tactics are used, as there are so few empirical studies of the plea bargaining process itself.<sup>33</sup> However, the likely fact that prosecutors are not using hard bargaining tactics in the majority of their cases does not mean that there is not a need for restrictions and better rules to prevent them.

Examples of hard bargaining tactics include “exploding offers”—when a prosecutor threatens that the deal is good “today only” or for some other restricted time period (such as until the case is called in court). Another standard hard bargaining tactic is for the prosecutor to threaten to add an enhancement, such as the use of a gun, which adds mandatory minimum jail time. A third hard bargaining tactic is to threaten to add additional charges that carry additional time, sometimes also as a mandatory minimum. A fourth hard bargaining tactic is to phrase the offer as a “take-it-or-leave-it” offer and refuse any further negotiation. Last, a fifth hard bargaining tactic is when prosecutors threaten to proceed with the case as a death penalty case unless the defendant takes the deal. As will be discussed below, prosecutors often use more than one hard bargaining tactic in the same case.

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<sup>29</sup> See, e.g., G. NICHOLAS HERMAN, PLEA BARGAINING 75–87 (Juris Publishing, Inc. 3d ed., Lexis Law Publishing 1997) (2012) (listing various “common” plea bargaining tactics, including hard bargaining tactics such as setting deadlines, overcharging, threats, and take-it-or-leave-it plea offers).

<sup>30</sup> For an interesting discussion of the dynamics at play with less experienced prosecutors, see Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors’ Syndrome*, 56 ARIZ. L. REV. 1065 (2014).

<sup>31</sup> See, e.g., JILL PAPERNO, REPRESENTING THE ACCUSED: A PRACTICAL GUIDE TO CRIMINAL DEFENSE 212 (2012) (discussing how prosecutors may not have discretion and may have to follow office-wide policies).

<sup>32</sup> *Id.* (discussing the general pressure prosecutors feel to resolve cases, not specifically the use of hard bargaining tactics).

<sup>33</sup> Jenny Roberts & Ronald F. Wright, *Training for Bargaining*, 57 WM. & MARY L. REV. 1445, 1451 (2016).



### A. *Exploding Offers*

Plea offers are often made with time limits attached. Prosecutors can place time limits on a plea offer for legitimate reasons. For example, if a case involves child witnesses or sexual-assault victims, making an offer that is good until the first proceeding when the child or sexual-assault victim may have to take the witness stand and testify is appropriate. The goal in these circumstances would be to protect the victims from having to testify. However, exploding offers are often made with no reason beyond pressuring the defendant to take the deal. This happens in both misdemeanor and felony cases.<sup>34</sup> Defendants are routinely put in the position of having to decide on the day of the arraignment, which is often the first day they are meeting and talking with their lawyer, whether to accept a plea deal or not.<sup>35</sup> Prosecutors routinely tell defendants and their lawyers that if they reject the deal that is good “today only,” they will face a higher sentence as the prosecutor will never again make that “low” plea offer. In some cases, prosecutors will make a specific threat, such as, “today I’m offering 6 months in the county-jail; if you don’t accept this deal today, the next time out, the best we will do is 3 years in state prison.”<sup>36</sup>

### B. *Threats to Add Enhancements*

Over the last four decades, penal codes have been amended and revised to allow the same act to be charged in a variety of ways.<sup>37</sup> One of the standard changes in penal codes has been the addition of a number of enhancements that can add time to the underlying criminal offense.<sup>38</sup> Often these enhancements,

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<sup>34</sup> The consequences of conviction are also serious in misdemeanor cases, see, for example, Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011) “Two ways in which the quality of misdemeanor representation matters more today than ever before merit particular attention: the proliferation of criminal records and the related phenomenon of an explosion in collateral consequences for minor criminal convictions.” *Id.* at 287.

<sup>35</sup> A recent study of adult and youth in New York found that nearly half of the youths had less than one hour to decide about whether to accept the plea deal in their case. See Tina M. Zottoli et. al., *Plea Discounts, Time Pressures, and False Guilty Pleas in Youth and Adults Who Pleaded Guilty to Felonies in New York City*, 22 PSYCHOL. PUB. POL’Y & L. 250 (2016). Only one-third had more than a day to make their decision. *Id.* at 254. The study found that nearly 60 percent of the adults reported they had “more than a day to make their plea decisions” with 28.6 percent reporting “they had less than an hour.” *Id.*

<sup>36</sup> These threats can exert even more pressure when the defendant is in custody and the offer is a time-served deal, or will simply end the misery of more court appearances. See Zottoli et. al., *supra* note 35, at 256; see also Alkon, *supra* note 12, at 600–01.

<sup>37</sup> See, e.g., 42 C.J.S. *Indictments* § 204 (2016); JAMES AUSTIN ET AL., UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA’S PRISON POPULATION 1, 3–4 (2007), <http://www.jfa-associates.com/publications/srs/UnlockingAmerica.pdf> [<https://perma.cc/5SAK-859R>].

<sup>38</sup> See, e.g., CAL. PENAL CODE § 12022.53(b) (West 2016) (“[A]ny person who, in the commission of a felony specified in subdivision (a), personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply.”).

once added to the offense, add mandatory time.<sup>39</sup> This means that if the defendant is convicted of the offense, including the enhancement, the judge will not be able, under the law, to sentence the defendant to anything but the mandatory time.<sup>40</sup> For example, the offense of selling a controlled substance has one penalty, but if the sale was in a school zone, additional time is added.<sup>41</sup> Gun use and prior criminal convictions are also standard enhancements that can add serious time. One example, from the federal system, is the case of Lulzim Kupa who was charged with distributing cocaine and rejected the initial plea offer.<sup>42</sup> However, two weeks prior to his trial date, the prosecution gave notice of two prior marijuana convictions.<sup>43</sup> The addition of these two prior convictions increased the possible penalty to life in prison.<sup>44</sup> The federal system has no parole, so life in prison is life without parole.<sup>45</sup> Mr. Kupa then agreed to accept a plea offer, was sentenced to eleven years in prison, and the prosecution agreed to withdraw the notice of the prior convictions.<sup>46</sup> While prosecutors might have had legitimate reasons for waiting to add the notice of prior convictions until after Mr. Kupa rejected the plea deal, the timing is suspect and it appears to have been done to exert pressure on Mr. Kupa to take the deal.

Criminal codes allow for extreme mandatory penalties if prosecutors add the right enhancement. Once the enhancement is added and the defendant is convicted at trial, the law often does not allow the sentencing judge to exercise any discretion. However, the prosecution has the discretion to withdraw the enhancement as part of a plea deal, which ultimately happened with Mr. Kupa.

### C. Threats to Add Additional Charges

Just as criminal codes now allow for a variety of possible enhancements, there are also a variety of ways in which the same act can be charged. For example, many acts can be charged as either felonies or misdemeanors. In addition,

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<sup>39</sup> See, e.g., FLA. STAT. § 775.087(2) (2016) (“[D]ischarged a ‘firearm’ or ‘destructive device’ as defined in s. 790.001 shall be sentenced to a minimum term of imprisonment of 20 years.”).

<sup>40</sup> See, e.g., Morgan Whitaker, *Marissa Alexander Could Face 60 Years*, MSNBC (Mar. 11, 2014, 8:12 AM), <http://www.msnbc.com/politicsnation/marissa-alexander-could-face-60-years> [https://perma.cc/2M8H-G6HG] (“Absent a plea agreement, if convicted as charged, the law of the State of Florida fixes the sentence . . .”).

<sup>41</sup> See, e.g., CONN. GEN. STAT. § 21a-278a(b) (2015).

<sup>42</sup> HUMAN RIGHTS WATCH, AN OFFER YOU CAN’T REFUSE: HOW US FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY 5 (2013), <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead> [https://perma.cc/K9C2-KUTN].

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Congress eliminated federal parole with the Sentencing Reform Act of 1984, 18 U.S.C. § 3551. Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 104 (1988).

<sup>46</sup> HUMAN RIGHTS WATCH, *supra* note 42.

the same act can result in one criminal charge or multiple criminal charges, depending on how the prosecutor chooses to look at it.<sup>47</sup> One example of this is the case of Marissa Alexander.<sup>48</sup> Ms. Alexander was originally charged with one count of aggravated assault with a deadly weapon in Florida.<sup>49</sup> The case started when Ms. Alexander shot her gun in the air “one time” during a fight with her estranged husband.<sup>50</sup> Ms. Alexander’s defense was that on the day in question, her husband grabbed her neck and threatened to kill her.<sup>51</sup> The trial judge, in error, shifted the burden of proof in the “stand your ground” defense to Ms. Alexander during jury instructions.<sup>52</sup> The jury convicted Ms. Alexander, and due to the mandatory “use-a-gun” law<sup>53</sup> in Florida, Ms. Alexander was sentenced to twenty years in prison.<sup>54</sup> Ms. Alexander’s case was overturned on appeal due to an error in the jury instructions and sent back for a re-trial.<sup>55</sup> Before her first trial, the prosecution offered three years in prison in exchange for her pleading guilty to aggravated assault (without the gun-use allegation).<sup>56</sup> Ms. Alexander rejected that deal and went to trial.<sup>57</sup> After the appellate court ordered a re-trial, the prosecutor added additional charges of aggravated assault, one for each of her two children who were present, in addition to her estranged husband.<sup>58</sup> Those additional charges made the possible maximum sentence sixty years in prison, because there was a mandatory twenty year “use-a-gun” allegation with each charge.<sup>59</sup> Ms. Alexander ultimately chose to take the three-year plea deal that the

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<sup>47</sup> This may be also be overcharging, depending on the circumstances. See Kyle Graham, *Overcharging*, 11 OHIO ST. J. OF CRIM. L. 701, 706–13 (2014).

<sup>48</sup> I have previously used the example of Ms. Alexander’s case and my statement of the facts here is drawn from that previous work. See Alkon, *supra* note 18, at 17–18.

<sup>49</sup> *Fla. Mom Gets 20 Years for Firing Warning Shots*, CBS NEWS (July 15, 2013, 11:02 AM), <http://www.cbsnews.com/news/fla-mom-gets-20-years-for-firing-warning-shots> [<https://perma.cc/667L-TCQA>].

<sup>50</sup> *Id.*

<sup>51</sup> Aliyah Frumin, *Marissa Alexander Accepts Plea Deal*, MSNBC (Jan. 27, 2015, 11:47 PM), <http://www.msnbc.com/msnbc/marissa-alexander-accepts-plea-deal> [<https://perma.cc/43RZ-BUD5>].

<sup>52</sup> *Alexander v. State*, 121 So. 3d 1185, 1186, 1188 (Fla. Dist. Ct. App. 2013).

<sup>53</sup> FLA. STAT. § 775.087(2) (2016).

<sup>54</sup> *Fla. Mom Gets 20 Years for Firing Warning Shots*, *supra* note 49 (“Under Florida’s mandatory minimum sentencing requirements Alexander couldn’t receive a lesser sentence, even though she has never been in trouble with the law before.”).

<sup>55</sup> *Alexander*, 121 So. 3d at 1186.

<sup>56</sup> Julia Dahl, *Fla. Woman Marissa Alexander Gets 20 Years for “Warning Shot”: Did She Stand Her Ground?*, CBS NEWS (May 16, 2012, 4:21 PM), <http://www.cbsnews.com/news/fla-woman-marissa-alexander-gets-20-years-for-warning-shot-did-she-stand-her-ground> [<https://perma.cc/UH2D-ZEGK>].

<sup>57</sup> *Id.*

<sup>58</sup> Whitaker, *supra* note 40.

<sup>59</sup> *Id.* The prosecutor stated that the additional charges were necessary due to a change in the law. *Id.*

prosecutor eventually offered again. By that time, Ms. Alexander was just weeks away from completing the three-year term.<sup>60</sup>

#### D. Take-It-or-Leave-It Offers

Related to and often accompanying threats to add enhancements and charges are take-it-or-leave-it offers. The prosecution may decide early on in the case that only a certain penalty is appropriate and refuse to negotiate. This happens in the context of “standard deals” when certain kinds of cases are routinely plea bargained for the same punishment. Driving-under-the-influence-of-alcohol and drug-possession cases are examples of cases that often have standard offers. The Aaron Swartz case provides an example of prosecutors using stiff penalties in the existing law and refusing to negotiate beyond a take-it-or-leave-it offer.<sup>61</sup> Aaron Swartz was an activist who thought there should be free access to information on the internet.<sup>62</sup> He used the network at the Massachusetts Institute of Technology (MIT) to download articles from the database JSTOR.<sup>63</sup> Mr. Swartz intended to make the information freely available and never intended to sell it or profit from it.<sup>64</sup> Initially, Mr. Swartz was charged with four counts of violating federal computer-fraud and abuse statutes, which carried a maximum of thirty years in prison and a \$1 million fine.<sup>65</sup> Fourteen months later, the Department of Justice indicted Mr. Swartz on thirteen counts of violating federal computer-fraud and abuse statutes, increasing the possible penalty to fifty years in prison.<sup>66</sup> Mr. Swartz had no prior criminal record. JSTOR was not “interest[ed] in this becoming an ongoing legal matter” as all of the information was returned.<sup>67</sup>

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<sup>60</sup> Frumin, *supra* note 51.

<sup>61</sup> For more information on Aaron Swartz see, for example, David Uberti, *Inquiry Widens into Swartz Prosecution*, BOS. GLOBE (Feb. 28, 2013, 12:59 AM), <http://www.boston.com/news/local/massachusetts/2013/02/28/house-committee-broadens-inquiry-into-aaron-swartz-case/mELDGN9wEuRKDghyhdexL/story.html> [<https://perma.cc/T42H-2LU9>]; see also Emily Bazelon, *When the Law Is Worse than the Crime: Why Was a Prosecutor Allowed to Intimidate Aaron Swartz for so Long?* SLATE (Jan. 14, 2013, 3:59 PM), [http://www.slate.com/articles/technology/technology/2013/01/aaron\\_swartz\\_suicide\\_prosecutors\\_have\\_too\\_much\\_power\\_to\\_charge\\_and\\_intimidate.html](http://www.slate.com/articles/technology/technology/2013/01/aaron_swartz_suicide_prosecutors_have_too_much_power_to_charge_and_intimidate.html) [<https://perma.cc/REG9-KJDL>].

<sup>62</sup> Uberti, *supra* note 61.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Indictment, United States v. Swartz (D. Mass. July 14, 2011) (No. 11-CR-10260-NMG), <http://www.documentcloud.org/documents/217117-united-states-of-america-v-aaron-swartz> [<https://perma.cc/7QUC-YXCA>]; 18 U.S.C. § 1343 (2012).

<sup>66</sup> Superseding Indictment at 240, United States v. Swartz (D. Mass. Sept. 12, 2012) (No. 11-CR-10260-NMG), <https://assets.documentcloud.org/documents/555334/1-11-cr-10260-nmg.pdf> [<https://perma.cc/L9FC-EKDT>]; 18 U.S.C. § 1343 (2012); 18 U.S.C. § 1030(c)(1)(B) (2012).

<sup>67</sup> See *JSTOR Statement: Misuse Incident and Criminal Case*, JSTOR, <http://about.jstor.org/news/jstor-statement-misuse-incident-and-criminal-case> [<https://perma.cc/KD8P-YYLK>] (last visited Nov. 17, 2016).

The prosecutor offered Mr. Swartz six months in custody in exchange for pleading to several felony counts. Mr. Swartz rejected the offer.<sup>68</sup> On January 13, 2013, a year and half after the prosecution began, Mr. Swartz committed suicide.<sup>69</sup> Mr. Swartz's suicide led to a flurry of questions about the aggressive prosecution and the plea-bargaining process in his case. Mr. Swartz's family and friends argued that the aggressive prosecution was a contributing factor to his suicide.<sup>70</sup> One commentator asked "[i]f [the prosecutor] thought that Swartz only deserved to spend 6 months in jail, why did she charge him with crimes carrying a maximum penalty of 50 years?"<sup>71</sup> Darrell Issa, the Chairman of the House Committee on Oversight and Government Reform, asked, "Are we using excess prosecution, excess claims in order to force guilty pleas?"<sup>72</sup> In a letter to then-Attorney General Eric Holder, the House Committee asked questions about the plea offers and how the charges and offers compared to other cases prosecuted under the Computer Fraud and Abuse Act.<sup>73</sup> During the hearing itself, Texas Senator John Cornyn said, "I'm concerned that average citizens, if you can call them that, like Aaron Swartz, people who don't have status and power, perhaps, in dealing with the federal government, could be bullied."<sup>74</sup>

Mr. Kupa's drug case and Ms. Alexander's assault case also both seem to have been "take-it-or-leave-it" plea offers as there is no record of alternative offers or any negotiation between the parties beyond the single offer made by the

<sup>68</sup> Spencer E. Ante et al., *Legal Case Strained Troubled Web Activist*, WALL ST. J. (Jan. 13, 2013, 9:14 PM), <http://www.wsj.com/articles/SB10001424127887324581504578238692048200404> [<https://perma.cc/EPT8-6B6C>]; Alex Fitzpatrick, *Aaron Swartz Plea Deal Reportedly Rejected Days Before His Death*, MASHABLE (Jan. 14, 2013), <http://mashable.com/2013/01/14/aaron-swartz-plea-deal/#x3QRHRTxgkqS> [<https://perma.cc/2GQL-PRWJ>].

<sup>69</sup> See, e.g., Timothy B. Lee, *Internet Pioneer and Information Activist Takes His Own Life*, ARS TECHNICA (Jan. 12, 2013, 11:10 AM), <http://arstechnica.com/tech-policy/2013/01/internet-pioneer-and-information-activist-takes-his-own-life> [<https://perma.cc/93GX-QM8R>].

<sup>70</sup> Suicide and mental illness are complex, but see Amanda Holpuch, *Aaron Swartz Girlfriend Blames Suicide on "Vindictiveness" of Prosecution*, GUARDIAN (Jan. 18, 2013), <http://www.theguardian.com/technology/2013/jan/18/aaron-swartz-suicide-girlfriend-internet-reddit> [<https://perma.cc/J4R3-PLLM>]. There were also calls to reform the law that prosecutors used to charge Mr. Swartz. See generally, Austin C. Murnane, Note, *Faith and Martyrdom: The Tragedy of Aaron Swartz*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1101 (2014).

<sup>71</sup> Timothy B. Lee, *Aaron Swartz and the Corrupt Practice of Plea Bargaining*, FORBES (Jan. 17, 2013, 12:50 AM), <http://www.forbes.com/sites/timothylee/2013/01/17/aaron-swartz-and-the-corrupt-practice-of-plea-bargaining/#188e4e7e3a0d> [<https://perma.cc/R4L8-EWXZ>].

<sup>72</sup> Uberti, *supra* note 61.

<sup>73</sup> Letter from Darrell E. Issa, Chairman, Cong. Comm. on Oversight and Gov't Reform, and Elijah E. Cummings, Ranking Member, Cong. Comm. on Oversight and Gov't Reform, to Eric H. Holder, Attorney General (Jan. 28, 2013), <http://www.oversight.house.gov/wp-content/uploads/2013/01/2013-01-28-DEI-EEC-to-Holder-re-Aaron-Schwartz-prosecution.pdf> [<https://perma.cc/9FH8-S57A>].

<sup>74</sup> David Uberti, *Holder Defends Swartz Prosecution*, BOS. GLOBE (Mar. 7, 2013), <http://www.bostonglobe.com/news/politics/2013/03/06/attorney-general-eric-holder-defends-aaron-swartz-prosecution-before-senate-committee/fsOapaK6rymx5OqF1ZPFCK/story.html> [<https://perma.cc/4HTD-3HT2>].

prosecution.<sup>75</sup> Both cases also carried potentially high sentences if the defendant refused the plea deal. The problem with take-it-or-leave-it offers, especially when combined with potentially heavy sentences after trial, is that defendants often consider cases with a good defense (such as Ms. Alexander's case) to be too risky to take to trial. Prosecutors can ratchet up the possible penalties on weaker cases, such as Ms. Alexander's case, and refuse to negotiate a better deal (for example, insisting that first time offenders must go to prison), and leave defendants with the choice either to plead guilty to charges of which they may not be guilty, or to accept higher sentences than the case may deserve.

#### *E. Threats to Seek the Death Penalty*

A threat to seek the death penalty can be considered a threat to add an enhancement or a new charge (depending on the jurisdiction). But this prosecutorial threat is different because it threatens to impose the ultimate penalty. In the context of this discussion, therefore, it is potentially even more coercive, although it involves a smaller sub-set of defendants.

It is not unusual for the defendant to offer to plead guilty in exchange for life in prison without parole in death penalty cases.<sup>76</sup> However, this is when the prosecution has already filed the charges, or sought an indictment, for the case as a death penalty case. Although there is undoubtedly pressure to accept any offered plea deal in a death penalty case, the concern, for purposes of this discussion, is those cases where the prosecution is using the possibility of the death penalty as leverage to extract a guilty plea.

## II. CONCERNS WITH COERCION DUE TO HARD BARGAINING

Coercion in plea bargaining is not new and is something that plea bargaining critics have discussed for decades.<sup>77</sup> Hard bargaining can be one factor in creating an overly coercive atmosphere where defendants are faced with potentially

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<sup>75</sup> In Ms. Alexander's case, there is no record that prosecutors offered any deal other than the original three-year offer. See *Fla. Mom Gets 20 Years for Firing Warning Shots*, *supra* note 49 ("Corey (the prosecutor) initially offered Alexander a three year deal if she pleaded guilty to aggravated assault, but . . . Alexander did not believe she had done anything wrong, and rejected the plea.").

<sup>76</sup> One example is the movie theater shooting case in Colorado. See Michael Winter, *James Holmes Offers Guilty Plea to Avoid Death Penalty*, USA TODAY (Mar. 27, 2013, 5:48 PM), <http://www.usatoday.com/story/news/nation/2013/03/27/colorado-theater-killings-guilty-plea-offer/2025809> [<https://perma.cc/QX7W-4DCZ>].

<sup>77</sup> See, e.g., H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63 (2011); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12 (1978); Steven F. Gillers, *Justice By Consent: Plea Bargains in the American Courthouse*, 5 HOFSTRA L. REV. 217 (1976) (reviewing ARTHUR ROSETT & DONALD R. CRESSEY, *JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE* (1976)); see also Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 229–47

serious consequences if they reject a plea offer or are forced to make quick and serious decisions about whether to take the deal. One of the primary concerns of plea bargaining critics is that the overly coercive atmosphere in plea bargaining can put pressure on innocent defendants to plead guilty. It can also put pressure on defendants to not litigate legal issues. Finally, defendants may end up accepting deals that aren't good deals, or even appropriate sentences, but are just not as bad as they could be.

#### A. *Innocent Defendants*

A standard concern of plea bargaining critics is that innocent defendants plead guilty due to the overall coercive atmosphere of plea bargaining.<sup>78</sup> Unfortunately, we now know that innocent people plead guilty in the United States.<sup>79</sup> For example, 17 percent of those exonerated in 2013 first pled guilty to the charges.<sup>80</sup> Overall, out of the 344 DNA exonerations nationwide, thirty-six (or just over 10 percent) pled guilty to the crime before being exonerated.<sup>81</sup> One reason that innocent people may plead guilty is because “the offer is too good to refuse,”<sup>82</sup> which is tied to defendants evaluating the possible maximum compared to the plea offer.<sup>83</sup> Innocent defendants may also be more risk averse than the guilty and, therefore, more likely to take deals.<sup>84</sup>

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(2006) (discussing, in part, whether a guilty plea is coerced when defendants have no “rational choice” but to plead guilty).

<sup>78</sup> See, e.g., Alkon, *supra* note 12, at 573–75 and accompanying notes; see also Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALB. L. REV. 919, 939 (2016) (“All in all, the American legal system is brilliant. The system makes it in the interest of defense attorneys as well as prosecutors and judges to convince defendants to plead guilty...this system is nearly perfectly designed to convict the innocent.”).

<sup>79</sup> See, e.g., *DNA Exonerations in the United States*, INNOCENCE PROJECT, <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide> [https://perma.cc/BK5J-96G7] (last visited Nov. 17, 2016); NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx> [https://perma.cc/YQ8W-CA6R] (last visited Nov. 17, 2016); see also WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.2(b) (4th ed. 2015) (describing inducements by prosecutors, and how the Department of Justice changed its policy in 2010 and no longer requested that defendants waive their right to future DNA testing at the time of the guilty plea due to the recognition that “factually innocent people plead guilty.”).

<sup>80</sup> Timothy Williams, *Study Puts Exonerations at Record Level in U.S.*, N.Y. TIMES (Feb. 4, 2014), [http://www.nytimes.com/2014/02/04/us/study-puts-exonerations-at-record-level-in-us.html?\\_r=1](http://www.nytimes.com/2014/02/04/us/study-puts-exonerations-at-record-level-in-us.html?_r=1) [https://perma.cc/ZU9N-ZQ7C].

<sup>81</sup> INNOCENCE PROJECT, *supra* note 74.

<sup>82</sup> Russell D. Covey, *Plea-Bargaining Law After Lafler and Frye*, 51 DUQ. L. REV. 595, 617 (2013).

<sup>83</sup> For an article arguing that innocent defendants may get better deals and that concerns about an “innocence problem” in plea bargaining are “misguided,” see Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008).

<sup>84</sup> For an interesting study finding that innocent people are highly likely to take plea deals, especially in the face of serious consequences if they reject the deal, see generally Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013). *But*

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*B. Failure to Litigate Issues*

Defendants who might be guilty of the underlying offense, may still have other legal issues that could lead to the case being dismissed. For example, if the evidence was gathered through an illegal search, it could lead to the case being dismissed if the search and seizure motion is granted. However, every defense lawyer knows these motions are not easy to win. Prosecutors also know this and will regularly make an offer that is contingent on the defense not litigating any motions. This might lead to an acceptable outcome for the individual defendant, but it can have larger and more serious policy concerns. Litigating motions can help prosecutors and judges uncover larger problems, such as police officers who are acting abusively and illegally.

*C. Taking Bad Deals*

Another concern of plea-bargaining critics is that defendants are treated differently depending on where they are arrested, and who they are.<sup>85</sup> There are serious, and well-documented, concerns that African-American and Latino defendants receive higher sentences for similar offenses than do white defendants.<sup>86</sup> Defendants may get higher sentences depending on who the prosecutor is and what the particular prosecutor offers. If there is no oversight, or if the prosecutor's office agrees with the higher offers, defendants often find they have no option but to take the bad deal, because the sentence after conviction at trial would be worse.<sup>87</sup>

### III. WHAT THE LAW RESTRICTS OR ALLOWS PROSECUTORS TO DO IN PLEA BARGAINING

As has been observed by others, there are few rules regulating the plea bargaining process itself.<sup>88</sup> The Court has held that a guilty plea must be voluntary and intelligent.<sup>89</sup> The Court has said this means that the defendant must understand what he is doing, act freely and knowingly, and accept (or decline) a plea

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see Oren Gazal-Ayal & Avishalom Tor, *The Innocence Effect*, 62 DUKE L.J. 339, 339 (2012) (arguing that "innocents are significantly less likely to accept plea offers that appear attractive to similarly situated guilty defendants." (italics omitted)).

<sup>85</sup> See generally Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959 (2005); see also 5 LAFAYETTE ET AL., *supra* note 79, § 21.1(e).

<sup>86</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 56, 99 (2d ed. 2012). See generally, King et al., *supra* note 85.

<sup>87</sup> For a longer discussion of the trial penalty see Alkon, *supra* note 12, at 603–05.

<sup>88</sup> See, e.g., Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1117–19 (2011) (cited in *Lafler v. Cooper*, 132 S. Ct. 1376, 1387 (2012)); Darryl K. Brown, *Lafler, Frye and Our Still-Unregulated Plea Bargaining System*, 25 FED. SENT'G. REP. 131 (2012); see also Covey, *supra* note 77, at 596.

<sup>89</sup> *Brady v. United States*, 397 U.S. 742, 747 (1970).



bargain without physical coercion.<sup>90</sup> In addition, there must be some showing on the record that the defendant is, in fact, knowingly and voluntarily giving up constitutional rights and pleading guilty.<sup>91</sup> Due to this requirement, statutory plea-bargaining rules tend to focus on the rights a defendant will waive and what must be put on the record as part of the plea colloquy.<sup>92</sup>

There are few rules dictating how prosecutors should approach the plea bargaining process. In general, the Court gives great deference to prosecutorial discretion.<sup>93</sup> The U.S. Supreme Court rarely finds prosecutorial behavior in plea bargaining to be a violation of a defendant's rights.<sup>94</sup> One such example is when the Court remanded a case where the prosecutor failed to stick to the original plea agreement after the defendant entered his plea of guilty<sup>95</sup> because to do otherwise would be an "unfulfilled promise" or governmental deception.<sup>96</sup> In so holding, the Court made it clear that prosecutors should not breach previous agreements.<sup>97</sup> However, the Court has not considered threats of worse punishment or of additional charges to be illegal coercion. For example, in *Brady*, the Court decided that the defendant's decision to take the deal to avoid the death penalty was not a violation.<sup>98</sup> In *Brady*, the Court held that the defendant accepted the deal knowingly and voluntarily, and that a prosecutor's threat to seek the death penalty if the deal was not accepted was not coercive because the death

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<sup>90</sup> *Id.* at 748–50.

<sup>91</sup> *Boykin v. Alabama*, 395 U.S. 238, 242–43 (1969).

<sup>92</sup> For a longer discussion, see Alkon, *supra* note 12, at 572.

<sup>93</sup> *See, e.g., United States v. Armstrong*, 517 U.S. 456, 464 (1996); *see also Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (saying that when "the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

<sup>94</sup> Prosecutors are rarely disciplined for misconduct, although some scholars argue that prosecutorial misconduct is getting more attention. *See Bruce Green & Ellen Yaroshefsky, Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 115 (2016) ("Information technology has served as a catalyst for change. . . There has been a shifting discourse about prosecutorial misconduct, its causes, and potential remedies.").

<sup>95</sup> *Santobello v. New York*, 404 U.S. 257, 262–63 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Additionally, "appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case.").

<sup>96</sup> *Mabry v. Johnson*, 467 U.S. 504, 505 (1984) (distinguishing the facts from *Santobello*).

<sup>97</sup> *Santobello*, 404 U.S. at 265. The fact that the prosecutor who made the agreement is no longer handling the case does not change this as "[t]he staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done. That the breach of agreement was inadvertent does not lessen its impact." *Id.* at 262.

<sup>98</sup> *Brady v. United States*, 397 U.S. 742, 755 (1970).

penalty could be lawfully imposed.<sup>99</sup> The Court has also held that it is not a violation of due process if a prosecutor threatens to re-indict the defendant with more serious charges if he refuses the plea deal.<sup>100</sup>

#### IV. FUNDAMENTAL FAIRNESS

Josh Bowers argues that fundamental fairness has been more important than accuracy in looking at the Supreme Court's plea bargaining decisions.<sup>101</sup> Bowers observed that the Court is concerned about "unfair surprise" in *Brady*, *Santobello*, and *Bordenkircher*, despite finding unfair surprise only in *Santobello*.<sup>102</sup> Bowers observed, however, that the Court authorized hard bargaining in *Bordenkircher*.<sup>103</sup> The distinction is that in *Bordenkircher*, "the defendant was not surprised by the added charge, and, thus, he could make no constitutional claim."<sup>104</sup> The Court has not yet found hard bargaining practices to be a violation of fundamental fairness in plea bargaining.

As the Court is starting to look more critically at plea bargaining, it is time to look again at whether prosecutorial hard bargaining practices, such as those discussed above, violate the right to fundamental fairness in plea bargaining. However, given the already-established line of cases and the Court's well-established deference to prosecutorial discretion, it seems unlikely that the Court will change course now and find routine prosecutorial hard bargaining tactics, as defined by this article,<sup>105</sup> violate a defendant's right to fundamental fairness in plea bargaining. However, as will be discussed below, arguing that prosecutorial hard bargaining is a violation of the right to counsel might be a more likely step for the Court to take, as it would not require overruling previous cases but would simply build off more recent decisions.

#### V. GOOD FAITH REQUIREMENT

Many criminal practitioners view good faith through the singular lens of the Fourth Amendment to the United States Constitution.<sup>106</sup> In the context of Fourth

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<sup>99</sup> *Id.* at 750–51.

<sup>100</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 364–65 (1978). William J. Stuntz stated, "In retrospect, *Bordenkircher* appears to be one of the great missed opportunities of American constitutional law." William J. Stuntz, *Bordenkircher v. Hayes: The Rise of Plea Bargaining and the Decline of the Rule of Law* (Harvard Pub. Law Working Paper No. 120, 2005), <http://papers.ssrn.com/sol3/papers.cfm?abstract-id=854284> [<https://perma.cc/QWE2-MX4H>].

<sup>101</sup> See generally Josh Bowers, *Fundamental Fairness and the Path from Santobello to Padilla: A Response to Professor Bibas*, 2 CAL. L. REV. CIR. 52, 54 (2011).

<sup>102</sup> *Id.* at 59.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> See *supra* Part I.

<sup>106</sup> U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

Amendment and search and seizure law, good faith is one exception to the exclusionary rule which allows evidence seized in violation of the Fourth Amendment to be used against the defendant.<sup>107</sup> However, good faith, as it has developed in some areas of negotiation, provides protection against bad behavior by requiring that parties negotiate in good faith, including not engaging in some specific hard bargaining tactics, such as take-it-or-leave-it offers.<sup>108</sup> The National Labor Relations Act (NLRA) imposes a duty to bargain in “good faith.”<sup>109</sup> In the labor context, “‘good faith’ bargaining lacks clear parameters, but a ‘totality of conduct’ standard has given way to a list of proscribed behaviors, such as disengaging from the negotiations and presenting take-it-or-leave-it offers.”<sup>110</sup> Failing to reach an agreement or a party’s refusing to make a concession is not usually enough to constitute bad faith under the NLRA.<sup>111</sup> The analysis of whether a party has failed to act in good faith is “contextual and considers whether the totality of a party’s conduct demonstrates bad faith . . . .”<sup>112</sup>

The classic example of bad faith and hard bargaining is *NLRB v. General Electric Co.*<sup>113</sup> In this 1969 case, the Second Circuit held that General Electric violated the good faith requirement<sup>114</sup> through a practice known as “Boulwareism.”<sup>115</sup> The practice was named after the Vice-President for Labor Relations of General Electric, Lemuel R. Boulware, who decided that the company would make a “firm, fair offer” only as a “take-it-or-leave-it” offer.<sup>116</sup> Looking at the totality of the circumstances, the court held that General Electric’s “campaign of unbending firmness” combined with “the take-it-or-leave-it approach” was evidence of its bad faith.<sup>117</sup>

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<sup>107</sup> See, e.g., PHILLIP A. HUBBART, MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK 384–92 (2d ed. 2015); 1 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.3 (5th ed. 2012). Thank you to Professor Elizabeth Phillips Marsh for pointing out this distinction.

<sup>108</sup> See, e.g., *Del Monte Fresh Produce, Inc. v. Int’l Longshoremen Warehouse Union Local 142*, 146 P.3d 1066, 1079 (Haw. 2006). See generally John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 78, 83 (2002) (giving examples of good faith requirements in the context of mediation, a facilitated negotiation).

<sup>109</sup> See National Labor Relations Act, 29 U.S.C. § 158(d) (2012); Russell Korobkin et al., *The Law of Bargaining*, 87 MARQ. L. REV. 839, 842 (2004); see also 1 THE DEVELOPING LABOR LAW 913–22 (John E. Higgins, Jr. et al. eds, 6th ed. 2012).

<sup>110</sup> Korobkin et al., *supra* note 103, at 842; see also 1 THE DEVELOPING LABOR LAW, *supra* note 103, at 914–22 (discussing how courts have defined and viewed the “totality of conduct.”).

<sup>111</sup> DOUGLAS E. RAY ET AL., UNDERSTANDING LABOR LAW 163 (2d ed. 2005).

<sup>112</sup> *Id.* at 164.

<sup>113</sup> *NLRB v. Gen. Elec. Co.*, 418 F.2d 736, 746, 756 (2d Cir. 1969).

<sup>114</sup> *Id.* at 763.

<sup>115</sup> RAY ET AL., *supra* note 111, at 164–65.

<sup>116</sup> *Id.* at 164.

<sup>117</sup> *Id.* at 165.

In addition, and most importantly for the purposes of this discussion, the Second Circuit held that this approach by General Electric meant that the company was bargaining “as though the Union did not exist, in clear derogation of the Union’s status as exclusive representative of its members” under the National Labor Relations Act.<sup>118</sup> Historically, companies in the United States resisted bargaining with union representatives.<sup>119</sup> The right to union representation under the NLRA has policy objectives that are tied to the history of labor unions and to the very specific goal to protect the right of union representation in collective bargaining, which can help to prevent labor unrest from disintegrating into violence.<sup>120</sup> Therefore, one goal of the good-faith requirement in the NLRA was to stop the practice when “employers politely met with the union representatives, listened to their demands and the supporting arguments and then rejected them.”<sup>121</sup>

This requirement has extended to prevent “surface bargaining,”<sup>122</sup> where one party appears to engage in bargaining on the surface “while concealing a purposeful strategy to make bargaining futile and to avoid reaching an agreement.”<sup>123</sup> The question is “whether, from the context of a party’s total conduct, the party is lawfully engaged in hard bargaining to achieve a contract it desires or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement.”<sup>124</sup>

Clearly, some parts of the good-faith requirement in the labor context do not translate well to plea bargaining. For example, in labor negotiations there is a statutory duty to bargain.<sup>125</sup> The duty to bargain in the NLRA is a direct response to the concern that the failure to bargain leads to labor strife and violence. There is no similar duty or right to engage in plea negotiations because plea bargains are entirely discretionary, and it is up to the prosecutor to decide whether or not to make an offer.<sup>126</sup> Criminal cases are different from labor cases and there are

<sup>118</sup> *Gen. Elec. Co.*, 418 F.2d at 763 (citing *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 234 (5th Cir. 1960)).

<sup>119</sup> *See, e.g.*, Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1403–06 (1958).

<sup>120</sup> The NLRA was intended to promote industrial peace. RAY ET AL., *supra* note 105, at 10; *see also*, Cox, *supra* note 113, at 1406–07 (“Prior to 1935 the outright refusal of employers to deal with a labor union was a prolific cause of industrial strife.”).

<sup>121</sup> Cox, *supra* note 119, at 1410.

<sup>122</sup> 1 THE DEVELOPING LABOR LAW, *supra* note 109, at 922–30.

<sup>123</sup> Marc Mandelman & Kevin Manara, *Staying Above the Surface—Surface Bargaining Claims Under the National Labor Relations Act*, 24 HOFSTRA LAB. & EMP. L.J. 261, 261 (2007).

<sup>124</sup> *Id.* at 272.

<sup>125</sup> RAY ET AL., *supra* note 111, at 161–62.

<sup>126</sup> *See, e.g.*, *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). Thus far no court has found that a defendant has a right to a plea bargain. *But see* *Lafler v. Cooper*, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting) (“Today, however, the Supreme Court of the United States elevates plea bargaining from a necessary evil to a constitutional entitlement.”). In the labor context, refusing to negotiate is bad faith. Mandelman & Manara, *supra* note 123, at 268.

times when there are good reasons not to make plea offers. For example, in some more serious cases, there is a single possible punishment (for example, life in prison), and there may be no reason for the prosecutor to reduce the charge to offer a lower sentence. Also, given the overwhelming use of plea bargaining to resolve cases, the concern in the criminal justice system is not the failure to plea bargain, but the potential overuse of the process. Related to this is the concern that the pressure to plead guilty may prevent defendants from exercising their constitutional right to trial.

I am not, therefore, suggesting that a good-faith requirement should be adopted in plea bargaining that copies the requirement in labor cases. Instead, I am suggesting that it is appropriate to consider whether concepts developed in labor law are applicable as one possible way to impose limits on prosecutorial conduct in plea bargaining. Specifically, as will be discussed in the next section, it is time to consider whether the concept of hard bargaining tactics undermining the right of representation could be applied in the context of plea bargaining.

#### VI. RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Unlike the right to representation in the labor context, the right to counsel in criminal cases is not solely statutory, but is also constitutional.<sup>127</sup> However, as discussed above, the U.S. Supreme Court has only recently begun to elaborate what the right to effective assistance of counsel is in the plea-bargaining context through the 2010 case of *Padilla v. Kentucky*,<sup>128</sup> and the 2012 companion cases of *Lafler v. Cooper*<sup>129</sup> and *Missouri v. Frye*.<sup>130</sup> In *Lafler* and *Frye* the Court held there is a right to effective assistance of counsel in plea bargaining.<sup>131</sup> The Court has, however, limited its analysis to effective assistance of counsel in the client-counseling phase of plea bargaining.<sup>132</sup> Due to the Court's seemingly renewed interest in plea bargaining, it is time to consider whether hard bargaining tactics effectively undermine the representational function, as has been found in the labor context. If yes, then it is time to consider these prosecutorial behaviors a violation of the right to effective assistance of counsel.

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<sup>127</sup> U.S. CONST. amend. VI.

<sup>128</sup> *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

<sup>129</sup> *Lafler*, 132 S. Ct. at 1385.

<sup>130</sup> *Missouri v. Frye*, 132 S. Ct. 1399, 1413–14 (2012).

<sup>131</sup> *Id.* at 1408; *Lafler*, 132 S. Ct. at 1384.

<sup>132</sup> Roberts, *supra* note 10, at 2653.

*A. How the Court Has Defined the Right to Effective Assistance of Counsel*<sup>133</sup>

The Sixth Amendment of the United States Constitution guarantees the accused, in criminal cases, the right “to have the Assistance of Counsel for his defense.”<sup>134</sup> However, as Chief Justice Burger observed, “[t]he right to counsel has historically been an evolving concept.”<sup>135</sup> In 1932, in *Powell v. Alabama*, the U.S. Supreme Court held that defendants had a right to appointed counsel under the due process clause of the Fourteenth Amendment in the limited context of capital cases.<sup>136</sup> The Court further limited this right to circumstances when the defendant was “incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy or the like . . . .”<sup>137</sup> It took another six years before the Court recognized in *Johnson v. Zerbst* the right to appointed counsel in federal cases under the Sixth Amendment,<sup>138</sup> rather than under the due process clause of the Fourteenth Amendment.<sup>139</sup> It was not until twenty-five years later, in 1963, that the Court in *Gideon v. Wainwright* extended a Sixth Amendment right to counsel to defendants charged with felonies in state cases.<sup>140</sup> It took the Court another nine years to hold that defendants had a right to counsel before being sentenced to any jail time, including for misdemeanors, unless they specifically waived the right.<sup>141</sup> Four years after *Gideon*, the Court held the right to counsel exists at the critical stages when “substantial rights of a criminal accused may be affected.”<sup>142</sup>

Twenty-one years after *Gideon*, in *Strickland v. Washington*, the Court created a two-prong test to determine whether a lawyer provided adequate assistance of counsel.<sup>143</sup> The first prong asked whether a lawyer’s performance “fell below an objective standard of reasonableness.”<sup>144</sup> The second prong, under *Strickland*,

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<sup>133</sup> I have previously described the case law on the right to counsel and this section draws from that previous work. See Alkon, *supra* note 10, at 381–83.

<sup>134</sup> U.S. CONST. amend. VI.

<sup>135</sup> *Argersinger v. Hamlin*, 407 U.S. 25, 44 (1972) (Burger, C.J., concurring).

<sup>136</sup> *Powell v. Alabama*, 287 U.S. 45, 73 (1932). See 3 LAFAVE ET AL., *supra* note 74, § 11.1(a)–(b), for a discussion of this case in the context of the due process clause of the Fourteenth Amendment. This was the infamous *Scottsboro* case in which nine African-American young men were tried without lawyers and sentenced to death for rape. See generally John D. King, *Beyond “Life and Liberty”: The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. REV. 1, 10 (2013); Sara Mayeux, *Ineffective Assistance of Counsel before Powell v. Alabama: Lessons from History for the Future of the Right to Counsel*, 99 IOWA L. REV. 2161 (2014), for a history of the right to counsel before *Powell*.

<sup>137</sup> *Powell*, 287 U.S. at 71.

<sup>138</sup> 3 LAFAVE ET AL., *supra* note 74, § 11.1(a).

<sup>139</sup> *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938).

<sup>140</sup> *Gideon v. Wainwright*, 372 U.S. 335, 339–45 (1963); see also 3 LAFAVE ET AL., *supra* note 74, § 11.1(a).

<sup>141</sup> *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

<sup>142</sup> *Mempa v. Rhay*, 389 U.S. 128, 134 (1967); see also 3 LAFAVE ET AL., *supra* note 74, § 11.2(b).

<sup>143</sup> *Strickland v. Washington*, 466 U.S. 668, 687–700 (1984).

<sup>144</sup> *Id.* at 688.

required the defendant to show that, but for this deficient performance by their lawyer, the result would be different.<sup>145</sup> *Strickland* was a death penalty case that went to trial, and the Court stated that the “purpose” of the Sixth Amendment right to effective counsel was “to ensure a fair trial.”<sup>146</sup> The Court went on to say that “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that *the trial* cannot be relied on as having produced a just result.”<sup>147</sup>

Although the Court applied the *Strickland* two-prong test to plea bargaining in earlier cases,<sup>148</sup> it was not until 2010, in *Padilla v. Kentucky*, that the Court held a defense lawyer violated the *Strickland* standards in plea bargaining.<sup>149</sup> In *Padilla*, the lawyer failed to advise the defendant about the immigration consequences of his guilty plea.<sup>150</sup> The Court concluded that “[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.”<sup>151</sup>

In 2012, the Court found that the defense lawyers’ performance failed to meet the *Strickland* effectiveness standard during the plea-bargaining phase in *Missouri v. Frye*<sup>152</sup> and *Lafler v. Cooper*.<sup>153</sup> In *Frye*, the Court explained that the first prong had been met as the defendant’s lawyer had failed to perform at the required standard.<sup>154</sup> In *Lafler*, the Court explained how the second prong can be established in the context of plea bargaining.<sup>155</sup> “[A] defendant must show the outcome of the plea process would have been different with competent advice.”<sup>156</sup> In both *Lafler* and *Frye*, the Court refers to *Hill v. Lockhart*, a case in which the defendant alleged ineffective assistance of counsel because his lawyer told him he would be eligible for parole before he actually was, in fact, eligible for parole.<sup>157</sup> The Court found that the defendant failed to establish that but for the incorrect advice, the defendant would not have taken the plea deal.<sup>158</sup> In *Hill*, as in *Lafler*, *Frye*, and *Padilla*, the Court was examining the question of whether the lawyer was effective solely during the counseling phase of the plea bargain.

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<sup>145</sup> *Id.* at 693.

<sup>146</sup> *Id.* at 686.

<sup>147</sup> *Id.* (emphasis added).

<sup>148</sup> *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

<sup>149</sup> *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010).

<sup>150</sup> *Id.* at 359–60.

<sup>151</sup> *Id.* at 367.

<sup>152</sup> *Missouri v. Frye*, 132 S. Ct. 1399, 1408–09 (2012).

<sup>153</sup> *Lafler v. Cooper*, 132 S. Ct. 1376, 1384–85 (2012).

<sup>154</sup> *Frye*, 132 S. Ct. at 1408–09.

<sup>155</sup> *Lafler*, 132 S. Ct. at 1384–85.

<sup>156</sup> *Id.* at 1384.

<sup>157</sup> *Lafler*, 132 S. Ct. at 1384; *Frye*, 132 S. Ct. at 1409; *Hill v. Lockhart*, 474 U.S. 52, 54–55 (1985).

<sup>158</sup> *Hill*, 474 U.S. at 60.

Despite examining how the defense lawyer performed, the Court was clear when it decided *Strickland* in 1984, that it will not be too critical of defense lawyers as “[j]udicial scrutiny of counsel’s performance must be highly deferential.”<sup>159</sup> The Court went on to say that “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.”<sup>160</sup> Then the Court gave the “out” that it has since used in numerous cases, stating that the defendant needs to overcome the presumption that the lawyer was engaging in “sound trial strategy.”<sup>161</sup> The Court also stated “advocacy is an art and not a science”<sup>162</sup> to help explain why these strategic choices should be “respected.”<sup>163</sup>

Due to the Court’s favoring “deference,” the *Strickland* standard is not an easy standard for defendants to meet.<sup>164</sup> Justice Stevens acknowledged this in *Padilla* when he wrote “[s]urmounting *Strickland*’s high bar is never an easy task.”<sup>165</sup> The Court has found that the *Strickland* two-prong test was violated in plea-bargaining cases only during the counseling phase of the plea-bargaining process. However, *Padilla*, *Lafler* and *Frye* open the door for the Court to look more critically at the role of defense lawyers during plea bargaining beyond the counseling phase and, as I argue below, also to demand that the Court look more critically at how prosecutorial behavior may be undermining the right to counsel.

#### B. Do Hard Bargaining Tactics Undermine the Right To Counsel?

In the labor context, the failure to negotiate, or to refuse to negotiate with a union, constitutes negotiating in bad faith and is an unfair labor practice under the NLRA.<sup>166</sup> Plea bargaining as a process, unlike collective bargaining, has grown largely outside the law and with minimal legal regulation. As stated above, the Court has subjected neither prosecutors nor defense lawyers to great scrutiny in terms of the plea negotiation process.<sup>167</sup> But, as the labor context illustrates, hard bargaining tactics can act to usurp the representational role.

Unlike in labor cases, the concern is not that hard bargaining practices cut off negotiation and settlement, but rather that hard bargaining practices back defendants into corners and leave them with little choice but to plead guilty. Hard

<sup>159</sup> *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*; see also, e.g., *Cullen v. Pinholster*, 131 S. Ct. 1388, 1404 (2011); *Harrington v. Richter*, 562 U.S. 86, 106–11 (2011).

<sup>162</sup> *Strickland*, 466 U.S. at 681.

<sup>163</sup> *Id.*

<sup>164</sup> For a more detailed analysis of *Strickland* see generally, for example, Gary Feldon & Tara Beech, *Unpacking the First Prong of the Strickland Standard: How to Identify Controlling Precedent and Determine Prevailing Professional Norms in Ineffective Assistance of Counsel Cases*, 23 U. FLA. J.L. & PUB. POL’Y 1 (2012). See also 3 LAFAVE ET AL., *supra* note 79, § 11.10(c).

<sup>165</sup> *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

<sup>166</sup> See *supra* Part V.

<sup>167</sup> See *supra* Part III; see also *supra* Section VI.A.



bargaining in those circumstances can make the plea bargaining process nothing more than a charade because the defense lawyer does not, in fact, bargain, but simply conveys the offer and advises her client of the serious consequences of turning down the offer. For example, in the Marissa Alexander case, the addition of charges and gun-use allegations ratcheted up the potential penalty.<sup>168</sup> This was combined with the prosecutor apparently standing fast in offering the same plea bargain as was offered before the first trial.<sup>169</sup> This scenario is all too common, leaving the defense lawyer with little to do but convey the offer, again, and to discuss the serious potential penalty if the defendant chooses to go to trial.

Essentially, these hard bargaining tactics are the criminal justice system's equivalent of "surface bargaining," in that plea offers are made, but without the intention to engage in real bargaining. The difference is that in the context of plea negotiations, the goal of hard bargaining is to force a settlement, instead of intending not to reach agreement.

One of the challenges with making this argument is that, thus far, the Court has examined effective assistance of counsel only in the counseling phase, not the negotiation phase of plea bargains. In explaining this limitation, Justice Kennedy stated:

Bargaining is, by its nature, defined to a substantial degree by *personal style*. The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process.<sup>170</sup>

The court would have to move beyond this narrow and inaccurate view of negotiation for this argument to work.<sup>171</sup>

#### VII. WHICH HARD BARGAINING TACTICS SHOULD BE RESTRICTED?

As in the labor context, the challenge is determining when prosecutorial hard bargaining tactics in plea bargaining cross the line. Borrowing from labor cases, the totality of the circumstances should be considered in determining whether the particular prosecutor has crossed over the line in a particular case. The discussion below is intended as an attempt to start the discussion, recognizing the inherent difficulty in deciding when to restrict hard bargaining tactics and which hard bargaining tactics to restrict. One challenge in placing restrictions on hard bargaining tactics is doing so in a way that will not invite prosecutors to work around the restrictions and engage in essentially the same hard bargaining tactics. This challenge is one reason why it is difficult to place meaningful limits on prosecutorial hard bargaining tactics as isolated plea bargaining reform without also

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<sup>168</sup> Whitaker, *supra* note 40.

<sup>169</sup> See *Fla. Mom Gets 20 Years for Firing Warning Shots*, *supra* note 49.

<sup>170</sup> *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) (emphasis added).

<sup>171</sup> See generally Alkon, *supra* note 10, at 389, for a more extensive discussion of how the court can and should look beyond the counseling phase and look at the preparation and negotiation phases of plea bargaining.

amending criminal codes that allow for extreme penalties, enhancements, and mandatory minimums.<sup>172</sup> However, despite this challenge, it is important to start to define what kinds of prosecutorial hard bargaining tactics should be subject to regulation.

A. *Exploding Offers*

This might be the easiest category to consider. In ordinary criminal cases, prosecutors should not rush defendants in their decision of whether to accept a deal or not. No defendant should be forced to decide on the day of arraignment whether to take a particular plea offer.<sup>173</sup> As noted above, there can be good reasons to place time limits on offers—but those reasons should be clearly stated on the record and should involve goals beyond simply moving the docket. It should be acceptable to limit an offer until the day a child victim or victim of a violent crime, including sexual assault, would have to come to court and testify. It should not, however, be acceptable for prosecutors to keep offers open only until a police officer testifies. Testifying is part of a police officer's official duties. As such, there would ordinarily be no reason to pressure defendants to accept plea deals to spare police officers from testifying.

Defendants should never face the choice between taking an offer and getting discovery on a case. The U.S. Supreme Court has not yet held that defendants have a right to all discovery, prior to plea bargaining.<sup>174</sup> However, as a basic rule, prosecutors, even in jurisdictions without open file discovery rules, should not make a plea offer at arraignment that is good only for that day. This is due to the concern that, as a practical matter, forcing pleas at arraignment shuts off the defendant's ability to get full discovery in the case. If there is a good reason to resolve cases at arraignment, prosecutors and courts should allow the defense to continue the arraignment until a day when the defense will have full discovery and will have had an opportunity to speak to the defendant about the case and about options. If a defense lawyer does not have full discovery in the case, she cannot competently advise her client about what to do. This includes whether

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<sup>172</sup> See generally Cynthia Alkon, *An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 191 (2015), for a longer discussion of the need for criminal code reform to better restrict prosecutorial behavior.

<sup>173</sup> This can be even more important for juvenile defendants or defendants with cognitive disabilities. See Zottoli et. al., *supra* note 35 at 255–56 (“It is fairly well established that decision-making competence breaks down when individuals have to make decisions in short periods of time, especially if these decisions involve emotionally laden outcomes...and the decision-making of youth is particularly susceptible to time pressure and emotion. . .”).

<sup>174</sup> See generally Cynthia Alkon, *The Right to Defense Discovery in Plea Bargaining Fifty Years after Brady v. Maryland*, 38 N.Y.U. REV. L. & SOC. CHANGE 407 (2014).

there should be further investigation or motions.<sup>175</sup> Depriving a defense lawyer of discovery is a clear usurpation of the representation function. Doing so reduces the defense lawyer to merely a conduit for conveying the offer without the ability to provide any meaningful advice or to make meaningful counter-offers because the defense lawyer may not know enough about the case to do either.

Prosecutors should also not be allowed to continue the practice of taking offers off the table if or when the defense files certain motions, such as search and seizure motions. Prosecutors often use the threat of withdrawing the offer to prevent defense lawyers from making motions, including, in some cases, to prevent them from requesting discovery.<sup>176</sup> The fact that the defense may want to explore the strength of the prosecution's discovery and file motions should not result in offers being withdrawn. Prosecutors who engage in this practice are clearly usurping the defense attorney's role, and can be acting to prevent effective assistance of counsel. The fact that the defendant may not prevail in the motion should not be dispositive in determining whether the prosecutor engaged in hard bargaining tactics. Search and seizure motions can be difficult to win, but there are good tactical reasons to file such motions, including that it may give the defense lawyer a better sense of how an individual police officer will be as a witness. If the prosecutor makes a direct threat to withdraw an offer when the defense files a motion, or states an intention to file a motion, that should be considered inappropriate hard bargaining.<sup>177</sup>

#### *B. Threats to Add Charges or Enhancements*

Once a prosecutor has made a plea offer and the defense has rejected it, they should not be allowed to add additional charges or enhancements. Prosecutors should also not be allowed to threaten to add charges if the defense rejects the offer. As discussed above, the threat to add additional charges also acts to undermine the defense lawyer's role.<sup>178</sup> The challenge with establishing this as a clear rule is that it will likely lead to prosecutors adding enhancements and charges at the beginning of the case. This could have the effect of adding pressure on the defendant and being even more coercive because the first charges and potential maximum will be so much more serious. This challenge points out the reality that simply restricting prosecutorial hard bargaining tactics, in the absence of other substantive reforms to the criminal justice system, can be easily worked around by professionals in the system who choose to "game it." What makes

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<sup>175</sup> I argue that a bright line for determining defense lawyer competency in the preparation phase of plea bargaining is whether the defense lawyer has adequately prepared the case, including determining if there is any defense, and if there are any possible pre-trial motions. *See generally* Alkon, *supra* note 10, at 390.

<sup>176</sup> *Id.* at 396.

<sup>177</sup> Thank you to Professor James Stark for raising this question.

<sup>178</sup> *See supra*, Section VI.B.

these threats so powerful is that the existing laws allow for extreme penalties for acts that might not be so serious, as the Aaron Swartz example illustrates.<sup>179</sup>

### C. *Take-It-or-Leave-It Offers*

There can be times when it is appropriate for the prosecution to make a set plea offer and not negotiate further.<sup>180</sup> The question would be why is the prosecutor refusing to negotiate? If it is to pressure the defendant to plead guilty, and the prosecutor is refusing to listen to new evidence or mitigating circumstances that call for a reconsideration of the plea offer, then it would be an unacceptable hard bargaining tactic. If the reason is simply that the case is standard, the offer is standard, and there is no reason to change it, this would not in and of itself constitute unacceptable prosecutorial hard bargaining. A district attorney's office may have decided to adopt a policy to handle particular crimes in a uniform way. There are good policy arguments against both mandatory minimums and adopting such sweeping policies. However, looking at the totality of the circumstances, if the prosecutor's office is making take-it-or-leave-it offers as part of a policy of making uniform offers, and not as part of an effort to pressure defendants to take the plea deals, this would not cross the line in terms of hard bargaining practices.

### D. *Threats to Seek the Death Penalty*

As discussed above, concern is raised when prosecutors threaten the death penalty to pressure defendants to accept plea deals when they have not already filed as a capital case. The challenge is the same as above in that a clear rule prohibiting prosecutors from filing later to seek death may just encourage more capital-case indictments earlier in the process and not reduce the actual number of times the threat of death is used to encourage defendants to take plea deals. A rule preventing later filing of capital charges could also work to undermine prosecutors' offices that have adopted policies to make sure their death prosecutions are well-considered and happen later in the process, not at the initial filing. However, it is time for the Court to move beyond a blanket acceptance of prosecutors threatening to seek the death penalty simply because the defendant is aware of the "relevant circumstances" and the result (death) would be a lawful penalty.<sup>181</sup>

## CONCLUSION

The U.S. Supreme Court has, thus far, imposed few restrictions on prosecutorial hard-bargaining practices. In an era when the Court has started to show a willingness to examine the plea bargaining process more closely, it is time to

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<sup>179</sup> See *supra*, Section I.D.

<sup>180</sup> See, e.g., *United States v. Morris*, 633 F.3d 885, 889 (9th Cir. 2011) ("There is nothing fundamentally wrong with the prosecution's decision to present its best offer up front.").

<sup>181</sup> *Brady v. United States*, 397 U.S. 742, 748 (1970).

focus attention on restricting some of the excesses in prosecutorial behavior. The criminal justice system gives prosecutors tremendous power. They can decide what charges and enhancements to file, and they can decide what plea offer, if any, to make. This power should not go unchecked.

As this article has described, in labor cases, hard bargaining tactics are restricted. In the context of labor negotiations, the goal is to encourage peaceful settlement of labor disputes with the recognition of the representation role of unions as an important part of that process. The stakes are no less important in criminal cases. It matters to individual defendants that they not be pressured or coerced into accepting deals that they do not want or that might not be in their best interest. It matters to individual defendants that the role of their defense lawyer not be usurped by prosecutorial hard bargaining tactics. It also matters to society at large that our criminal justice system function in a way that does not call into question its legitimacy. Extreme examples of prosecutorial hard bargaining tactics, such as the cases of Marissa Alexander and Aaron Swartz, have raised questions of legitimacy.

Deciding where and how to draw the line on prosecutorial hard bargaining tactics is not easy. However, it is time to begin the discussion and for the Court to begin looking more critically at prosecutorial behavior in plea bargaining. This article has suggested one possible argument to help encourage that movement in the most extreme examples of prosecutorial hard bargaining that risk undermining a defendant's right to effective assistance of counsel.