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What's Law Got to Do With It? Plea Bargaining Reform after Lafler and Frye

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By
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I. Introduction:

This symposium poses an interesting question: What's left of the law in the wake of ADR? I will address this question in the context of the criminal justice system in the United States. As with civil cases, few criminal cases go to trial. Negotiated agreements through plea bargaining have been the predominate form of case resolution since at least the mid-twentieth century.[2] As criminal caseloads rose, trial rates decreased, as they did for civil cases.[3] Today, only a small percentage of criminal cases go to trial.[4] Plea bargaining, as with other forms of alternative dispute resolution, is an informal process that operates largely outside the formal legal system. Plea bargains are rarely negotiated on the record in open court. Instead, they are usually negotiated in private between the defense and the prosecution and only announced in open court and on the record once the deal is final and agreed to by all the parties. Does this mean the law is absent in the process? And, does plea bargaining work to undermine the formal criminal codes in the United States? The simple answer is that the formal criminal law provides the framework for how plea bargaining works and also acts as a substantial impediment to serious plea bargaining reform, an impediment that is often not recognized as scholars and practitioners focus on the fact that the plea bargaining process itself operates with few rules and constraints.[5]

As with other dispute resolution processes, plea bargaining grew as a process largely outside the law. Despite being used since colonial times,[6] it was not until 1970 that the Supreme

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[2] For example, in 1962 just 15.39% of defendants went to trial in U.S. District Courts, with 53% of those defendants having jury trials, the remaining were bench trials. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. OF EMPIRICAL LEGAL STUD. 459, 554 (2001).

[3] *Id.* at 492-98.

[4] 92-97% of resolved criminal cases are resolved through plea bargaining. Missouri v. Frye 132 S. Ct. 1399, 1407 (2012).

[5] An important article arguing for better regulation of plea bargaining is Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117 (2011) (cited in Lafler v. Cooper 132 S. Ct. 1376, 1387 (2012)); *see also* Russell D. Covey, *Plea-Bargaining Law after Lafler and Frye*, 51 DUQ. L. REV. 595 (2013); Darryl K. Brown, *Lafler, Frye and Our Still-Unregulated Plea Bargaining System*, 25 FED. SENT'G. REP. 131 (2012).

[6] *See, e.g.*, GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 9-10 (2003) (by the nineteenth century plea bargaining was the "dominant means of resolving criminal cases"). *See also* John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV 261 (1979).

Court recognized plea bargaining as constitutional.[7] Since 1970, the Court and criminal codes have remained largely silent on the plea bargaining process itself. There are rules surrounding how a defendant should enter his plea of guilty on the record and in open court, but few limitations or rules on how prosecutors or defense lawyers can or should go about negotiating those plea deals.[8] As a result, plea bargaining critics often focus on the shortage of law regulating plea bargaining and call for new rules and laws to make it a better regulated process.[9] However, as this article will discuss, plea bargaining is defined by the law, meaning that the law is an important factor, if not the most important factor, in plea negotiations and plea bargaining outcomes. Plea bargaining reform will therefore require substantive criminal law reform. This is not to suggest that substantive criminal law reform is all that is required to address the problems with plea bargaining, but rather that it is a key element that should be part of any meaningful reform effort.[10]

Scholars have been highly critical of plea bargaining although it has been a part of our criminal justice system since the founding of this nation.[11] One of the earlier debates in plea bargaining scholarship was whether to abolish plea bargaining entirely.[12] A few jurisdictions experimented, without much success, with banning plea bargaining.[13] Professionals in the criminal justice system are often not as critical of the process as scholars and instead often see plea bargaining as a practical process through which they can manage their high caseloads. Practitioners, therefore, often resist efforts to prevent the use of plea bargaining and find ways to continue plea bargaining cases.[14] Not surprisingly, the need to efficiently manage caseloads is perhaps the most often cited reason for the heavy use of plea bargaining.[15]

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[7] Brady v. United States 397 U.S. 742, 751-52 (1970).

[8] See discussion *infra* Section II.

[9] *See, e.g.*, Bibas *supra* note 5.

[10] For a more detailed discussion of how complex plea bargaining is see generally 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 (2014).

[11] *See, e.g.*, FISHER, *supra* note 6, at 9-10.

[12] *See, e.g.*, Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652 (1981), Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992).

[13] For a discussion of the bans in Alaska and the Bronx see Douglas D. Guidorizzi, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics,* 47 EMORY L.J. 753, 774-779 (1998); for an example from another jurisdiction see generally Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265 (1987).

[14] *See, e.g.*, Weninger, *supra* note 13, at 289-311 (judges routinely went around the ban. *Id.* at 306-08).

[15] *See, e.g.*, Alkon, *supra* note 10, at 589-590 ("Judges, prosecutors, and defense attorneys all rely on plea bargaining to manage their caseloads…[and] consider plea bargaining to be an indispensable part of how they do their jobs and manage work-life balance." *Id.*).

Criminal justice reform in the 1970s and 1980s focused on being "tough on crime."[16] As a result, laws were passed in every state, and federally, that increased punishments, added enhancements, and added mandatory sentencing provisions or guidelines.[17] These increased penalties gave prosecutors even more power in the plea bargaining process.[18] The dramatic increase in possible penalties exacerbated a longstanding concern of plea bargaining critics: that the plea bargaining process is coercive and may lead to innocent defendants pleading guilty. This problem became even more of a concern as penalties increased making the consequences of losing at trial worse.[19]

A more recent wave of plea bargaining scholarship recognizes that plea bargaining is an entrenched part of the criminal justice system and focuses instead on how to reform it.[20] This current wave of scholarship includes those who are critically examining plea bargaining after the Supreme Court started taking a greater interest in the process, starting in 2010 with *Padilla v. Kentucky* when the Court held that defendants have the right to be informed about the collateral immigration consequences of a guilty plea.[21] Scholarly interest increased again when the Court decided the 2012 companion cases of *Lafler v. Cooper*[22] and *Missouri v. Frye*[23] when the Court held for the first time that there is a constitutional right to effective assistance of counsel in plea bargaining.

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[16] *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, 40-58 (2012).

[17] *See, e.g.*, James Austin, et al., *Unlocking America: Why and How to Reduce America's Prison Population*, THE JFA INSTITUTE 1, 4 (2007), http://www.jfa-associates.com/publications/srs/UnlockingAmerica.pdf.

[18] For a more extensive discussion of how the structure of the laws give prosecutors greater power in plea bargaining see Alkon, *supra* note 10, at 586-87.

[19] This is referred to as the trial penalty. *See, e.g.*, 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, 992 (2005) (reporting trial penalties ranging from thirteen percent to four hundred sixty-one percent).

[20] *See, e.g.*, Wesley MacNeil Oliver, *Toward a Common Law of Plea Bargaining*, KY. L. J. 2013-2014 at 1; Rishi Batra, Lafler *and* Frye: *A New Constitutional Standard for Negotiation*, 14 CARDOZO J. CONFLICT RESOL. 309 (2013); Stephanos Bibas, *The Duties of Non-Judicial Actors in Ensuring Competent Negotiation*, 51 DUQ. L. REV. 625 (2013); Covey, *supra* note 5; Nancy J. King, *Plea Bargains That Waive Claims of Ineffective Assistance—Waiving* Padilla *and* Frye, 51 DUQ. L. REV. 647 (2013); Wesley MacNeil Oliver, *The Indirect Potential of* Lafler *and* Frye, 51 DUQ. L. REV. 633 (2013); Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150 (2012); Stephanos Bibas, Taming Negotiated Justice, Yale L. J. Online (June 20, 2012); Wesley M. Oliver, *The Present and Future of Plea Bargaining: A Look at* Missouri v. Frye *and* Lafler v. Cooper, 2012 CATO SUP. CT. REV. 257, http://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2012/9/scr-2012-oliver.pdf.

[21] Padilla v. Kentucky, 559 U.S. 356 (2010).

[22] Lafler v. Cooper, 132 S. Ct. 1376 (2012).

[23] Missouri v. Frye, 132 S. Ct. 1399 (2012).

Much of the most current scholarship on plea bargaining uses these recent Supreme Court cases, most notably *Lafler* and *Frye* to recommend further reforms to plea bargaining.[24] However, *Padilla*, *Lafler*, and *Frye*, were all cases in which the Court looked only at the question of whether there was competent assistance of counsel during the client-counseling phase of plea bargaining.[25] The narrow focus of the Court in these cases has meant that many commentators and scholars have been similarly focused on the defense lawyer role in plea bargaining or how to provide better defense services.[26] Some scholars have focused more generally on the need to reform plea bargaining by adopting more procedural rules.[27] Undoubtedly improving defense services and improving the procedural framework are important areas for reform in the plea bargaining process. Yet, the current wave of scholarship often fails to recognize the importance of also reforming the substantive criminal law as a key component to meaningful plea bargaining reform. This is due, in part, to a failure by many critics and commentators to more fully examine bargaining behavior during plea negotiations and to their underlying assumption that plea bargaining is a process that exists outside the law instead of a process that is defined by the existing law.

This article will begin, in Section II, with a brief explanation of the few rules that regulate the plea bargaining process. Section III will examine how plea bargaining works, focusing on how the substantive criminal law impacts bargaining behavior. Section IV will discuss the concern that plea bargaining is often overly coercive and how the substantive criminal law contributes to the coercive atmosphere. Section V will consider the classic article, *The Shadow of the Law: The Case of Divorce*[28] and examine whether plea bargaining happens in the shadow of the law. This article will use the shadow of the law concept and build off the analysis from previous articles arguing that while plea bargaining is highly complex, it is time to reexamine how the substantive criminal law impacts plea bargaining behavior and the importance of substantive criminal law reform as part of the overall reform of the plea bargaining process. Section VI will propose that plea bargaining reform efforts should include efforts to reform the underlying criminal law using examples from California's recent changes in the law to explore the kinds off substantive criminal law reform that might contribute to plea bargaining reform.

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[24] *See* note 20 for a listing of some of these recent articles.

[25] Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L. J. 2650, 2653 (2013).

[26] *See, e.g.*, Laurence A. Benner, *Expanding the Right to Effective Counsel at Plea Bargaining*, 27 CRIM. JUST. 4 (2012); Richard E. Myers II, *The Future of Effective Assistance of Counsel: Rereading* Cronic *and* Strickland *in Light of* Padilla*,* Frye *and* Lafler, 45 TEX. TECH L. REV. 229 (2012); Ronald Wright, Padilla *and the Delivery of Integrated Criminal Defense*, 58 UCLA L. REV. 1515 (2011).

[27] *See, e.g.*, Bibas, *supra* note 5; Oliver, *Toward a Common Law of Plea Bargaining*, *supra* note 20; Batra, *supra* note 20.

[28] Robert H. Mnookin & Lewish Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979).

II. The Laws Regulating Plea Bargaining

Critics complain that the plea bargaining process operates too informally as there are few rules to regulate how the prosecution and defense negotiate plea deals.[29] Historically, the Supreme Court has been more interested in regulating trials and less interested in plea bargaining.[30] Despite its widespread use, it wasn't until 1970 that the Supreme Court, in *Brady v. United States,* specifically recognized the constitutionality of plea bargaining.[31] The Court has held that a guilty plea must be must be voluntary and intelligent.[32] The Court has said this means that the defendant understands what he is doing, acts freely and knowingly, and accepts (or declines) a plea bargain without physical coercion.[33] There are few constraints on how prosecutors approach plea bargaining.[34] One exception is that prosecutors should not breach previous agreements.[35] For example, the Court remanded a case when the prosecutor failed to stick to the original plea agreement after the defendant entered his plea of guilty[36] as to do otherwise would be an "unfulfilled promise" or governmental deception.[37] The court has not considered threats of worse punishment or additional charges to be illegal coercion. For example, in *Brady*, the Court decided that the defendant deciding to take the deal to avoid the death penalty was not a violation.[38] 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

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[29] *See, e.g.*, Bibas, *supra* note 5; Susan R. Klein, *Plea Bargaining after Lafler and Frye*, 51 DUQ. L. REV. 559 (2013).

[30] *See, e.g.*, Bibas, *supra* note 5, at 1123 ("The law of criminal procedure is primarily a law of trials and preparation for trials.").

[31] Brady v. United States 397 U.S. 742, 751-52 (1970)("[G]uilty pleas are not constitutionally forbidden." *Id*.).

32. *Id*. at 748.

33. *Id.* at 748–50.

[34] *See e.g.*, Angela J. Davis, *The American Prosecutor: Power, Discretion, and Misconduct*, 27-30, 23-SPG CRIM. JUST. 24 (2008) (a general discussion of prosecutorial discretion and why courts defer to prosecutors imposing few rules or constraints on the exercise of their discretion).

[35] Santobello v. New York, 404 U.S. 257, 262 (1971) (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).

36 *Id*. ("[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…").

37 Mabry v. Johnson, 467 U.S. 504, 505 (1984) (distinguishing the facts from *Santobello*).

38 397 U.S. at 755.

not accepted was not coercive because the death penalty could be lawfully imposed.[39] 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.[40] In practice, as there are no rules to prevent it, prosecutors can (and do) threaten to add additional charges or enhancements if the defendant does not accept the plea deal.[41] As will be discussed below, prosecutorial threats to add more charges or enhancements puts more pressure on defendants to accept deals as the consequences of failing to do so can be so much more serious.[42] Threats of additional charges and enhancements increases the concern about the overall coercive atmosphere of plea bargaining including the reality that innocent defendants may plead guilty.[43]

Just as the Court has had a very narrow reading of what is coercion in the plea bargaining context, the Court has considered plea deals "intelligent" even if the defendant lacks information about the evidence that will be admitted at trial against him or how that may impact his chances of conviction.[44] In general, under *Brady v. Maryland,* the prosecutor must disclose "evidence favorable to the accused . . . where the evidence is material either to guilt or to punishment."[45] *Brady*, did not, however involve a plea bargain and the Court has not specified what evidence must be disclosed before a plea deal. In 2002, in *U.S. v. Ruiz*, the U.S. Supreme Court decided, in part, that a defendant did not have a constitutional right to impeachment information before entering a plea agreement.[46] This creates a problem in that it may limit the leverage a defendant might have in plea negotiations, as impeachment evidence may help to secure a better deal. It also means that defendants may be accepting plea deals without ever knowing that they have this possible leverage.[47] So far the Court has not held that there is a defense right to open-file discovery, which means that defendants are often entering guilty pleas without knowing all of the evidence the prosecution may have, including evidence that may increase their bargaining power. There are also, unfortunately, examples of the prosecution failing to turn over

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39 *Id.* at 751.

40 Bordenkircher v. Hayes, 434 U.S. 357, 364–65 (1978). William 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* (Harv. Pub. L. Working Paper No. 120, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract-id=854284.

41 *See e.g.*, G. NICHOLAS HERMAN, PLEA BARGAINING, 87 (3rd ed. 2012).

42 *See infra* Section V.

43 *See infra* Section V; Alkon, *supra* note 10, at 595-605.

44 397 U.S. at 757; *see also* United States v. Ruiz 536 U.S. 622 (2002).

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

46 536 U.S. at 625.

47 For a longer analysis of the problem of lack of defense discovery and a recommendation to adopt open file discovery law 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).

exculpatory evidence as *Brady v. Maryland* clearly requires.[48] Plea bargaining reform proponents, including myself, have called for open file discovery as one procedural rule to better protect defendants to ensure that they have all of the information in the case both to help in the negotiation process and in their decision-making about whether to accept the plea offer or not.[49]

Since 2010, the Court has decided three cases involving plea bargaining that have helped to carve out some minimally better regulation in one part of the plea bargaining process: the client counseling phase.[50] In *Padilla v. Kentucky,* the Court held that the defendant has the right to be advised by his lawyer about the collateral immigration consequences of his guilty plea and that failure to do so is a violation of the Sixth Amendment right to counsel.[51] In 2012, the Court decided the companion cases of *Lafler v. Cooper*[52] and *Missouri v. Frye*.[53] In *Fry*e the Court held that the defendant's sixth amendment right to counsel had been violated when the defendant's lawyer failed to convey a plea offer before it expired.[54] In *Lafler* the defendant's lawyer conveyed the offer, but wrongly advised his client that the prosecution "would be unable to establish intent to murder" because the victim was shot below the waist (despite being shot four times).[55] This was so clearly incorrect that the parties on appeal agreed that the advice fell below the required "objective standard of reasonableness."[56] Based on this poor advice, the defendant turned down a plea deal that was over one-third less than his eventual sentence.[57]

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[48] For example, the prosecution in the Michael Morton case failed to turn over exculpatory evidence, in violation of Brady. Michael Morton was wrongly convicted for murdering his wife and served twenty-five years in the Texas prison system. The prosecutor who failed to turn over the evidence, Ken Anderson, was later convicted and sentenced to ten days in jail for the violation of the law. For a longer discussion of the Michael Morton case see Alkon, *supra* note 47 at 419-21.

[49] *See, e.g*., Alkon, *supra* note 47; John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437 (2001). For articles more generally recommending open file discovery see Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533 (2010); Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008).

[50] Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2653 (2013).

[51] Padilla v. Kentucky, 559 U.S. 356 (2010). Bibas, *supra* note 5, at 1120 ("With Padilla, the Court has now begun to interpret due process and the Sixth Amendment right to counsel to impose meaningful safeguards on the plea process.").

[52] 132 S. Ct. 1376.

[53] 132 S. Ct. 1399.

[54] *Id*. at 1404.

[55] *Id.* at 1380.

[56] *Id*. at 1384 ("In this case all parties agree the performance of respondent's counsel was deficient when he advised respondent to reject the plea offer on the grounds he could not be convicted at trial. In light of this concession, it is unnecessary for this Court to explore the issue." *Id*.)

[57] *Id*. at 1383-84 (He rejected an offer of 51-85 months in prison (4.25-7.08 years) and was sentenced to 185-360 months in prison (15.4 -30 years) after the jury convicted him at trial.).

There were no errors in the trial itself, but the Court concluded that the trial did not cure whatever problems may have occurred during the plea bargaining process and specifically said "[e]ven if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence."[58] The Court, thereby, recognized the fact that plea deals are often significant discounts from what a defendant will get if they go to trial and are convicted.

Beyond these few constitutional requirements, there are statutory requirements. However, many of the statutory rules simply reflect the constitutional minimums that the Court has established and therefore concentrate on procedural issues.[59] The rules surrounding plea bargaining do not focus on the negotiation process itself, but rather the formal process of the defendant entering a guilty plea and the court accepting it after the prosecution and defense have agreed on a deal.[60] For example, Rule 11 of the Federal Rules of Criminal Procedure states what rights a judge must advise the defendant that he is waiving, and that the judge should get the factual basis for the plea.[61] Rule 11 also states that the defendant should be advised about the charges, and the maximum and minimum penalties.[62] There are also rules concerning what judges can and cannot do, for example, under the Federal Rules, judges cannot "participate" in plea negotiation discussions.[63] The rules in state criminal procedure codes regarding plea bargaining also tend to focus more on the form of the guilty plea and procedures surrounding accepting the plea in court.[64]

Many scholars calling for plea bargaining reform focus on the lack of regulation in the plea bargaining process. As Stafanos Bibas observed, "…a $100 credit-card purchase of a microwave oven is regulated more carefully than a guilty plea that results in years of imprisonment."[65] Bibas has been in the forefront in calling for better regulations and looking to other possible models such as consumer protection.[66] Bibas' recommendations include some specifically aimed at decreasing the potentially coercive atmosphere of plea bargaining. For

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[58] 132 S. Ct. at 1386.

[59] Bibas, *supra* note 5, at 1124.

[60] *See, e.g.,* Boykin v. Alabama, 395 U.S. 238 (1969) (holding that there needs to be a record to establish that the defendant voluntarily and knowingly entered his plea); Bibas, *supra* note 5, at 1124.

[61] FED. R. CRIM. P. 11(b)(1), (b)(3).

[62] *Id.*

[63] FED. R. CRIM. P. 11(c)(1); for a recent decision holding that a violation of this rule is not grounds to vacate a guilty plea see U.S. v. Davila, 133 S. Ct. 2139 (2013).

[64] *See, e.g.,* TEX. CODE CRIM. PROC. ANN. art. 26.13 (West 2011).

[65] Bibas, *supra* note 5, at 1153.

[66] *See generally* Bibas, *supra* note 5, at 1151-1158.

example, Bibas recommends a "cooling-off period" for any plea deals involving five or more years of imprisonment.[67] However, as will be discussed below, improving the procedural rules that surround plea bargaining, while important, will not fully address the concern that plea bargaining is unduly coercive because of the pressure prosecutors can put on defendants by threatening to apply the potentially severe penalties written into the criminal codes themselves.

III. How Plea Bargaining Works:

"Plea bargaining is a form of negotiation by which the prosecutor and defense counsel enter into an agreement resolving one or more criminal charges against the defendant without a trial."[68] There is no right to a plea bargain which means it is entirely within the discretion of the prosecutor to decide whether to offer a deal.[69] If there is a plea deal, it is not final unless the judge agrees to accept it.[70] There are three basic types of plea bargaining: charge bargaining, sentence bargaining and sentence recommendation agreements.[71] In charge bargaining, the negotiation is about whether the prosecutor may agree to dismiss one or more of the charges or to not charge particular offenses in exchange for a guilty plea.[72] In sentence bargaining the prosecution and defense negotiate about the sentence or punishment.[73] Plea negotiations often include both sentence and charge bargaining.[74] A third form of plea bargaining, sentencing recommendations agreements, is more common in the federal system and is when the prosecutor agrees to recommend a particular sentence to the judge.[75]

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[67] Bibas, *supra* note 5, at 1155. Nancy Welsh suggested a cooling-off period in mediation to help address concerns about coercive mediation practices ("muscle mediation"). Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?* 6 HARV. NEGOTIATION L. REV. 1, 6-7 (2001).

[68] HERMAN, *supra* note 41 at 1.

[69] This does not mean that defendants must always go forward to trial, as the defendant may have the option to "plead open" to the court, leaving it to the judge to decide the sentence, with or without the benefit of a pre-arranged plea deal. However, if the defendant pleads open to the court he is "pleading to the sheet" meaning he will have to plead to all charges, as filed, as the judge will not be able to dismiss any charges or enhancements on her own motion. *See, e.g.*, Eric M. Matheny, *The Risks of Pleading Open to the Court*, ERIC MATHENY L. BLOG (Mar. 3, 2012, 12:55 PM), http://www.ericmathenylaw.com/Criminal-Defense-Blog/2012/March/The-Risks-Of-Pleading-Open-To-The-Court.aspx.

[70] HERMAN, *supra* note 41 at, at 109-12 (listing the role of the judge in "finalizing the bargain).

71. *See, e.g.*, HERMAN, *supra* note 41 at 1–2.

72. For a more extensive list of possible plea bargaining outcomes, see *id.* at 104–06. For purposes of simplicity, this article will often refer to "guilty pleas" and not also include no-contest or Alford pleas. *See e.g.*, HERMAN, *supra* note 41 at 189-91.

73. *See id.* at 1-2.

74. *See id.*

75.U.S. SENTENCING COMM'N, 2014 GUIDELINES MANUAL [USSG] § 6B1.2(b) (Nov. 2014), *available at* http://www.ussc.gov/guidelines-manual/2014/2014-chapter-6#6b12.

Depending on the seriousness and complexity of the case, plea negotiations can be simple and fast or complex and drawn out.[76] Plea bargaining is often a multi-party negotiation as not only must the prosecutor and defense lawyer agree, but also the defendant and the judge, and in some cases the prosecutor's boss.[77] Victims do not have a formal role, although in many jurisdictions they must be informed about any plea deal.[78] Police officers also have no formal role, and, unless they are a victim, may not be notified about the deal until after it is concluded (if at all). However, police officers and victims, despite the fact that they have no formal role in the plea negotiation, can informally exert influence over the prosecutor.

Plea negotiations can be as simple as an offer from the prosecutor that is accepted by the defense without any counter-offers. Or the negotiation may involve the defense sharing information about possible defenses and possible motions (such as a search and seizure motion) with the goal being to persuade the prosecutor to reduce the charge or reduce the sentence or both. Plea negotiations are usually conducted off the record, even if the negotiation is in open court. At some point the plea offer may be reduced to writing or the offer may be stated on the record in court.[79]

Because plea bargaining tends to happen in private, it is harder to study and analyze than, for example, trials. Empirical studies of plea bargaining often focus on the outcome of the plea

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76. *See, e.g.*, HERMAN, *supra* note 41 at 75-87 (describing various plea bargaining tactics including "quick pleas"), 89-109 (describing how plea negotiations are done). In simple cases—such as driving under the influence of alcohol or drug cases—prosecutors and defense lawyers know the "standard deal" in the individual court or jurisdiction. The "negotiation," thus, often simply consists of the prosecutor stating the offer and the defense lawyer confirming that her client accepts the deal. *See* DOUGLAS W. MAYNARD, INSIDE PLEA BARGAINING: THE LANGUAGE OF NEGOTIATION 78 (1984) (referring to these types of plea negotiations as "routine processing" *Id*., and at 104-07).

[77] For a discussion about plea bargaining as a multi-party negotiation see Alkon, *supra* note 47 at 413-14.

[78] For a general description of victims' rights in criminal cases see *About Victims' Rights,* https://www.victimlaw.org/victimlaw/pages/victimsRight.jsp (last visited Sept. 6, 2015). For a recommendation of more victim involvement see e.g., STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 150-53 (2012).

[79] This has become more common after the 2012 cases of Lafler v. Cooper, 132 S. Ct. 1376 (2012) and Missouri v. Frye, 132 S. Ct. 1399 (2012). For more information on the efforts to place more information on the record regarding plea offers post-*Lafler* and *Frye* see Alkon, *supra* note 10 at 617-18.

negotiation as that is something that is both easier to determine and to measure.[80] There have, however, been studies of plea bargaining that have attempted to examine the negotiation process in more detail. One such study was conducted in the early 1980s and used conversational analysis to examine how plea bargaining worked and the skills the lawyers used while negotiating misdemeanor cases.[81] One observation from this study was that plea negotiations tend to happen in "spurts and starts" in between other conversations the lawyers are having in court, in between the judge calling cases, and other defense lawyers trying to talk to the prosecutor.[82] Criminal courts can be chaotic places and misdemeanor courts even more so.[83] But, unlike negotiation or mediation of civil cases which may happen far away from the formal trappings of the court system, plea bargaining more often happens in courtrooms and courthouses.

One distinction in plea bargains is between those that are routine and those that are not. Routine plea bargains are those cases in which the prosecution and the defense agree on what the case is worth and "they do not 'really negotiate.'"[84] However, as Douglas Maynard noted, a case that is resolved without apparent negotiation "still reflects strategic and systematic negotiational efforts."[85] The charge, the facts, and the prior criminal record of the defendant are all a part of the analysis for the defense in determining whether the prosecutor's first offer is acceptable.[86] The other type of plea negotiation is one where the defense attorney does not accept the prosecutor's first offer.[87] In these cases, Maynard observed, lawyers will typically discuss facts

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[80] For examples of empirical studies examining plea bargaining outcomes focused on whether the type of lawyer (public defender, publicly appointed private counsel or private counsel) makes a difference in case outcomes see, e.g., ROGER HANSON, BRIAN OSTROM, WILLIAM HEWITT, AND CHRISTOPHER LOMVARDIAS, NAT'L CTR. FOR STATE COURTS, INDIGENT DEFENDERS: GET THE JOB DONE AND DONE WELL (1992); James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 22 YALE L.J 154 (2012); Richard D. Harley, et.al., *Do You Get What you Pay for? Type of Counsel and Its Effect on Criminal Court Outcomes*, 38 J. OF CRIM. JUST. 1063 (2010); Morris B. Hoffman, Paul H. Rubin & Joanna M. Shepherd, *An Empirical Study of Public Defender Effectiveness: Self-Selection by the "Marginally Indigent"*, 3 OHIO ST. J. CRIM. L. 223 (2005); Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* (Nat'l Bureau of Econ. Research, Working Paper No. 13187, 2007), *available at* https://www.nber.org/papers/w13187; Thomas H. Cohen, *Who's Better at Defending Criminals? Does type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes?* https://ssrn.com/abstract= 1876474; Michael Roach, *Explaining the Outcome Gap between Different Types of Indigent Defense Counsel: Adverse Selection and Moral Hazard Effects*, (Apr. 2011), http:ssrn.com/abstract=1839651.

[81] DOUGLAS W. MAYNARD, INSIDE PLEA BARGAINING: THE LANGUAGE OF NEGOTIATION, 1-4 (1984).

[82] *Id.* at 36.

[83] For the classic study of misdemeanor courts see generally MALCOM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979).

[84] MAYNARD *supra* note 79, at 104.

[85] *Id*.

[86] *Id*. at 104-07 (describing several routine plea agreements and why the fact of little discussion does not mean there was no negotiation).

that might show weaknesses in the prosecutor's case and factors about the defendant that might support a more lenient penalty.[88]

The starting point in any plea negotiation is the charges. A defense lawyer will evaluate whether the prosecutor has sufficient evidence to prove the charges, and if there are any weaknesses in the case, these weaknesses will be used to argue for a reduced charge and/or a reduced sentence. For example, if the charge is possession for sale of a controlled substance, the defense attorney may argue that the surrounding circumstances and the amount of the drug will make it difficult for the prosecution to prove beyond a reasonable doubt that the drugs were possessed for sale and that, therefore, the prosecutor should reduce the charge to a simple possession of a controlled substance and that the penalty should also be reduced. Defense lawyers will also evaluate whether there are additional charges or enhancements that could be added that could increase the possible maximum penalty as part of deciding whether the offer is fair. The charge or potential charges are a key starting point because whatever crime the defendant is accused of violating, or could be accused of violating, is what determines the possible maximum penalty.[89]

Defendants who do not accept a plea deal and instead go to trial and lose, can expect to get a higher sentence than they would have gotten through plea bargaining.[90] This is often referred to as the "trial penalty" and researchers report that defendants who go to trial and are found guilty can receive prison sentences that are over four times higher than those who plead guilty.[91] Stefanos Bibas explains that the "expected post-trial sentence is imposed in only a few percent of cases" which means it is "like the sticker price for cars: only an ignorant, ill-advised consumer would view the full price as the norm and anything less as a bargain."[92] However, the

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[87] MAYNARD *supra* note 79, at 107. Maynard refers to these types of plea bargains as "adversarial" although later studies suggest that this is not the best term as plea negotiation is often highly cooperative. For studies that look at negotiation styles of criminal lawyers, and found a significant percentage to be rated as "problem solvers" as compared to "adversarial" see Andrea Kupfer Schneider, *Cooperating or Caving In: Are Defense Attorneys Shrewd or Exploited in Plea Negotiations*? 91 MARQ. L. REV. 145 (2007); Andrea Kupfer Schneider, *Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143 (2002).

[88] MAYNARD *supra* note 81, at 107-08.

[89] *See e.g.*, JILL PAPERNO, REPRESENTING THE ACCUSED: A PRACTICAL GUIDE TO CRIMINAL DEFENSE, 216-18 (2012).

[90] For a scathing report on how the trial penalty impacts plea bargaining in felony drug cases in the United States, see generally HUMAN RIGHTS WATCH, *An Offer You Can't Refuse: How U.S. Federal Prosecutors Force Drug Defendants to Plead Guilty* (Dec. 2013), *available at* http://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0_0_0.pdf.

[91] *See* 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, 992 (2005) (reporting trial penalties ranging from thirteen percent to four hundred sixty-one percent, depending on the state and the offense); Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining,* 91 MARQ. L. REV. 213, at 224–30 (stating that the actual trial penalty could be substantially higher due to the fact that most statistics compare the sentence for similar charges and do not consider the fact that plea bargains often include pleading guilty to a lesser offense than the one originally charged).

[92] Bibas, *supra* note 5, at 1138.

fact that defendants don't plead out to the maximum, doesn't mean that the maximum possible sentence don't anchor the plea negotiations. As will be discussed later, a defendant's fear of a high maximum sentence can raise concerns of coercion in the plea bargaining process and innocent defendants have plead guilty to avoid the risk of trial and the potentially dramatically higher maximum sentence.[93]

One empirical study looking at plea bargaining outcomes concluded that the criminal code mattered in terms of plea outcomes and how prosecutors bargained in particular cases.[94] The more options a prosecutor had under the law to reduce the charges, without reducing to a misdemeanor, the more likely they were to reduce the charges and along with that, the sentence.[95] Ronald Wright and Rodney Engen concluded that "the substantive criminal law determines the outcome of the criminal process" and that plea bargaining does not mean that the parties "negotiate a customized outcome without regard to the legal rules."[96] Instead, the law creates "starting points" for the negotiation.[97] One question was whether prosecutors still exercise wide discretion when there are sentencing guidelines and mandatory sentencing provisions. Wright and Engen examined previous empirical studies that found it was "clear that prosecutors circumvent guidelines through charge bargaining in a sizeable minority of cases."[98] Wright and Engen also found that to be true in the data they collected. They looked at two factors, the "depth" and "distance" of the criminal code. The "depth" of the criminal code is determined by whether there are a lot, or just a few, charging options for similar facts.[99] The "distance" is the "relative difference in the sentences that attach to the more- and less-serious charging options."[100] Wright and Engen found that the charges are more likely to be reduced when there is more depth, meaning more options for the prosecutor to choose from. It is less likely if there is a large distance, meaning big differences in sentences.[101] This study confirmed that plea bargaining is not a process that takes place outside the legal system but instead is a process that is, as will be discussed below, framed by the substantive law.[102]

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[93] See infra Section IV. *See, e.g.*, Ronald Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 84-86, 100-12, 129-37, 150-54 (2005)(concluding that federal defendants who would have been acquitted at trial plead guilty in increasing numbers due to increased federal prosecutorial power and threats of large penalties for going to trial combined with much better deals for pleading guilty).

[94] Ronald F. Wright & Rodney Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1939 (2006).

[95] *Id*. at 1940.

[96] Wright, *supra* note 94, at 1940.

[97] *Id*.

[98] *Id*. at 1947.

[99] *Id*. at 1939.

[100] *Id*. at 1940.

[101] Wright, *supra* note 94, at 1940.

[102] *See infra* Section V.

Bibas observed that until 2010, when *Padilla v. Kentucky*[103] was decided, the Supreme Court's "world was binary: defendants were either guilty or not guilty" and that the Court "ignored the varieties of possible charges and the gradations of sentences that might fit a crime."[104] The substantive criminal law makes a substantial difference in terms of how plea bargaining works.[105] Prosecutors have the power and discretion to charge any offense that the facts arguably support.[106] Since the 1970s, legislatures in every state, and the U.S. Congress, have increased penalties for crimes, created new crimes, added habitual offender statutes, and increased sentences through enhancements for things like using a gun or committing a crime in a school zone.[107] The changes in the substantive criminal law have given prosecutors more leverage in plea bargaining and made plea bargaining a much higher stakes process for defendants who face significantly higher sentences if they reject the plea offer.[108] As was discussed above, thus far the Supreme Court has shown little interest in sentencing issues in plea bargaining in large part due to the tendency to take "trials as the norm and thus post-trial punishments as the normative baseline."[109] Scholars have also tended to focus more of their attention on better regulating the process of plea bargaining and less on the impact of the substantive criminal law on how plea bargaining actually works.[110] However, the substantive criminal law is part of the reason that the plea bargaining atmosphere can be coercive, as will be discussed below.

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[103] 559 U.S. 356.

[104] Bibas, *supra* note 5, at 1128.

[105] For another study concluding that that substantive crime "can catalyze or frustrate plea bargaining" see Kyle Graham, *Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 CALIF. L. REV. 1573 (2012).

[106] HERMAN, *supra* note 41 at 15 (Prosecutors are "given extraordinarily broad discretion in deciding whether to prosecute and what charges to bring, and this discretion is not subject to judicial intervention so long as the charges brought are based on probable cause and the prosecution is not facially discriminatory." *Id*. *See, also* ALEXANDER, *supra* note 16 at 87 (discussing prosecutorial discretion and the practice of overcharging); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85-105 (1968) (discussing prosecutorial overcharging, based on interviews with prosecutors and defense attorneys in the 1960s, an example that overcharging is not a new practice).

[107] For a discussion of how these changes increase prosecutorial power see Alkon, *supra* note 79, at 585-87.

[108] *See, e.g.,* Albert Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 570-71 (1978).

[109] Bibas, *supra* note 5, at 1127. However, the Court recognized that the defendant who turned down a plea deal due to ineffective assistance of counsel got a worse sentence after trial. Lafler v. Cooper, 132 S. Ct. 1376 (2012)("Far from curing the error, the trial caused the injury from the error. Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence." *Id*. at 1386).

[110] For a notable exception, see Wright & Engen *supra* note 94.

IV. Concerns About Plea Bargaining

Critics have expressed serious concerns for decades about how plea bargaining works and about the fact that it is the predominate process to resolve criminal cases in the United States. Those expressing concern about the heavy use of plea bargaining question whether it undermines our adversarial system of justice.[111] There is also the concern that plea bargaining fails to give victims a voice[112] or to offer procedural justice generally.[113] Other concerns are that plea bargaining encourages defendants to "game" the system[114] and that it leads to disparate sentencing.[115] Critics have also looked at the overall atmosphere and expressed concern that plea bargaining acts as a form of torture[116] and is unduly coercive.[117] Some have suggested procedural reform to address the concern about undue coercion in plea bargaining.[118] Better regulation of the plea bargaining process, including putting greater restrictions on prosecutorial hard bargaining behavior, could help to reduce the pressure placed on many defendants to plead guilty. However, procedural protections alone can't fully address the problem of coercion as it is often the underlying criminal law, and the possibility of an extremely high penalty, that places pressure on defendants to accept the prosecutor's offer.[119]

One concern is that innocent defendants are pleading guilty due to concerns about possibly heavy penalties after trial. For example, seventeen percent of those exonerated in 2013 first plead guilty to the charges.[120] Overall, out of the 329 DNA exonerations nationwide, thirty-one (or just over nine percent) plead to the crime before being exonerated.[121] This means that we

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[111] *See, e.g.*, William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 80-82 (2006).

[112] *See, e.g.*, STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 26, 150-53 (2012).

[113] *See generally* Michael O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407 (2008).

[114] *See, e.g.*, ROBERT A. KAGEN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 85 (2001).

[115] *See, e.g.*, Laurie L. Levinson, *Peeking Behind the Plea Bargaining Process:* Missouri v. Frye *&* Lafler v.Cooper, 46 LOY. LA. L. REV. 457, 471 (2013).

[116] John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12 (1978).

[117] *See, e.g.*, H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63 (2011).

[118] *See, e.g.*, Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2042-50 (2006); *see also* Bibas, *supra* note 5, at 1155-57.

[119] For a more detailed discussion of the overall negotiation atmosphere for plea bargaining, including bargaining imbalances and coercion, see Alkon *supra* note 10, at 594-605.

[120] 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=0.

[121] *DNA Exonerations Nationwide*, The Innocence Project (Feb. 7, 2007), http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide.

know that innocent people are pleading guilty.[122] One reason that innocent people may plead guilty is because "the offer is too good to refuse"[123] which is tied to defendants evaluating the possible maximum compared to the plea offer.[124] Innocent defendants may also be more risk averse than the guilty and more likely, therefore, to take deals. [125]

Oren Gazal-Ayal and Avishalom Tor examined whether innocent defendants are more likely to take deals.[126] Gazal-Ayal and Tor suggested that one possible reform to lessen the problem of innocent defendants taking plea deals would be to place restrictions on plea offers.[127] They suggest to "limit the magnitude of plea discounts or, alternatively, or trial penalties." [128] The way they suggest this should be accomplished is that judges should "reject plea agreements that include a sentence that is significantly lower than the sentence expected following conviction by a jury trial."[129] Gazal-Ayal and Tor confidently predict that this will "result in plea rejections by those defendants who require deeper discounts in exchange for their guilty pleas" which will reduce the number of innocent defendants who plead guilty.[130] While this might prevent some of the most extreme examples of hard bargaining, it will also likely result in more trials and more convictions and higher sentences for innocent defendants who might otherwise, at least, have benefitted from a reduced sentence.[131] Gazal-Ayal and Tor do not discuss the need to also reduce mandatory sentencing provisions, sentencing enhancements, or long possible maximum sentences as part of how this proposal might help to reduce the pressure on innocent defendants to plead guilty. As with other scholars who focus on procedural reform, Gazal-Ayal and Tor fail to also examine the underlying criminal law and recommend changes to the law in addition to the procedural changes.

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[122] The overall numbers are probably higher. For a longer discussion see Alkon, *supra* note 10, at 601-03.

[123] Covey, *supra* note 5, at 617.

[124] 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, 1117 (2008).

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

[126] Gazal-Ayal & Tor, *supra* note 125, at 347.

[127] *Id*. at 395.

[128] Gazal-Ayal & Tor, *supra* note 125, at 395.

[129] *Id*.

[130] *Id.*

[131] Most of the exonerated were convicted by a jury trial. Simply having a trial is far from a guarantee that the defendant will not be convicted. *See supra* notes 120-122.

On example of how extreme possible sentences can work in the plea bargaining context is the case of Marissa Alexander. Ms. Alexander was charged with aggravated assault with a deadly weapon in Florida.[132] The case started when Ms. Alexander shot her gun in the air "one time" during a fight with her estranged husband.[133] Ms. Alexander's defense was that on the day in question her husband grabbed her neck and threatened to kill her.[134] The trial judge, in error, shifted the burden of proof in the "stand your ground" defense to Ms. Alexander during jury instructions.[135] The jury convicted Ms. Alexander and due to the mandatory "use a gun" law[136] in Florida, Ms. Alexander was sentenced to twenty years in prison.[137] Ms. Alexander's case was overturned on appeal due to an error in the jury instructions and sent back for a re-trial.[138] Before her first trial the prosecution offered three years in prison in exchange for a guilty plea to aggravated assault (without the gun use allegation).[139] Ms. Alexander rejected that deal and went to trial. 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. Those additional charges made the possible maximum sentence sixty years in prison, as there was a mandatory twenty year "use a gun" allegation with each charge.[140]

Ms. Alexander was faced with a decision that is all too typical. She could reject the deal and go to trial on what appeared to be a solid self-defense claim. However, she had already lost at trial (albeit with bad jury instructions). If she lost at trial again, and on all charges, she would be sentenced to sixty years in prison. Or she could take the three year plea deal that the prosecutor eventually offered again. By the time the offer was renewed, Ms. Alexander was just weeks away from completing the three year term.[141] Defendants are regularly faced with "time-

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[132] *Fla. Mom Gets 20 Years for Firing Warning Shots*, CBS NEWS (July 15, 2013), http://www.cbsnews.com/news/fla-mom-gets-20-years-for-firing-warning-shots.

[133] *Id.*

[134] Aliyah Frumin, *Marissa Alexander Accepts Plea Deal*, MSNBC (Nov. 24, 2014), http://www.msnbc.com/msnbc/marissa-alexander-accepts-plea-deal.

[135] Alexander v. State, 121 So. 3d 1185, 1188 (Fla. Dist. Ct. App. 2013).

[136] FLA. STAT. §775.087.2 (2014) ("… discharged a 'firearm' or 'destructive device' as defined in s. 790.001 shall be sentenced to a minimum term of imprisonment of 20 years." *Id*.).

[137] *Fla. Mom Gets 20 Years for Firing Warning Shots*, *supra* note 132 ("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." *Id*.).

[138] 121 So. 3d 1185 at 1189.

[139] Julia Dahl, *Fla. Woman Marissa Alexander Gets 20 Years for "Warning Shot": Did She Stand Her Ground?*, CBS NEWS (May 16, 2012), http://www.cbsnews.com/news/fla-woman-marissa-alexander-gets-20-years-for-warning-shot-did-she-stand-her-ground/.

[140] Morgan Whitaker, *Marissa Alexander Could Face 60 Years*, MSNBC (Mar. 3, 2014) http://www.msnbc.com/politicsnation/marissa-alexander-could-face-60-years (the prosecutor stated that the additional charges were necessary due to a change in the law. *Id*.).

[141] Frumin, *supra* note 134.

served" or nearly time-served deals or extremely high sentences if they go to trial and lose.[142] As Ms. Alexander experienced, if she was convicted, she could expect to get the maximum. As is no surprise, on reflection, Ms. Alexander decided to accept the plea deal.[143] What is never explained is why the same act would be worth three years in prison after a guilty plea, but twenty or sixty years after a trial, an example of a significant trial penalty of 566% to 1900%. Simply taking the possibility of the three-year offer off the table, as Gazal-Ayal and Tor suggest as one possible reform, would not have helped Ms. Alexander. She would have been forced to go to trial and risked another jury, even with proper instructions, convicting and sending her to prison for sixty years. However, if the underlying law was changed, and Ms. Alexander was looking at a much lower possible sentence, the risk of going to trial would be that much lower and one that she might have been willing to take.

Ms. Alexander's case illustrates how the substantive criminal law can be used to create a coercive atmosphere. Prosecutors have discretion to file charges that carry the maximum penalty (or not) and they can decide to add (or not) enhancement allegations, like the "use a gun" enhancement in Florida. However, if the law allows for these charges, it is unrealistic to assume that prosecutors won't use the charges and that they won't use them as part of their arsenal to secure guilty pleas.[144]

The Marissa Alexander case highlights another problem with mandatory minimums. Although mandatory minimums were intended to ensure that similar acts were punished similarly, in reality, due to plea bargaining, mandatory minimums instead often are only used against those who go to trial or otherwise can't negotiate around the mandatory sentence. There is no doubt that Marissa Alexander used a gun. There is a question whether the act of firing the gun was a criminal act (an assault). Before trial, the prosecution made plea offers that took the mandatory twenty years in prison for using a gun off the table. After Ms. Alexander's conviction at her first trial, the judge had no choice, under the law, but to sentence her to the twenty years.[145] Mandatory minimums, either for the existing charge or through enhancements, increase the pressure on defendants to accept plea deals, increase the potential trial penalty, and increase the disparity between defendants who committed otherwise similar acts.

V. Bargaining in the Shadow of the Law:

The now classic article to examine and describe how the substantive law can impact bargaining behavior was published in 1979 and described the bargaining behavior in divorce

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[142] *See supra* notes 90-91 and accompanying text.

[143] Frumin, *supra* note 134.

[144] *See e.g.*, WILLIAM STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 259 (2011) ("…these and similar laws granted prosecutors the power to threaten sentences that neither the enacting legislators not the prosecutors themselves wished to apply, all as a means of inducing guilty pleas with prosecutor's preferred sentences attached. The predictable consequence was more easily induced guilty pleas and harsher sentences." *Id*. at 259).

[145] *Florida Mom Gets 20 Years for Firing Warning Shots*, *supra* note 132.

cases as happening in the "shadow of the law."[146] The article concluded that there were a number of reasons why the substantive family law mattered in how the parties approached negotiating divorce, custody, and support issues. Years later, in 2004, Stefanos Bibas, critically analyzed plea bargaining scholarship that adopted one piece of the shadow of the law theory, the "shadow of trial."[147] Bibas concluded that trial outcomes are only one piece of a much more complex dynamic.[148] Bibas argued for the need to recognize these other complexities and not simply look at plea bargaining behavior in the context of trial outcomes.[149] In considering plea bargaining reform it is useful to first explore how the shadow of the law theory may explain plea bargaining behavior to better understand why it is also necessary to reform the substantive criminal law as part of any meaningful plea bargaining reform effort.

A. The Shadow of the Law:

In *Bargaining in the Shadow of the Law: The Case of Divorce*, Robert Mnookin and Lewis Kornhausert examined how the law impacted divorce negotiations "outside the courtroom"[150] and suggested that divorce law did not impose "order from above" but rather provided a "framework" for the negotiations.[151] Mnookin and Kornhausert concluded that the existing laws on "custody, alimony, child support, and marital property are all striking for their lack of precision and thus provide a bargaining backdrop clouded by uncertainty."[152] However, this uncertainty in the law did not mean that the law was irrelevant to the negotiations.

In examining how divorce negotiations worked, Mnookin and Kornhausert identified five factors that they concluded were important in determining the outcome of divorce negotiations. The five factors were: "(1) the preferences of the divorcing parents; (2) the bargaining endowments created by legal rules that indicate the particular allocation a court will impose if the parties fail to reach agreement; (3) the degree of uncertainty concerning the legal outcome if the parties go to court, which is linked to the parties' attitudes towards risk; (4) transaction costs and the parties' respective abilities to bear them; and (5) strategic behavior."[153]

Mnookin and Kornhausert discussed how the substantive law can impact these factors. For example, if custody is determined under a "best interests of the child standard" as compared

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[146] Mnookin & Kornhausert, *supra* note 28.

[147] Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

[148] *Id*. at 2469.

[149] *Id*. at 2470-2486.

[150] Mnookin & Kornhausert, *supra* note 28, at 950.

[151] *Id*.

[152] Id. at 969.

[153] *Id*. at 966.

to a "maternal-preference rule" or a "joint custody rule" it changes the bargaining power of each parent.[154] Under a rule where mothers are presumed to get custody, fathers will have relatively little bargaining power.[155] Likewise, rules that give fathers more equality in custody, particularly when combined with laws that limit alimony, give fathers more bargaining power.[156]

Mnookin and Kornhausert looked at the impact that changes in the law may have on whether the parties reach an agreement. The example that they gave is a proposal to give the custodial parent, whoever it might be, the exclusive right to determine when the non-custodial parent can visit, if at all and joint custody would not be a possibility.[157] The problem with a rule like this, as Mnookin and Kornhausert explained, is that it makes it harder for divorcing parents to agree on custody and reach "initial agreement" as this proposed rule would prevent the parties from agreeing to promises regarding visitation beyond who has custody.[158]

Under Mnookin and Kornhausert's analysis, the shadow of the law in the context of divorce cases exists in two pieces: the applicable legal codes and how the courts might decide any divorce case that fails to settle. In looking at the how the law influenced divorce negotiations, Mnookin and Kornhausert used as a reference point what the courts might do and the fact that any divorce case that is not settled through negotiation will go to trial.[159]

B. Does the Shadow of the Law Theory Apply to Plea Bargaining?

Twenty five years after the *Shadow of the Law* was published, Stephanos Bibas criticized applying Mnookin and Kornhauser's second piece of the analysis, how the courts might decide a case, to the plea bargaining context.[160] Bibas took issue with scholars who looked at "plea bargaining as just another case of bargaining in the shadow of expected trial outcomes."[161] Bibas, concluded that the "shadow-of-trial" model was "far too simplistic" when looking at the relationship between criminal trials and plea bargains.[162] Bibas defined the "shadow of trials" to

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[154] Mnookin & Kornhausert, *supra* note 28, at 977.

[155] *Id*. at 978.

[156] *Id*.

[157] *Id.* at 983-85.

[158] *Id*. at 983-85.

[159] *Id*. at 975. (In doing so, Mnookin and Kornhausert identified five reasons why divorcing couples may fail to negotiate an agreement, despite the advantages of negotiated agreements. These reasons are "(1) spite; (2) distaste for negotiation; (3) calling the bluff—the breakdown of negotiations; (4) uncertainty and risk preferences; (5) no middle ground" *Id*.).

[160] Bibas, *supra* note 147.

[161] *Id.* at 2465.

[162] Id. at 2466-67.

mean "the influence exerted by the strength of the evidence and expected punishment after trial."[163] Bibas concluded that plea bargaining is more complex as there are "structural impediments that distort bargaining" such as bad lawyers, the rules surrounding bail, and mandatory sentences.[164] The second big problem, according to Bibas, with applying a shadow of trials theory is that it "assumes that the actors are fundamentally rational" in plea bargaining.[165]

Bibas briefly examines the impact that the legal framework has on plea bargaining, but not as Mnookin and Kornhausert did. In the *Shadow of the Law*, Mnookin and Kornhausert discuss not just trial outcomes, but how the substantive law of divorce impacts or could impact, divorce negotiations. Bibas, by focusing on trial outcomes, gives little attention to the first question: how much does the substantive legal framework impact plea bargaining? Bibas rightly points out that trial outcomes are not as important as a shadow of trials theory might suggest in the specific context of plea bargaining as there are many other factors that influence bargaining behavior. In doing so, Bibas recognizes the importance of the substantive criminal law in terms of mandatory sentences and sentencing guidelines that contribute to the "structural skewing of bargains." [166] As Bibas explains it, mandatory sentencing guidelines and mandatory minimums make it so that punishment is no longer "calibrated" to the "strength of the evidence" as these statutory provisions "act as sledgehammers" that crash down on defendants if the crime was committed under certain circumstances, regardless of the severity of the criminal act.[167] Bibas concludes that the inflexibility of the substantive criminal law impacts plea bargaining and examines how it might encourage cooperation from defendants to get better deals as defendants will "look for ways to smooth out the sharp peaks and valleys" of the substantive laws.[168]

Mnookin and Kornhausert's conclusion that the divorce law provides the framework for divorce negotiations is equally applicable in plea bargaining. As with divorce cases, the substantive criminal law creates "bargaining endowments" for the prosecution and gives them far greater power in plea negotiations. Marissa Alexander's case illustrates how an extreme possible sentence can give the prosecutor power in the bargaining process to pressure a defendant to accept the deal or face the high sentence. For many laws, such as the mandatory use-a-gun laws in Florida, the legal outcome is not uncertain if the defendant is convicted: the defendant will get the mandatory minimum. There is a degree of uncertainty in how a jury may see an offered defense and whether they will vote to acquit. In such situations, Mnookin and Kornhausert discussed that the decision of whether to negotiate a settlement or not will depend on the how the parties view risk.[169] There is a serious concern that innocent defendants may be more risk averse

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[163] Bibas, *supra* note 147 at 2467.

[164] *Id*. at 2467.

[165] *Id*.

[166] *Id*.

[167] *Id.* at 2488.

[168] Bibas, *supra* note 147 at *2490*.

[169] Mnookin & Kornhausert, *supra* note 28, at 975.

than the guilty and more likely, therefore, to take deals, especially if the potential consequences of losing at trial are more serious.[170] Mnookin and Kornhausert also point to the transaction costs and the parties willingness to bear them as one of the factors influencing bargaining behavior in divorce cases.[171] As with the above factors, defendants are often at a serious disadvantage as the transaction costs of not taking the deal can include the general unpleasantness of making court appearances and the possibility of spending more time in custody awaiting their trial than the time-served deal.[172]

While any single theory explaining plea bargaining (or any form of negotiation) will undoubtedly over-simplify the analysis of how the process works, it is still useful to analyze whether the shadow of the law applies to plea bargaining. One of Bibas' concerns about the focus on the shadow of trial theory is that by doing so scholars failed to look critically enough at how plea bargaining works and the need for reform.[173] As Bibas said, if trials are the "backstop" to plea bargaining then "we do not need new procedural safeguards for pleas because plea outcomes already incorporate the value of trial safeguards."[174] However, it is precisely because of the complexities of plea bargaining that it is important to understand the variety of factors that influence bargaining behavior, particularly if the goal is to reform plea bargaining. One of the factors that exerts a strong influence in the parties bargaining behavior in plea negotiations is the substantive criminal law. Therefore it is important to not only look to what additional law or regulation may help improve the plea bargaining process, but to also not overlook the importance of reforming the underlying criminal law as a part of reforming plea bargaining.

VI. Reforming Plea Bargaining After *Lafler* and *Frye*:

As discussed above, the Supreme Court has decided few cases on plea bargaining and even fewer that place limits on the plea bargaining process. Therefore, the 2012 cases of *Lafler v. Cooper*[175] and *Missouri v. Frye*[176] made some observers optimistic that these cases heralded a

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[170] *See supra* notes 123-125.

[171] Mnookin & Kornhausert, *supra* note 28, at 971-72.

[172] For a longer discussion of the challenges defendants face making court appearances see Alkon, *supra* note 10, at 600-601; Covey, *supra* note 91, at 239-41.

[173] Bibas disagrees with scholars who adopt the shadow of trial view as "they presume that bargains largely reflect the substantive outcomes that would have occurred at trial anyway, minus some fixed discount." Bibas *supra* note 147, at 2465; for the list of scholars Bibas cites, see id. at note 2 (HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 31-32 (1966); Thomas W. Church, Jr., *In Defense of "Bargain Justice*," 13 LAW & SOC'Y REV. 509, 512-14, 523 (1979); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 309-17 (1983; Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992); William M. Landes, *An Economic Analysis of the Courts,* 14 J. L. & ECON. 61, 66-69 (1971); Edward A. Ruttenburg, *Plea Bargaining Analytically—the Nash Solution to the Landes Model*, 7 AM. J. CRIM. L. 323, 353 (1979); Robert E. Scott & William Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1910 (1992). *Id*.).

[174] Bibas, *supra* note 147, at 2466.

[175] 132 S. Ct. 1376.

new era and would have a "significant effect."[177] As I have written elsewhere these cases are likely to have a much more limited impact.[178] However, these cases, have sparked renewed scholarly interest in plea bargaining and may spark renewed efforts to reform plea bargaining.

Nationwide, there is a growing interest in criminal justice reform that cuts across partisan political lines.[179] Much of the interest is focused on decreasing high incarceration rates.[180] This interest is not limited to academics, but instead includes legislators and has already involved some significant changes in state criminal laws. For example, the Sentencing Project reported that in 2014 alone "at least 30 states and the District of Columbia authorized a range of law changes and policies that may address the nation's scale of incarceration."[181] Although these legislative changes are aimed at decreasing incarceration rates they may have a significant impact on how plea bargaining works. If done right, legislative reforms aimed at reducing incarceration rates could also help to significantly lessen the often coercive atmosphere in plea bargaining.

California is an example of a state that has restructured its criminal law to reduce possible sentences and to reduce some offenses from felonies to misdemeanors. These new laws were not intended to reform plea bargaining, but were instead intended to decrease incarceration rates in the state.[182] Over-crowding in California prisons is so serious that the state has been under a continuing federal court order, since 2009, to reduce its prison population.[183] The first significant

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[176] 132 S. Ct. 1399.

[177] Erwin Chemerinsky, *Effective Assistance of Counsel Now a Right in Plea Bargaining*, ABA JOURNAL (June 4, 2012, 1:45PM), http://www.abajournal.com/news/article/chemerinksy_effective_assistance_of_counsel_now_a_right_in_plea_barga ining/.

[178] *See generally*, Alkon, *supra* note 10.

[179] *See, e.g.*, Attorney General Eric H. Holder Jr., Address to the Bipartisan Summit on Criminal Justice Reform (Mar. 26, 2015) (transcript available at http://www.justice.gov/opa/speech/attorney-general-holder-addresses-bipartisan-summit-criminal-justice-reform).

[180] The United States incarcerates more people than any other country and has the highest incarceration rate in the world. *See, e.g.,* Nicole D. Porter, *The State of Sentencing 2014: Developments and Practice*, THE SENTENCING PROJECT 1 (Feb. 2015), http://www.sentencingproject.org/detail/publication.cfm?publication_id=583&id=156 (The total correctional population [of the United States] of 6.9 million consists of more than 2.2 million people in prison or jail and 4.7 million under community supervision on probation or parole.").

[181] Porter, *supra* note 180, at 1.

[182] This is in contrast to earlier law reform in California, Proposition 8 (A Victims Bill of Rights) which was passed in 1982 and intended, in part, to reform plea bargaining. *See* CANDACE MCCOY, POLITICS AND PLEA BARGAINING: VICTIMS' RIGHTS IN CALIFORNIA, 32-40 (1993).

[183] *See, e.g.,* Alex Dobuzinskis, *Judges Tell California to cut prisoner count by 10,000*, REUTERS (June 20, 2013) http://www.reuters.com/article/2013/06/20/us-usa-california-prisons-idUSBRE95J17W20130620 ("California...has been under court orders to reduce inmate numbers in its…prison system since 2009, when the same three-judge panel ordered it to relieve overcrowding that has caused inadequate medical and mental healthcare." *Id*).

change in the California Penal Code was Proposition 36, which passed in 2012, and amended the three-strikes law.[184] Previously, any defendant convicted of any new felony, if they had two prior convictions for serious and violent felonies, faced a sentence of twenty-five years to life.[185] This meant that if a defendant had two prior convictions for residential burglary and was convicted on a drug possession, or petty theft with a prior, that defendant would be sentenced to twenty-five years to life in prison, unless the case was plea bargained for less.[186] Proposition 36 changed the law by requiring that the new criminal case also be a serious or violent felony. Proposition 36 also included a retroactivity clause, allowing up to 3000 defendants sentenced under the old law to be resentenced.[187]

To date, it is not clear how this change in law has changed, or not, plea bargaining practices in California. Under both the old and new law, prosecutors have discretion to file cases as three-strike cases and to "strike strikes" as part of the plea bargaining process. This meant that some cases that could be three-strike cases were reduced in plea bargaining to second-strike cases. For example, a typical three-strike of possession for sale of one rock of crack cocaine alleged as a three-strike case under the old law due to two prior strike offenses could have been reduced in plea bargaining. The prosecution could offer to reduce the case to a second-strike case with a sentence of eight years in prison (compared to twenty-five to life). Defendants who were facing twenty-five to life sentences often jumped at the opportunity to take those reduced sentences. Proposition 36 prevents prosecutors from threatening to add strikes, or offering to take them away, when the new criminal case is not a serious or violent felony. The change in law took away one significant category of possible mandatory minimum sentences and therefore, possibly, one opportunity for prosecutors to threaten higher sentences if a defendant did not take the plea deal. One of the problems with three-strike cases is that they were often "no offer" cases, which means the prosecutor refused to make an offer, often due to office-wide policies.[188] As with other charges, prosecutors can exercise wide discretion on how to handle three strikes cases from the initial charging decisions to the decision of whether to offer a plea bargain. There are no studies yet analyzing the impact of Proposition 36 on plea bargaining in California. The focus has been instead on its impact in reducing the prison population.

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[184] CAL. PENAL CODE §667 (West 2012).

[185] The U.S. Supreme Court held this law did not violate the Eight Amendment prohibition against cruel and unusual punishment. Ewing v. California, 538 U.S. 11 (2003) (the defendant stole three golf clubs, and the Court held that his sentence of twenty-five years to life was not a violation as "Ewing's sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record." *Id*. at 29-30).

[186] The law also restricted early release so that defendants sentenced under it served more of their time. On a twenty-five to life sentence a defendant is eligible for release on parole after serving 85% of the twenty-five years. CAL. PENAL CODE §667(c)(5) (West 2012).

[187] David Mills & Michael Romano, *The Passage and Implementation of the Three Strikes Act of 2012 (Proposition 36)*, 25 FED. SENT'G. REP. 265, 267 (2013).

[188] Whether the DA should reduce three-strike cases was a campaign issue for the District Attorney in Los Angeles in 2000. *See* Mitchell Landsberg, *Garcetti and Cooley in Spirited Exchange on 3-Strikes Law*, L.A. TIMES, Sept. 26, 2000, http://articles.latimes.com/2000/sep/26/local/me-26844.

The second change in the law in California is potentially even more far-reaching. Proposition 47 passed in November, 2014, and reduced some felonies to misdemeanors, including drug and property crimes.[189] It also allowed those who have already been sentenced to be re-sentenced under the new law.[190] It is still too early to evaluate the long-term impact. The initial reports seem to suggest that there will be fewer arrests. The old law, as one Deputy Public Defender in Los Angeles, Russell Griffith remarked, "….gave the cops an enormously strong incentive to arrest people because they were cheap statistics."[191] Early reports are that arrests are down dramatically for narcotics offenses which are no longer felonies.[192] Overall, in Los Angeles County, narcotics arrests decreased by 30% and overall bookings into the Los Angeles County Jail were down by 23% since the adoption of Proposition 47.[193] The decrease in arrests has meant that county jail inmates now serve more of their time as the need for early release due to over-crowding has decreased.[194] It is unclear what impact Proposition 47 may be having on plea bargaining. For example, are prosecutors decreasing county jail time offers due to the understanding that an inmate will serve more time on a sixty day sentence than they did in the past?

Another question is what will be the fate of problem-solving courts, such as drug courts, in the wake of this change in law? Possession of controlled substances is now a misdemeanor. Without the threat of a felony conviction, at least some prosecutors are worried that defendants will no longer agree to drug rehabilitation or other treatment as part of a sentence, particularly as the possible sentences are now dramatically lower. As one Los Angeles County District Attorney observed, in such cases, defendants serve little time in the county jail and in "just a few minutes and they're out. You have removed that leverage" of the higher possible sentence.[195]

Removing that kind of leverage could make a significant difference in how plea bargaining works, at least in terms of potentially coercive prosecutorial plea bargaining behavior. Proposition 47 removes the option to file certain offenses as felonies. As Wright and Engen

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[189] Marisa Gerber, et. al., *Prop 47 Brings a Shift to Longer Time Spent Behind Bars*, L.A. TIMES, Jan. 28, 2015, http://www.latimes.com/local/crime/la-me-early-release-20150128-story.html#page=1.

[190] *See, e.g.*, J. Richard Couzens & Tricia A. Bigelow, *Proposition 47: "Safe Neighborhoods and Schools Act"* (Dec. 2014), http://www.adi-sandiego.com/pdf_forms/PROPOSITION_47_by_Couzens_and_Bigelow_December_2014.pdf (a guide for judges, which, in part, explains how to apply the retroactive portions of the law both in terms of re-classifying offenses as misdemeanors and re-sentencing. *Id.* at 23-64).

[191] Rory Carroll, *'Doing Life when No One Died': Prop 47 Ends 'Insane' Drug Penalties in California*, THE GUARDIAN, Nov. 28, 2014, http://www.theguardian.com/us-news/2014/nov/28/proposition-47-california-drug-crime.

[192] Gerber, *supra* note 189.

[193] *Id*.

[194] Gerber, *supra* note 189.

[195] Carroll, *supra* note 191.

observed in their study, prosecutors are less likely to reduce charges to a misdemeanor.[196] John Pfaff, who has done extensive empirical work to better understand the causes of mass incarceration in the United States, concludes that the increase in incarceration in the 1990s and 2000s was "driven almost entirely by change in precisely one part of the criminal justice chain—the prosecutor's decision to file a felony claim."[197] Removing this option may help to not only reduce incarceration rates overall, but may also help to limit or restrict prosecutors using the potential of harsher charges and penalties as pressure in the plea negotiation process, for at least some categories of crimes.

California's reforms may influence other states to take similar actions. The key questions for future research include not only whether incarceration rates decrease, but also whether the changes in the law cause changes in plea bargaining and prosecutorial behavior. Are prosecutors filing a lower percentage of cases because they can only file them as misdemeanors?[198] Are trial rates increasing? Increasing trial rates would be one indicator that the pressure to plead guilty has reduced, although arguably an outcome that none of the professionals in the criminal justice system would be anxious to see.[199] Careful study of the impact of these changes in the specific context of plea bargaining, could help to understand what reforms of the underlying criminal law might make sense as part of the process of reforming plea bargaining.

VII. Conclusion

As Malcom M. Feeley observed, during an earlier era when many were calling for plea bargaining reform, "[r]eforms that focus exclusively on one narrow problem without seeing it in the context of the entire system may generate unanticipated consequences even less desirable than the status quo."[200] In fairness, plea bargaining critics in this era who call for procedural reforms are often doing so in ways that are far-reaching and not focused on narrow problems. However, as this article has discussed, they tend to do so without including recommendations to reform the underlying criminal law. This is a key area to not overlook. The possibility of harsh

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[196] Wright & Engen, *supra* note 94, at 1940. However, misdemeanor convictions carry serious potential consequences including serious collateral consequences, so a misdemeanor, while a reduction, is not equivalent to a dismissal. *See* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, U.C. DAVIS L. REV. 277, 287 (2011).

[197] John F. Pfaff, *The Causes of Growth in Prison Admissions and Populations*, SOC. SCI. RES. NETWORK 1, 3 (July 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1884674. *See also* Leon Neyfakh, *Why Are So Many Americans in Prison? A Provocative New Theory*, SLATE, Feb. 6, 2015, http://www.slate.com/articles/news_and_politics/crime/2015/02/mass_incarceration_a_provocative_new_theory_for_why_so_many_americans_are.html ("...over the course of the '90's and 2000s, district attorneys just got much more aggressive in how they filed charges." *Id*.).

[198] *See e.g*., John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GEORG. STATE UNIV. L. REV. 1239 (2012) (concluding that incarceration rate increases are due in large part to prosecutors filing a larger percentage of cases, when they can file felony charges. Id. at 1241).

[199] Managing caseloads is an interest that prosecutors and defense lawyers share. For a longer discussion on shared interests, see Alkon, *supra* note 10 at 609-614.

[200] Malcom M. Feeley, *Perspectives on Plea Bargaining*, 13 LAW & SOC'Y REV. 199, 204 (1979).

penalties, combined with prosecutors having the discretionary power to charge the same act as a felony or misdemeanor and to add a variety of sentencing enhancements, contribute to what is often a highly coercive atmosphere in plea bargaining. Plea bargaining is a form of negotiation that most certainly does not exist outside the law, but is instead a process framed by the underlying criminal law. Reformers need to recognize this key part of how plea bargaining works and move beyond focusing primarily on procedural reform to include broader discussions of criminal code reform as part of any effort to reform plea bargaining.