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THE CRIMINAL JUSTICE SYSTEM'S ALLEGIANCE TO PLEA BARGAINS WITH LIBERTY AND JUSTICE FOR *SOME*

Christina Brito

INTRODUCTION

Has our criminal justice system become so ineffective by allowing prosecutors to plea bargain with our rights? Today, defendants are more likely convicted through plea bargains than through a traditional trial by judge and jury. In addition, statistics continue to show the wide disparities between minorities and whites within the American prison population. Is there a correlation between these racial disparities in our prisons and convictions obtained through plea bargains? The disproportionate effects of minority defendants being convicted merits a discussion whether plea bargains affect racial minorities more than other defendants. This article will discuss how plea bargaining is a relatively unregulated area of the criminal justice system and how this lack of regulation is likely to be particularly harmful to racial minorities. Racial injustice is made worse through plea bargaining because the process is under the sole discretion of prosecutors who have the freedom to subjectively decide what a particular defendant deserves without any safeguards to assure plea offers are not motivated by pre-textual bias. Our pledge of allegiance to the flag concludes with liberty and justice for all; ironically, the current criminal justice system and its allegiance to plea bargaining ends with liberty and justice only for some.

Part I of this article will begin with a historical background of how plea bargain was developed and how it has evolved within the judicial branch. Here, I will describe what doubts our Supreme Court justices had with respects to plea bargains and their attempts to implement safeguards in order to protect an individual's constitutional rights. Next, I will discuss how plea bargaining functions in our society and how it is relatively unregulated in the law. Prosecutors

have tremendous discretion in the area of plea negotiations. The role of a prosecutor allows them to decide if, when and what to charge a particular defendant with. Yet, there are no safeguards that protect defendants from the possibility of offers being made based on their race or socioeconomic status. In addition, statutes with mandatory minimums (or the Sentencing Guidelines in the Federal System) empowers a prosecutor to single handedly create what he or she *feels* is the appropriate sentence for a particular defendant and what he or she deserves as a plea offer. Consequently, plea bargaining becomes the most critical point of a defendant's timeline prior to conviction and defendants are left with heavily relying on what their counsels advise them to do. Thus, the Supreme Court's interpretation on what is effective assistance of counsel and what is considered a sufficient reasonable lawyer during pre-trial negotiations also becomes very important. Through the cases in this section, I attempt to read into what the judge's intentions were in the process of constitutionalizing plea bargains. Even with Supreme Court decisions to guide the lower courts, there is still confusion on what is or is not allowed during plea negotiations. The cases that have been decided in the context of plea bargains do not help the fact that there is a lack of regulation when it comes to prosecutorial discretions.

Part II of this Article will discuss the overall racial patterns of racial disparities in our criminal justice system. Statistical data demonstrates how old historical patterns of racial inequality still exists. Over ninety-four percent of convictions are produced through guilty pleas and minorities are still the majority in our prisons. I will show how these disproportionate effects of convictions have a class race correlation with plea bargains and why racial injustice is made worse by these deals. Statistics also show how racial minorities are likely to be poorer and less likely to afford legal representation. As a result, most minority defendants end up having no real choice but to plea bargain..

Part III will focus on why we need more information on plea bargaining. The relatively unregulated area of plea bargaining enables prosecutorial discretion and unequal bargaining powers which leads to unjust results. Allowing unjust results to continue undermines the character of our society and our commitment to fairness. Acknowledging that our current criminal justice system has transitioned form convictions by trials to pleas, forces this country to face the urgent to change the process.

Through plea bargaining the illusion of liberty, justice and mercy is dealt, leaving defendants with a false sense of satisfaction. The disproportionate effects of plea bargaining and incarceration with minority defendants, especially indigent minorities, demonstrates the inequality that stems from this process. Racial injustice is made worse through plea bargaining because the process is under the sole discretion of prosecutors who have the freedom to subjectively decide what a particular defendant deserves without any safeguards to assure plea offers are not motivated by pre-textual biases. Our pledge of allegiance to the flag concludes with liberty and justice for all; ironically, the current criminal justice system and its allegiance to plea bargaining ends with liberty and justice only for some.

I. A PLEA FOR LIBERTY

A. Constitutionality of Plea Bargaining

Several constitutional rights are implicated and waived when a defendant enters a guilty plea.[1] These rights include the Fifth Amendment's privilege against self-incrimination the Sixth Amendment right to a jury trial to effective assistance of counsel.[2] Plea negotiations are predominantly discussed by prosecutors and defense counsel prior to plea deals reaching the defendant and the Sixth Amendment becomes implicated when there is ineffective assistance of counsel. A guilty plea implicates the Fifth Amendment when the defendant admits to the charges against him or herself and is basically standing as a witness against him or herself.[3] This is why the *voluntariness* aspect of a guilty plea is significant to a defendant's confession.[4] The Supreme Court's efforts to ensure a guilty plea is free from coercion, inducements, subtle, or blatant threats, stems from a defendant giving up these constitutional rights.[5] When a defendant pleas guilty he or she waives their right to a trial before a jury or a judge and from that point the only thing left is judgment and sentencing. Accordingly, the plea bargaining process is the most critical point in a defendant's timeline prior to his or her conviction.[6]

Prior to 1970 it was understood that prosecutors may never produce pleas by "actual or threatened physical harm or by mental coercion overbearing the will of the defendant".[7] In 1959,

[1] *Boykin v. Alabama,* 395 U.S. 238, 242 (1969) (describing the importance of a guilty plea as being more than a mere confession or condition of conduct because it is a conviction where the only thing left to address is the punishment).
[2] *Id.*
[3] *Brady v. U.S.*, 397 U.S. 742, 748 (1970).
[4] *Boykin,* 395 U.S. at 239-242 (discussing that the same standard that is used to determine a waiver of a right to counsel applies to accepting a guilty plea. The record must show, by an allegation or evidence, that the defendant voluntarily and knowingly entered his plea prior to accepting a guilty; presuming a constitutional waiver is unacceptable.).
[5] *Boykin,* 395 U.S. at 239, 243-244 (involving defendant Edward Boykin, a black defendant, was indigent and appointed counsel. He was then indicted and tried for robbery, which was punishable by death. Three days later at his arraignment, Boykin pled guilty to robbery and as a result was sentenced to death by electrocution. Four of the seven justices, on their own motion, questioned the constitutionality of the trial court accepting a guilty plea prior to determining if it was made voluntarily and knowingly.).
[6] *Boykin,* 395 U.S. at 242; *See generally Brady*, 397 U.S. at 748 (describing the importance) ("That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized."); *See also Missouri v. Frye,* 566 U.S. 134, 143 (2012) ("The reality is that plea bargains have become so central to the administration of the criminal justice system . . . .").
[7] *Brady,* 397 U.S. at 750.

defendant Robert Brady was charged with kidnapping, in violation of 18 U.S.C. 1201(a) and faced a maximum sentence of death.[8] After Brady discovered his codefendant would pled guilty and be able to testify against him, Brady pled guilty and was sentenced to fifty years imprisonment.[9] Eight years later Brady attacked his sentence claiming his guilty plea was involuntary because 18 U.S.C. 1201(a) functioned as coercion, causing him to fear the death penalty.[10] However, when a defendant has a strong case against him or herself it may not necessarily be coercion.[11] The Court noted that all relevant circumstances must be considered, including when a defendant is aware of his or her very slim chance of acquittal if they chose to exercise their right to a trial.[12] As long as a guilty plea is not produced by mental coercion and is entered intelligently, knowingly, and voluntarily, a defendant's guilty plea is constitutional.[13]

Even though *Brady v. U.S.* endorsed the constitutionality of pleas, it was done with a raised eyebrow warning; "We would have *serious doubts* about this case *if* the encouragement of guilty *pleas by offers of leniency substantially increased the likelihood* that defendants, advised by competent counsel, *would falsely condemn themselves*."[14] Because plea negotiations likely begin with discussions between a prosecutor and a defense counsel, defendants heavily rely on the assistance of counsel in order to make decisions on plea offers. In *Hill v. Lockhart* the defendant claimed his guilty plea was involuntary because he pled guilty after his counsel gave him incorrect

[8] *Id.* at 743.
[9] *Id.* at 745.
[10] *Id.* at 743.
[11] *Id.* at 749 (describing Brady's guilty plea was based off of other matters in the case and not by reason of the statute. In other words, the Court declared that all relevant circumstances must be considered, which includes Brady being aware of his codefendant's ability to testify against him as one of the triggers that led for Brady to have pled guilty.).
[12] *Id.* at 751 (declining to hold that a guilty plea is compelled or invalid whenever the defendant feared a higher penalty and entered a plea for purposes of a lesser penalty).
[13] *Id.* at 748 (explaining the voluntariness standard for accepting a guilty plea. The Court adopted this test for determining the validity of a guilty plea); *See also North Carolina v. Alford,* 400 U.S. 25 at 31 ("The standard was and remains whether the plea represents a knowingly and intelligent choice among the alternative course of action open to the defendant.").
[14] *Id.* at 758 (emphasis added).

information about his parole eligibility date.[15] However, the Court found that the defendant's claims was involuntary only because he *relied* on the information and advice from his counsel.[16] On that account, the *voluntariness* of the plea, as a result of the advice from his counsel, should be governed by the two-part test established in *Strickland v. Washington* for ineffective assistance of counsel.[17] This standard test requires for the defendant to show "that counsel's representation fell below an objective standard of reasonableness"[18] and "that there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different."[19] Specifically, the defendant has to demonstrate prejudice resulted because of the alleged ineffective advice or lack of advice from counsel.[20]

In a more recent case where a counsel's advice had drastic implications, the Court emphasized on the importance of a defendant having the right information in order to make a valid decision during the process of plea bargaining.[21] In *US v. Padilla* defendant Jose Padilla was not advised about the deportation consequences of his conviction if he pled guilty. [22] Not only was he not advised, he was also assured by his counsel that because he was a long time resident of the United States he did not have to worry about deportation.[23] Further, there was no doubt from the record presented to the Supreme Court that Padilla's removal from the United States would result from his guilty plea.[24] Consequently, Padilla was able to successfully show that his counsel's

[15] *Hill v. Lockhart*, 474 U.S. 52, 53 (1985).
[16] *Id.* at 56.
[17] *Id.* at 57 (declaring the same two-part standard is "applicable to ineffective-assistance claims arising out the plea process.").
[18] *Strickland v. Washington*, 466 U.S. 668, 688 (1984).
[19] *Id.* at 694.
[20] *Hill,* 474 U.S. at 57-58 (holding the two-part test applies to guilty pleas based on ineffectiveness of counsel).
[21] *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (recognizing "that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective counsel.").
[22] *Id.* at 359 (pointing to the false sense of security set by Padilla's counsel when his counsel referenced to Padilla being a permanent resident in the U.S. for over 40 years, as if deportation would not be considered).
[23] *Id.*
[24] *Padilla*, 559 U.S. at 368 ("Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute. . . . [C]ounsel provided him false assurance . . . .").

representation fell *below* the objective standard of reasonableness because the deportation consequences were absolutely clear from the record alone.[25] The Court stated on the record how a well informed defendant allows both sides to reach an agreement that can "better satisfy the interests" of both the government and the defendant.[26]

Two years after *Padilla v. Kentucky* the Court again highlighted the importance of advice from counsel during plea negotiations.[27] In *Missouri v. Frye*, the prosecutor advised defense counsel of three different plea offers for the accused.[28] Here the Court addressed "whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected."[29] None of the offers were conveyed to the defendant.[30] Instead, defense counsel let the offers expire without the defendant's knowledge that the offers were available.[31] Defendant Frye claimed if he had known about the plea offers, he would have entered a guilty plea to a misdemeanor offense, instead of the felony charge.[32] Frye was deprived of his constitutional right to effective assistance of counsel because he was kept in the dark about the options available to him in furtherance of making a knowledgeable decision.[33] *Missouri v. Frye*, highlighted yet again how a defendant that is well informed and has an opportunity to consider his or her available

[25] *Id.* at 369 (finding counsel's deficient advice to fail the first prong of the *Strickland* standard. The Court then reversed and remanded for the lower court to determine if Padilla is entitled to relief, which depends on a showing of prejudice as a result of his guilty plea; the second prong.) .
[26] *Id*. at 373.
[27] *Missouri v. Frye,* 566 U.S. 133, 141 (2012) (noting how in *Padilla* the Supreme Court had "rejected the argument that a knowing and voluntary plea supersedes errors by defense counsel.").
[28] *Frye,* 566 U.S. at 138-139 (discussing defendant Galin Frye was charged with driving with a revoked license and because he had three prior convictions of that same offense, the State of Missouri charged him with a class D felony facing a maximum of four years of imprisonment. Frye's attorney did not communicate offers presented by the prosecutor, one of which included a reduction from a felony to a misdemeanor charge with a maximum of one year instead of four.).
[29] *Frye*, 566 U.S. at 138.
[30] *Id.*
[31] *Id.* at 138 (discussing along with the guilty plea to the lesser charge of a misdemeanor the prosecutor offered to recommend a ninety-day sentence to the judge).
[32] *Id.*
[33] *Frye*, 566 U.S. at 140 ("The Sixth Amendment right to effective assistance of counsel. . . . [a]pplies to "all 'critical stages' of the criminal proceedings." (quoting Montejo v. Louisiana, 566 U.S. 778, 786 (2009))).

options can only benefit all parties involved.[34] The Court held "[D]efense counsel has a duty to communicate formal offers…that may be favorable to the accused."[35]

The Supreme Court has held that a prosecutor has a duty to disclose exculpatory evidence that is material to the conviction or punishment of the accused,[36] but the Court has yet to address actual disclosure requirements during plea bargaining.[37] In 1963, the Supreme Court extended the rule on what kind of nondisclosure by a prosecutor violates due process.[38] In *Brady v. Maryland*, the crime was murder committed in perpetration of a robbery.[39] Two men in separately held trials, were found guilty of first degree murder and sentenced to death.[40] Brady admitted to participating in the crime, but claimed his partner did it.[41] Brady's attorney requested for the prosecutor to allow him to examine the partner's extrajudicial statements.[42] In spite of this specified request, the prosecutor withheld the statement in which Brady's partner confessed to the murder.[43] Following this case, what is now known as *Brady* material, includes exculpatory or impeaching information and evidence that is material to the guilt or innocence or to the punishment of a defendant.[44] The

[34] *Padilla*, 559 U.S. at 373 ("[I]nformed consideration of possible deportation can only benefit both the State and the noncitizen during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties.").
[35] *Frye*, 566 U.S. at. 145.
[36] *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding "[s]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").
[37] *See* James M. Grossman, *Getting Brady Right: Why Extending Brady v. Maryland's Trial Right to Plea Negotiations Better Protects A Defendant's Constitutional Rights in the Modern Legal Era*, 2016 BYU L. Rev. 1525, 1528 (2016) (noting that *Brady v. Maryland's* outcome is a powerful decision for defendants, however, it only reaches criminal trials and not where it is needed most; plea bargains).
[38] *Brady*, 373 U.S. at 87.
[39] *Id.* at 84.
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *See also* Grossman, *supra* note 37, at 1528.

Court found that suppression of this information was a violation of the Due Process Clause of the Fourteenth Amendment and disclosure is required.[45]

In *U.S. v. Ruiz* Supreme Court addressed whether a federal criminal defendant's plea deal, which required a waiver of her right to receive exculpatory *impeachment* material was constitutional.[46] The deal was that if defendant Ruiz waived indictment, trial, and an appeal, the prosecutor would recommend a two-level downward departure from the Federal Sentencing Guidelines.[47] Incorporated in the deal was also a waiver to the right to impeachment information relating to witnesses.[48] This "fast track" plea deal would have shortened her sentencing range by six months; from 18 to 24 months to 12 to 18 months.[49] The lower court found that a guilty plea cannot be *voluntary* without the impeachment information the defendant was entitled to.[50] On appeal the Ninth Circuit held that criminal defendants are entitled to receive impeachment information prior to entering a plea agreement.[51] The court's reasoned that the defendant would have otherwise received this impeachment information before trial and requiring her to waive this right was unlawful.[52] Nonetheless, the Supreme Court found that "the Constitution does not require the prosecutor to share all useful information" and permits the court to accept a guilty plea with waivers of constitutional rights.[53] Hence, they reversed the decision, concluding that the prosecutor does not have to disclose impeachment evidence prior to a plea agreement.[54] What is

[45] *Id.* at 86-88 (declaring that withholding evidence that can exculpate or reduce the penalty of a defendant "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justic[e].").
[46] *U.S. v. Ruiz,* 536 U.S. 622, 628 (2002).
[47] *Id.* at 625.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.* at 626.
[53] *Id.* at 629 ("[T]he *more information* the defendant has, the *more aware* he is of the likely *consequences of a plea*, waiver, or decision, and *the wiser that decision* will likely be.") (emphasis added).
[54] *Id.* at 629 (concluding the prosecutor does not have to disclose impeachment evidence prior to a plea agreement).

important to note however, is how the Court declared that it was specifically addressing *impeachment* evidence only; evidence which is related to the fairness of the process in at a trial.[55]

Our modern criminal justice system is a system that convicts through pleas rather than trials. Yet, the safeguards that exist for a defendant during trial hardly extend during the plea bargaining process. *U.S. v. Ruiz* made it clear that there is no constitutional right to *impeachment* evidence during plea negotiations.[56] The *Ruiz* Court also mentioned that a prosecutor does not have to divulge *everything* that is favorable to the defendant; only exculpatory evidence that is material to *conviction or punishment*.[57] On the other hand, *Ruiz* did not particularly address "how to treat [all] exculpatory evidence at plea negotiations."[58] Accordingly, there is a Circuit split on this issue.[59] At least three Circuits have held the disclosure of exculpatory *Brady* material is required for a guilty plea to be knowingly and voluntarily valid.[60] Others interpret the *U.S. v. Ruiz* decision as the prosecution not having a duty to disclose *any Brady* material during plea negotiations.[61] The state courts are also divided on this question of whether a prosecutor violates the *Brady* rule by not disclosing all Brady material during plea bargaining.[62]

B. *Plea Negotiations Are Relatively Unregulated*

Prosecutors are empowered with the ideal tools necessary to bring about a certain consequence. Prosecutorial discretion to bring charges against a defendant, coupled with statutory minimums or the sentencing guidelines, enables prosecutors to create the terms and results they

[55] *Id.*
[56] *Ruiz*, 536 U.S. at 629.
[57] *Id.* at 630.
[58] *See* Grossman, *supra* note 37, at 1527.
[59] *Id.* at 1529.
[60] *Id.* at 1544.
[61] *Id.*
[62] *Id.*

would like a particular defendant to end up with.[63] For example, in the federal system Title 18 U.S.C. § 3553 (b) instructs, "the court shall impose a sentence of the kind, and within the range" of the Federal Sentencing Guidelines "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commissio[n]."[64] Although judges are permitted to depart from the range set by the Sentencing Commission, the Sentencing Guidelines provide prosecutors with the means to pick the range that goes with the crime they plan to charge with. Senator Cory Booker highlights this very point when he said we have people pleading guilty to crimes they didn't commit just because the mandatory minimums are so excruciating.[65]

Usually a prosecutor's offer in exchange for a guilty plea is a reasonable prediction of the likely sentence. The fact that the guidelines are advisory rather than binding on the judges, does not make much of a difference. The reality is, most people in society understand that judges listen to what the prosecutor recommends.[66] To such a degree, in the context of plea negotiations, a defendant's life is in the prosecutor's hands. The prosecutor's choice on what to charge and what he or she is willing to offer as a *deal*, plays a huge role on whether the defendant will pled guilty or exercise their right to a trial. Rightly, various issues call into question whether there truly is

[63] *Cf.* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 Cal. L. Rev. 1471 (1993) ("The fact that the sentencing outcome depends substantially on the crime charged permits the prosecutor's charging decisions to control plea bargaining.").
[64] 18 U.S.C.A. § 3553 (Westlaw through Pub. L. No. 115-22); *See U.S. v Booker*, 543 U.S. 220, 233 (2005) (discussing prior to *Booker*, the Sentencing rules were mandatory and binding on sentencing judges. Justice Stevens found that if these rules were merely advisory instead of binding, the Sixth Amendment would not be implicated).
[65] *13th: Ava DuVernay*, (Netflix Documentary Oct. 7, 2016) [hereinafter *Documentary 13th*], https://www.netflix.com/watch/80091741?trackId=13752289&tctx=0%2C0%2C3270d2a9-6f4f-4cca-8e45-85e16421a7c3-49625447.
[66] *See also Frye*, 566 U.S. at 143-144 ("To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992))).

voluntariness in a plea bargain[67] and whether some defendants ever have a real choice. Particularly, when a defendant's options are between going to prison or entering a guilty plea that keeps him or her out of prison.

What sets the United States apart from other governments is loyalty to the Constitution, which is rooted in a system of checks and balances. However, there is nothing to check and balance prosecutors and the relatively unregulated area of plea bargaining. *Missouri v. Frye* demonstrates that when court appearances are not required during the preliminary stages of the plea bargaining process it is difficult to demonstrate prejudice or voluntariness issues with plea offers. There are no clear standards or judicial supervision of what a prosecutor decides to offer a particular defendant or what they discuss with defendants or their defense counsel.[68] *Padilla v. Kentucky* involved issues with the ineffectiveness of counsel resulting from improper or lack of advice in entering a guilty plea. However, defendant Frye's claim was not in reference to the guilty plea accepted in court, rather, it referred to a stage in plea negotiations where the presence of neither the defendant, a court reporter, or a judge's is required. "The real question in cases where defendants pled guilty, then, should not be whether the plea of any individual defendant is voluntary or knowing, but whether there is a sufficient check on prosecutors' use of the bargaining power."[69]

It is clear from our body of case law that prosecutorial discretion provides a prosecutor with tremendous power.[70] To make plea bargaining fairer it is obvious we need more participation,

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[67] *See State in Interest of M.T.S.,* 129 N.J. 422 (1992) (explaining words like voluntary and coercion can change in our society as wrong doings or crimes evolve. For example, in prior sexual assault cases, it was believed that if a woman did not resist, the sexual act was deemed *voluntary*, *id.* at 434, and the New Jersey Legislature was able to redefine rape, by removing the need for resistance in order for a sexual act to be *involuntary* or unlawful, *id.* at 443.

[68] *See Frye*, 566 U.S. at 142 (explaining this very reason is why the, "[P]lea bargaining process is often in a flu[x].").

[69] Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1049 (2006).

[70] *See* Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 Albany L. Rev. 919, 922 (2017) ("A legal system in which a prosecutor could convict whomever he liked just by pointing could lead to conviction in cases in which the prosecutor had no evidence at all.").

efficient safeguards and more transparency without lies or manipulation.[71] Stephanos Bibas has explored factual moral and legal inaccuracies in guilty pleas.[72] Bibas asserts that because even completely innocent people submit to the overwhelming pressures of pleading guilty, there has to be many more with plausible factual, legal or equitable defenses who are also pleading.[73] "Not only are defendants often in the dark about the evidence for and against them, but they also have difficulty understanding and evaluating plea deals and the likely consequences."[74] Unlike the civil system where discovery opportunities allow parties to learn more about their case, depose witnesses, and serve interrogatories.[75] In criminal cases prosecutors hold all the cards[76] and only having to provide exculpatory evidence is not enough when it comes to defendants waiving their constitutional rights and entering a guilty plea.

Prosecutors subjectively choose the ideal outcome for a particular defendant because they have the discretion and tools to do so. The plea negotiation process resembles the process of entering into a contract, except, with plea offers prosecutors always have the upper hand. There is something inherently wrong when prosecutors are allowed to decide just how vigorous or lenient they are willing to be with a particular defendant. Some defendants mistakenly believe they receive a fair deal during plea bargaining even though, in this relatively unregulated area of the law, biases can easily go unnoticed

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[71] *See* Stephanos Bibas, *supra* note 106, at 1081 (describing because plea bargains were designed to be used in exceptional cases, little safeguards were put in place and pleas bargains ended up growing below the radar. Bibas is the Director of the Supreme Court Clinic at University Pennsylvania of Law and won the *Padilla v. Kentucky* case).
[72] *Id*. at 1055.
[73] *Id* at 1060.
[74] *Id*.
[75] *See also* Russell M. Gold, Carissa Byrne Hessick & F. Andrew Hessick, *Civilizing Criminal Settlements*, 97 B.U. L. Rev. 27 (forthcoming 2017) ("The criminal system promotes settlements by empowering prosecutors to make the price of going to trial and risking conviction intolerably high for defendants. This leverage enables prosecutors to force defendants to enter into plea bargains under terms largely dictated by the prosecutor.")
[76] *See also* 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, 14 (2013) ("Through charge selection and influence over sentencing ranges, prosecutors today possess striking powers to create significant sentencing differentials.").

II. A PLEA FOR JUSTICE

A. Racial Disparity in Our Criminal Justice System

The fact remains that ninety-four percent of all convictions are guilty pleas resulting from plea bargains[77] and minorities make up more than sixty percent of the prison population.[78] These numbers are indicative that plea bargains are likely to be particularly harmful to racial minorities. Dr. Vanessa Edkins suggests that in order to explain racial inequities in our prison system we need to look at the ones who are involved in plea negotiations.[79] Part of the reason for racial disparities in prison has to do with the counsel defendants received from their attorneys, which stems from prosecutorial discretions.[80] However, there is barely any research on how the role of prosecutors (or defense attorneys) during plea negotiations may contribute to these disparate rates in our prisons.[81] Racial injustice is made worse through plea bargaining because the process is under the sole discretion of prosecutors who have the freedom to subjectively decide what a particular

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[77] *Missouri v. Frye*, 566 U.S. 133, 143 (2012) (Ninety-seven percent of federal convictions and ninety-four percent of state convictions are guilty pleas resulting from plea bargains (citing Dep't of Justice, Bureau of Justice Statistics, *Sourcebook of criminal justice statistics Online*, http://www.albany.edu/sourcebook/pdf/t5222009.pdf)).

[78] The Sentencing Project., *Fact Sheet: Trends in U.S. Corrections*, 5 (2017), http://www.sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf ("Black men are nearly six times as likely to be incarcerated as White men and Hispanic men are 2.3 times as likely.").

[79] Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 Law & Hum. Behav. 413, 413 (2011) ("While the effect of race on incarceration may not be a direct one . . . research has concluded that the disproportionate incarceration rates [of minorities] cannot be explained simply by higher rates of crime or higher rates of arrest for minorities.").

[80] *Id.* at 424 (suggesting "to get to the root cause of the racial disparities . . . we need to address how race may be affecting attorneys' abilities to zealously represent their clients."[80] Her study concluded there was differential treatment from defense attorneys as to recommendations given to a minority client versus a white client. The minority client was three times more likely to be encouraged to accept a plea that involved jail time than the white client. Access to more data or research can help determine what is behind these issues and what roles prosecutors and attorneys have in contributing to these disparities.); *See also*–Alschuler, *supra* note 70, at 939 ("In their efforts to persuade clients to pled guilty, defense attorneys . . . emphasize or exaggerate the strength of the prosecutor's evidence, emphasize or exaggerate the sentences likely to follow conviction at trial, . . . threaten to withdraw from clients' cases, and lie."); *See also* Loretta Lynch, Att'y Gen., U.S. Dep't of Justice, *Remarks at the Eighth Annual Judge Thomas A. Flannery Lecture* (Nov. 15, 2016), https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-eighth-annual-judge-thomas-flannery (explaining how overwhelming cases and fewer resources for public defenders are why, Ms. Lynch claims, public defenders help their clients by, "[H]elping them pled guilty." However, "If everybody insisted on a trial, the whole system would shut down.").

[81] *See* Vanessa A. Edkins, at 413-414;

defendant deserves without any safeguards to assure plea offers are not pre-textual; motivated by personal biases whether it be a defendant's race or socioeconomic status.

Money and education are powerful resources in making decisions during plea negotiations. Sadly, racial minority defendants are likely to be poorer and with less education than white defendants. Josh Bowers explains how even "[i]n, low stakes cases, process costs dominate, and plea bargaining is a potential way out."[82] Former Attorney General Loretta Lynch describes, "Those who can afford to pay can quickly move on with their lives. But for those who can't, these fees can be a trap door into an intractable cycle of debt, incarceration, and poverty."[83] People who live in communities where the vast majority have a low socioeconomic status usually share similar characteristics of low education, low income, and poor health.[84] These communities display class race correlations between ethnic and racial minorities living in these neighborhoods and how likely they are to be poorer and less educated than whites.[85] The United States Census Bureau estimates a total of 44.9% of Blacks and Hispanics are below poverty level, compared to 8.8% of Whites[86]

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[82] *Id.* at 1134 [82] Josh Bowers, *Punishing the Innocent*, 156 U. Pa. L. Rev. 1117, 1132 (2008). (a professor at the University School of Law) (stating "the costs of pleading becomes a reasonable option even before assessing . . . trial convictio[n]." For most minority defendants whether they can afford bail, trial or legal representation affects major parts of their lives. Even if a defendant manages to afford bail, other issues like having to return to court, legal fees, or lost wages, can cause major inconveniences to defendants who are poor).

[83] Loretta Lynch, Att'y Gen., U.S. Dep't of Justice, *Remarks at the Eighth Annual Judge Thomas A. Flannery Lecture* (Nov. 15, 2016), https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-eighth-annual-judge-thomas-flannery (explaining after a municipal government investigation of Ferguson, Missouri, The Department of Justice (DOP) found, "widespread use of excessive fines and fees," imposing steep fines like $531 for lawn care. DOJ' resulted with a dismissal of more than 32,000 court cases, canceling more than 1.5 million in fines.)

[84] *See* Am. Psychol. Ass'n, *Ethnic and Racial Minorities & Socioeconomic Status* (last visited April 2017), http://www.apa.org/pi/ses/resources/publications/minorities.aspx; *See also* United States Census Bureau; *Community Facts ACS DEMOGRAPHIC AND HOUSING ESTIMATES: 2011-2015 American Community Survey 5-Year Estimates*, American Community Survey 5-Year Estimates (last visited April 2017), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_5YR_DP05&src=pt (stating General Population 73.6% White; Black or African American 12.6%, Hispanic or Latino 17.1%. Percentages of People below poverty level in the past 12 months: 8.8% White; 23.1% Black; 21.8% Hispanic.).

[85] Am. Psychol. Ass'n, *Ethnic and Racial Minorities & Socioeconomic Status* ("Discrimination and marginalization are sometimes barriers for ethnic and racial minorities seeking to escape poverty." (ciiting Corcoran & Nichols-Casebolt, 2004)).

[86] The U.S. Census Bureau, *American Community Survey: Poverty Status in the Past 12 Months*, (2015) https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF (Black 23.1% and Hispanic 21.8%).

and only 18.6% of Blacks and Hispanics have attained an educational level of a high school diploma or above, compared to 66.27% of Whites.[87] Racial injustice is made worse by plea bargaining when a defendant's socioeconomic status affects the process and there are no safeguards in place to make sure that what is offered to a rich defendant is equivalent to what is offered to a poor defendant.

In his role as President, Barack Obama witnessed firsthand "how our criminal justice system exacerbates inequality."[88] Policies adopted in an effort to control crimes created the disproportionate effects and racial disparities in our system.[89] At the yearend of 2015, prisoners sentenced to more than one year under state or federal correctional authorities, comprised of 499,400 White prisoners and a total of 842,400 Black and Hispanic prisoners.[90] In the United States one out of nine men are likely to serve time in prison; only one out of seventeen are projected to be White men, as oppose to one in three Black men, and one in six Hispanic men.[91] For women the estimates are, one in one-hundred eleven White women, one in eighteen Black women and one in forty-five Hispanic women.[92] The rate of imprisonment per 100,000 in 2015 by gender, race, and ethnicity are:[93]

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[87] The U.S. Census Bureau, *American Community Survey: Educational Attainment*, (2015) https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF.

[88] President Barack Obama, *The President's Role In Advancing Criminal Justice Reform*, 130 Harv. L. Rev. 811, 812 (2017).

[89] *Id.* at 819 (describing how sentencing policies from the War on Drugs era caused a ridiculous increase in the number of people in our jails and prisons. From its inception in 1980 there were 40,900 incarcerations, going up to 469,545 by 2015); *See also Documentary 13th, supra* note 65 (Michelle Alexander describes the war on drugs era, "You see a rhetorical war . . . announced as part of a political strategy by Richard Nixon and which morphed into a literal war by Ronald Reagan. . . turning into something that began to feel nearly genocidal in many poor communities of color.").

[90] E. Ann Carson, *U.S. Dep't of Justice Office of Justice Programs Bureau of Justice Statistics*, 6 (Dec. 2016), https://www.bjs.gov/content/pub/pdf/p15.pdf.

[91] The Sentencing Project, Fact Sheet: Trends in U.S. Corrections, Racial Disparities, 5 (2017) (citing Bonczar, T. (2003). *Prevalence of Imprisonment in the U.S. Population, 1974-2001*. Washington, DC: Bureau of Justice Statistics), *available at* http://www.sentencingproject.org/wp-content/uploads/2015/10/lifetime-likelihood-of-imprisonment-by-race.png.

[92] *Id.*

[93] *Id.*

White women: 52 White men: 457

Black women: 103 Black men: 2,613

Latina women: 63 Latino men: 1,043[94]

"A large body of research finds that for similar offenses, members of the African American and Hispanic communities are more likely to be stopped, searched, arrested, convicted, and sentenced to harsher penalties."[95]

In his book *Just Mercy*, Bryan Stevenson explains how our criminal justice system is designed to treat individuals who are rich and guilty better than if they are poor and innocent.[96] One example is the case of Kalief Browder.[97] Kalief was an African American teenager whose family could not afford his ten thousand dollar bail nor could they afford any legal representation.[98] Kalief had no prior criminal history, had never been arrested, and insisted that not only was he not guilty, but he had never seen or met the victim.[99] In a live interview, Kalief explains he refused to take a plea deal because he wanted to speak up and bring awareness to society about how our criminal justice system functions in hopes that his example will cause a change.[100] Since his family

[94] *Id.*

[95] *See* Obama, *supra* note 88, at 820.

[96] Bryan Stevenson, *Just Mercy* 313 (Spiegel & Grau Trade 2014); *See also* Bryan Stevenson, *We Need to Talk About an Injustice*, (Tedtalk Mar. 2012), http://www.ted.com/talks/bryan_stevenson_we_need_to_talk_about_an_injustice (Bryan Stevenson challenges bias against the poor and minorities; he has argued five times before the Supreme Court; has obtained relief for many innocent and poor prisoners with death or life prison sentences and is the Executive Director and founder of the Equal Justice Clinic in Montgomery.).

[97] Marc Lamont Hill, *HuffPost Live Interview with Kalief Browder*, YouTube (Dec. 3, 2013), https://www.youtube.com/watch?v=yIlSqk_pfbA.

[98] *Id.* (discussing in May 2010, sixteen year old Kalief Browder was walking home from a party in the Bronx when the police stopped him explaining someone had just identified and accused him of robbery. The officers conducted a search and after not finding any stolen item, assuring him he would be free to go home later on that night, they took him to the precinct. At the precinct he was formerly charged with second degree robbery with a bail set at ten thousand dollars.).

[99] Hill, *supra* note 97 (discussing after thirty-three months of imprisonment, the prosecutor's offered Kalief a reduced sentence in exchange for a guilty plea to robbery and because of his time already served (thirty-three months), he would be free to go home. The choice was to go home or await trial where, if found guilty, he would be facing another fifteen years in prison.).

[100] *Id.*

could not afford bail, he was imprisoned at Rikers Island.[101] After serving thirty-three months, refusing to take a plea deal, he was released. Kalief never had a trial and was never convicted.[102] While referencing the Kalief Browder case, Liza Jessie Peterson explains our criminal justice system uses heavier penalties and punishment for defendants who dare to not take a plea bargain when it is offered.[103] President Obama advises, "[S]tates and communities must continue to examine their own policies so that they do not criminalize poverty."[104]

One important aspect that would help poor minority defendants in making a decision without the dangers of overbearing their will would be if they could be released on bail. Having the freedom to consult attorneys, family, friends, or just having the capability to look into their own case, would help even out the unequal bargaining position between an accused and prosecutorial pressures.[105] Former Attorney General Lynch, announced that "[t]housands of nonviolent, non-felony defendants languish behind bars, not because they have been found guilty of a crime or pose a flight risk, but simply because they cannot pay."[106] Defendants having the capability of making decisions while at home as oppose to a precinct or a jail, would help reduce the coercive effect and pressures that contribute to accepting a guilty plea offer.

Our history of racism is what "continues to drive inequality on how the justice system is experienced."[107] Bryan Stevenson emphasizes that "[A]cknowledging our nation's history of racial injustice is critical to addressing a range of contemporary issues."[108] Racial disparities in our

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[101] *Id.*
[102] *Id.*
[103] *Documentary 13th, supra* note 65.
[104] *See* Obama, *supra* note 88, at 845.
[105] *See* Stephanos Bibas, *supra* note 106, at 1071 (suggesting reduction or eliminating monetary bail can be accomplished by making greater use of ankle bracelets); *See* Loretta Lynch, *supra* note 98 (The Bureau of Justice Assistance has awarded "Price of Justice" grants to states in order to help reform fines, fees, and bail practices).
[106] *See* Loretta Lynch, *supra* note 83.
[107] Obama, *supra* note 60, at 815.
[108] Bryan Stevenson, *Equal Justice Initiative*, (April 27, 2017), http://eji.org/videos/new-eji-museum-enslavement-to-mass-incarceration (Bryan Stevenson announced on April 12, 2017 the opening *EJI's New Museum: From*

criminal justice system has existed since the Thirteenth Amendment. After the Thirteenth Amendment ended slavery new laws were created designed for the imprisonment of blacks or former slaves.[109] Michelle Alexander explains, "Throughout American History African Americans have repeatedly been controlled through systems of racial and social control that appear to die, but then are reborn in new form, tailored to the needs and constraints of the time."[110] She describes the New Jim Crow system as mass-incarceration; a system that, "[O]nce again, strips millions of poor people, overwhelmingly poor people of colo[r]."[111] The continued racial patterns of minorities in our prisons and the disproportionate effects of convictions through plea bargains validates why plea bargaining is likely to be particularly harmful to racial minorities.

III. A PLEA FOR MERCY

A. Work to Be Done

Recently I observed two plea hearings at a U.S. District Court. Formal court hearings are conducted when defendants decide to enter into a guilty pleas as a result of a plea bargain. This process was made to have safeguards in place for judges to ensure the defendant's plea was

Enslavement to Mass Incarceration in 2018 to educate on, "There is a line from slavery to the racial bias and discrimination that we see today that needs to be understood.").

[109] Douglas Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* 156 (New York: Anchor-Random House, 2009); *See also Slavery by Another Name* (PBS Film Feb. 13, 2012), *avialble at* http://www.pbs.org/tpt/slavery-by-another-name/watch/ (explaining vagrancy laws allowed law enforcement to arrest individuals who could not provide proof of employment. After an arrest, court fees were assessed and if the prisoner did not pay the fees, they were sent to prison. While in prison, they had no chance to work or pay off the debt and so they remained held. Laborers held to work off an alleged debt, known as peonage, introduced convict leasing. Through the leasing of convicts, prisoners were forced into signing contracts that authorized *purchasers,* to impose brutal punishment and involuntary servitude for as long as the debt still existed. These purchasers included white former slave owners, causing the re-enslavement of blacks.).

[110] *See Documentary 13th, supra* note 65 (discussing Michelle Alexander's, a civil rights lawyer titled her latest book *The New Jim Crow*; referring to mass-incarceration as the new Jim Crow).

[111] *Id.*

voluntary and that he or she is aware of certain consequences.[112] For each defendant there were two U.S. Marshalls escorting them to their attorney waiting at the defense table. The officers remained standing about a foot behind the defendant the entire time. The defendants remained in handcuffs attached to a chain that went around the waist and down to the handcuffs on their ankles. The defendants were asked whether their plea was voluntarily and whether they were forced or threatened. It was blatantly obvious the Judge read off some sort of Rule 11 checklist, barely raising his head to look at the defendants. After a few "yes" or "no" replies, the plea hearing was complete. As I watched each defendant struggle to sign his plea deal while in handcuffs and chains, I realized how unrealistic it was for any judge to evaluate the voluntariness of a plea through this process. Any defendant in this setting clearly is not communicating to the judge that they were coerced, afraid, or threatened. I wondered what was even the point of this hearing? It was not so much to *ensure* the plea was voluntary. It was more to ensure the judges followed what Rule 11 instructs them to do; by *literally* just *asking* if a plea was voluntary. The *purpose* for Rule 11 was completely out the window.

Justice Scalia in *Missouri v. Frye* noted the long overdue recognition that "[t]he plea bargaining process is a subject worthy of regulation."[113] Justice Scalia suggests that the legislature could handle these issues in a more efficient manner than the Courts. He mocks at the idea of plea bargains as the "[N]ewly created constitutional field of plea-bargaining law" and the arbitrary safeguards the Courts have set up.[114] Estimating what a defendant *would have* done or what a Court *would have* approved, which depending on the particular case, works the same as calling

[112] *See* Fed. R. Crim. R. P. 11(b)(2) (instructing a judge on "Ensuring a Plea Is Voluntary" stating to "[A]ddress the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises.").
[113] *Missouri v. Frye*, 566 U.S. 134, 154 (Scalia, J., dissenting).
[114] *Frye*, 566 U.S. at 155 (describing how determining *prejudice* in the second prong of the *Strickland* test, "[I]s a process of retrospective crystal-ball gazing posing as legal analysis.").

heads or tails.[115] The most important statement in Justice Scalia's dissent is the one that admits there is no basis for assuming that prosecutors and judges are familiar with boundaries of acceptable plea bargains and sentences.[116]

For starters, we need more data to demonstrate how plea bargains contribute to these racial inequities that area leading to racial disparities in our prisons. There is an urgent need to focus on the disparate effects and find information that can reveal a pretext for discrimination. Implicit bias continues to cause racial inequality in our criminal justice system. Thus far, there is enough data that demonstrates the steep numbers of convictions that result from plea bargains, along with the disproportionate effects of minorities behind bars. Gathering more information on a prosecutors' charging practices can help answer questions like, are prosecutors charging more serious offenses to minority defendants? There is not enough data or research on how plea bargains could be causing more harm than good, especially to minorities. Plea negotiations remain in the dark and the lack of data stunts options of elimination or reform. Improvements cannot happen by turning a blind eye. Data is needed to analyze 1) what type of plea offers are being made to particular defendants and 2) is there a race or socioeconomic correlation?

There would not be much additional cost in compiling the data needed to evaluate these factors and formulate statistical data. Most of the data required can stem from the existing police reports and the plea negotiation agreements. For example, when law enforcement makes an arrest a description of the accused is documented. These descriptions may include height, weight, nationality, age, employment, neighborhood, background, etc. When prosecutors prepare plea agreements they compile their own data to present to the court, which will include what the defendant was charged with, details of the plea negotiation, including what the defendant was

[115] *Id.*
[116] *Id.*

offered in exchange for his or her guilty plea, etc. By combining the police reports with the plea negotiations files can be created to analyze plea offers made to particular defendants. Race class correlations and socioeconomic status of defendants can be deciphered by having this information. This big data will help compare plea negotiations and analyze the differences in deals being offered minority and white defendants. Being able to look at individual cases and answer questions like, why a particular white defendant and a particular black defendant, charged with the same offense, receive a better plea offer? Issues of racial injustice in our prison, which is likely stemming from plea bargains, can be addressed and remedied once we have the information to back up the inequality.

Once the big data is compiled and we face the racial issues within our criminal justice system, then the need for reform has to be dealt with. Bail reform has helped many states manage their prison populations, but not all guilty convictions require imprisonment. Many plea agreements actually may keep defendants out of prison with reduced sentences in exchanged for a guilty plea. However, the issue of having a record still remains. A guilty plea follows a defendant for the rest of their lives and affects them in society with things like finding employment, voting rights, where to live, citizenship status, etc. Prosecutors having this great power affects defendants whether the guilty plea is to imprison or free them. If plea bargains must remain, what must not remain is all the power prosecutors hold. Prosecutors are not elected officials chosen by the community. They are paid governmental employees that should not have the power to take away someone's liberty without meaningful and significant regulations over that process. Legislators would be the ideal department to enact laws that would protect the public from the discretionary powers that a prosecutor has. The power to be vigorous or lenient on a particular defendant should have a method that ensures equality, fairness and justice for all, not just for some.

Plea bargains did not always exist. Our criminal system needs it because the case load is too heavy for our court systems to function without them. However, if for example, a violent criminal committed an offense, should he be allowed to have a reduced sentence for his crime? Are we looking to do favors? Do we care if the defendant is guilty or innocent or is the focus on who has better representation or negotiation powers? In order to fix issues of plea bargaining, we need to think about what are the true goals of plea bargaining? What is society and the government looking to accomplish through plea bargaining? Our adversary system includes members of the jury as a means to convict and since plea bargains have essentially replaced trials, how can the community be involved in this new form of conviction? Whether we are including members of the community or electing legislative bodies, the point is that a prosecutor on his own should not be entitled to the powers equivalent to the judicial or legislative branch of government.

What may seem as an extreme measure would be to just abolish plea bargains. However what seems more extreme is the number of people being convicted. Without plea bargains, everyone would need more information, beginning with law enforcement. This would push law enforcement to be more selective when they make arrests. It would require more investigation and evidence to have a case strong enough for prosecutors to 1) be able to charge the defendant and 2) be able to take the case to trial, regardless of their socioeconomic status. The need for enticing offers in order to pressure defendants who may be innocent into a guilty plea would disappear along with the plea bargains.[117] It could shift the focus from *quantity* to *quality*. Abolishing plea bargains would push law enforcement and prosecutors to focus on the type of crime being committed, for example, those causing real violent dangers. It can help prioritize those cases that justify removing defendants from society versus those that could be better off as a house arrest.

[117] James M. Grossman, *Getting Brady Right: Why Extending Brady v. Maryland's Trial Right to Plea Negotiations Better Protects A Defendant's Constitutional Rights in the Modern Legal Era*, 2016 B.Y.U. L. Rev. 1525, 1558 (2016).

"Can we implement reforms that both reduce the number of people incarcerated in the U.S. *and* the well-known racial and ethnic disparities in the criminal justice system?"[118] Looking at the bigger picture of mass-incarceration helps to reflect on how did we get here, but most importantly, how do we **end** this?[119] Plea bargaining has become *the* criminal justice system.[120] Allowing plea bargains to continue producing unjust results, undermines the character of our society and our commitment to fairness. The United States has a colorful history full of lessons from its own wars, ignorance, mistakes, and racial injustice. History has taught us that we move forward towards a better future by being able to live amongst each other. Putting a defendant behind bars and stripping their freedom does not strip the injustice a relative or friend might feel for the accused. When communities do not trust their own governments, it leads to riots, retaliation, and violence. Ignoring the likelihood that plea bargains are oppressing minorities, ends up affecting our society as a whole.

Professor Angel Davis describes, "Historically when one looks at efforts to create reforms, they inevitably lead to more repression."[121] If we continue riding this along with ignorance to the fact that over ninety-four percent of convictions are produce through plea bargains AND that there is a disproportionate amount of minorities in prison, our society will end up suffering the consequences, just like our historical past. "[O]ur system of the administration of justice suffers

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[118] Peter Wagner and Bernadette Rabuy, Mass Incarceration: The Whole Pie 2017 (March 2017) https://www.prisonpolicy.org/reports/pie2017.html

[119] *Id.* (this site focuses on looking at the "whole pie" to ask ourselves, "[I]f it really makes sense to lock up 2.3 million people on any given da[y]." Emphasizing, "Both policymakers and the public have the responsibility to carefully consider each individual slice in turn to ask whether legitimate social goals are served by putting each category behind bars, and whether any benefit really outweighs the social and fiscal costs.").

[120] Robert E. Scott William, *Plea Bargaining As Contract*, 101 Yale L.J. 1909, 1912 (1992).

[121] *See* Ava DuVernay, 13th, *supra* note 47 (distinguished Professor Emirita at the University of California Santa Cruz); *See* Angela Y. Davis, *Biography, Education and Training*, (2017) (described as a living witness to historical struggles in this country, "In 1970 she was placed on the FBI's Ten Most Wanted List on false charges, and was the subject of an intense police search that drove her underground and culminated in one of the most famous trials in recent U.S. history). http://feministstudies.ucsc.edu/faculty/singleton.php?singleton=true&cruz_id=aydavis.

when any accused is treated unfairly."[122] It is difficult to reconstruct a system that is so broken, which is why plea bargaining needs more than just a reform, it needs a complete makeover.[123] Adding safeguards to a system that is already broken would be equivalent to putting on a band-aid on an already infected wound. For this reason, starting from the ground up, or abolishing plea bargaining all together, may be the only realistic remedies.

CONCLUSION

Through plea bargaining the illusion of liberty, justice and mercy is dealt, leaving defendants with a false sense of satisfaction. The disproportionate effects of plea bargaining and incarceration with minority defendants, especially indigent minorities, demonstrates the inequality that stems from this process. Racial injustice is made worse through plea bargaining because the process is under the sole discretion of prosecutors who have the freedom to subjectively decide what a particular defendant deserves without any safeguards to assure plea offers are not motivated by pre-textual biases. Our pledge of allegiance to the flag concludes with liberty and justice for all; ironically, the current criminal justice system and its allegiance to plea bargaining ends with liberty and justice only for some.

[122] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).
[123] Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials As Backstops*, 57 Wm. & Mary L. Rev. 1055, 1061 (2016) (Bibas proposes designing plea bargain from scratch rather than waiting for adversarial trials, appeals, or collateral attacks that can take years and in the meanwhile cause unnecessary damage).